

First Greater Western Limited's
Reply to
Network Rail Infrastructure Limited's
Notice of Appeal to the
Office of Rail Regulation

An Access Disputes Panel of the
Access Dispute Resolution Committee
Determination in respect of Reference ADP31

(1) Network Rail Infrastructure Limited

and

(2) First Greater Western Limited

Reply to Notice of Appeal in relation to ADP31

1 REPLY TO NOTICE OF APPEAL

- 1.1 This document sets out First Greater Western Limited's reply to the Notice of Appeal served by Network Rail Infrastructure Limited on 10th April 2008 in respect of the determination of the Access Dispute Panel of the Access Disputes Committee in respect of reference ADP31, which involved Network Rail Infrastructure Limited, (**Network Rail**) (the **Appellant**) and First Greater Western Limited (**FGW**) (the **Respondent**).
- 1.2 This reply is issued following the letter of the Office of Rail Regulation to the parties the appeal on 24 April 2008 confirming its decision to hear the appeal.
- 1.3 FGW confirms in this reply that it is opposing the appeal.

2 BACKGROUND

- 2.1 FGW has no comments on the Background set out in section 3 of Network Rail's notice.

3 GROUNDS FOR OPPOSITION TO THE APPEAL

- 3.1 FGW opposes the appeal raised by Network Rail.
- 3.2 FGW maintains that the re-introduction of Class 142 vehicles on the routes in question was not in fact a Vehicle Change, because the following through of the process did not in fact establish that there were any material affects on the maintenance or operation of the Network , or the operation of trains on the Network. This is because the Class 142s are already route cleared as confirmed by the Sectional Appendix, there were no objections from other operators to the change and because such costs as there are in relation to maintenance and operation of the Network are addressed by the charges payable under the track access contract and the larger arrangements for the funding of Network Rail.
- 3.3 However to the extent that the re-introduction of Class 142 vehicles on the routes in question is in fact a Vehicle Change then no compensation is due to Network Rail for a combination of reasons including:

(a) The vehicles were already route cleared as confirmed by the Sectional Appendix;

(b) Network Rail is funded through a combination of its existing funding arrangements and the variable charges payable with reference to use of the Class 142s in relation to their use on routes for which they are already route cleared and will continue to be appropriately funded under the forthcoming CP4 Charges Review;

(c) In this respect the decision of Network Rail to fit lubricators is its choice as to the methodology to be adopted by it for maintenance of the route and this should be a matter for Network Rail not impacting on the charges payable by FGW;

(d) In any event the improvement of the Network through the fitment of lubricators enhances Network Rail's asset, may be expected to be funded via the RAB and have a range of wider benefits for Network Rail (including compliance with best practice as assumed by it for the purposes of its CP4 calculations). These should be taken into account, together with the charges payable by FGW in relation to use of the Class 142s and the other funding provision for Network Rail, so as to offset fully any compensation otherwise due.

4 RELIEF AND DIRECTIONS SOUGHT

4.1 The ORR is respectfully requested to:

(a) Dismiss Network Rail's appeal;

(b) Direct that there was no Vehicle Change in this case;

(c) If it is determined that there was a Vehicle Change in this case, direct either that no compensation is payable by FGW to Network Rail in respect of that Vehicle Change on what should be the proper basis for calculating the costs and off-setting the benefits associated with the Vehicle Change, taking into account the funding provided or to be provided to Network Rail, the wider benefits associated with the proposed capital investment and the other opportunities available to Network Rail to mitigate and recoup its costs.

5 RESPONSE TO NETWORK RAIL'S INTRODUCTORY PRINCIPLES

5.1 Network Rail set out a number of principles before expanding on its grounds of appeal. FGW comments on these as follows:

5.2 Part F of the Code – Network Rail comments that:

"Part F is designed to compensate Network Rail for the implementation of a change to vehicles/Specified Equipment (as defined in schedule 5 to the passenger track access contracts) where there is, or likely to be, a material effect on the operation of the railway."

The primary purpose of Part F is to provide a procedure through which changes to railway vehicles can be assessed and implemented (see paragraph A of the explanatory note to Part F). There are mechanisms to provide for what is a consequence of the relevant Vehicle Change but the benefits and opportunities for recouping costs or losses have also to be taken into account (see paragraph (d)(vi) of the explanatory note to Part F). The primary mechanism for compensating Network Rail for the operation of vehicles on the network is in fact the charging mechanism under the relevant track access contracts: Vehicle Change is focussed on the costs associated with initial introduction of a vehicle type onto a route.

5.3 Network Rail comments that

"The Panel correctly determined that the operation of the Part F Vehicle Change procedure distinguishes between what type of change qualifies as a Vehicle Change as a process discrete from the compensation which would flow from such a change (see paragraph 25). The Panel determined that the facts giving rise to ADP 31 did give rise to a Vehicle Change as defined by Part F of the Code. As such, the Panel then moved on to the question of compensation which forms the basis of this appeal. "

FGW accepts this summary of the Panel's approach. However, it raises the issue of whether there is indeed a Vehicle Change where the relevant vehicle is already route cleared and the range of industry charging and funding arrangements mean that the impact of a Vehicle Change are in fact addressed and adequately compensated. For example, FGW considers there is no Vehicle Change where an access party includes in its contract equipment already cleared and operated by other parties over the same route on terms that it will pay the regulated variable track access charge. The wear and tear associated with running a train cannot by itself mean that the requirement is satisfied for a material affect on maintenance as set out in the definition of Vehicle Change, because:

- there would be no requirement for the material affect test if it was necessarily always met; and

- the concept of materiality requires the exercise of judgement in assessing the significance of the scale of change over what would otherwise have been the situation.

In judging materiality it will therefore be relevant to consider whether rolling stock is already route cleared and the extent to which costs associated with its operation are already funded. In this case the Class 142 vehicle type was route cleared and the usage charges in respect of it cover the relevant variable costs.

5.4 Specified Equipment – Network Rail notes that:

"Unless a class of vehicle is contained within the Specified Equipment schedule, the train operator will not be able to use such vehicles on any part of the network. The list of vehicles can be amended to include additional classes of vehicles, but this is both subject to agreement between the parties in the form of a supplemental agreement and completion of the Part F process."

FGW notes that the statement in the first sentence is correct insofar as it relates to the operation of "Services" as defined in the Track Access Contract. The second sentence assumes that any change of vehicles is necessarily a Vehicle Change: this is incorrect, as it is possible for there to be changes of vehicles which will not satisfy the material affect test in the "Vehicle Change" definition, in which case the Part F process will not need to be followed.

5.5 Network Rail goes on to comment that:

"The Panel's finding at paragraph 26.1.4 is significant. It states that except where Network Rail specifically agrees an amendment to a track access contract, the inclusion of a type of passenger rolling stock in the Sectional Appendix does not confer upon a passenger train operator any right to include such stock in the Specified Equipment, or to use such stock to operate services for which it otherwise has access rights (for the avoidance of doubt, this finding relates specifically to the Passenger Track Access Contract only; the Panel acknowledges that within the Freight Access Contract, the Sectional Appendix has a more specific standing in relation to the Operating Constraints)."

FGW does not regard this finding as particularly significant. It is accepted as obvious that where equipment is not included in Specified Equipment, in order to include it within Specified Equipment so that it is covered by the permission to use in the

Services granted by the track access contract, the track access contract will need to be amended (either by agreement or at the direction of the ORR). The significance of the Sectional Appendix lies in its record of the route clearance of the rolling stock concerned.

5.6 Network Rail goes on to comment that:

"Network Rail's position is that any amendment to the Specified Equipment schedule in the passenger track access contract must be subject to Part F of the Code."

FGW notes that this position is incorrect and not supported by the requirements for material affect in the definition of "Vehicle Change".

FGW does accept that it instituted the Vehicle Change process and notes that this is regarded as good practice where any party requests that the process be followed. This is not conclusive that there is a Vehicle Change or that compensation is payable, but rather indicates that the process is being followed to enable these issues to be properly considered.

5.7 Compensation for Vehicle Change – Network Rail notes that:

"In finding that the facts of ADP 31 gave rise to a Vehicle Change, the Panel then correctly confirmed that such change rendered FGW potentially liable to pay compensation under Part F of the Code to Network Rail. The level of that compensation is, in accordance with Part F, the amount of compensation equal to the amount of the costs, losses and expenses (including loss of revenue) which can reasonably expected to be incurred by Network Rail as a consequence of the implementation of the proposed change, taking into account any benefits which Network Rail obtains as a result of the change."

FGW notes that:

- it raises whether the Panel were correct to find that the introduction of the Class 142 vehicles satisfied the material affects test of the Vehicle Change definition;
- where there is Vehicle Change it is correct that the payment of compensation is only a potential outcome;
- it is necessary to establish that the costs claimed are indeed a consequence of the relevant Vehicle Change; and

- the requirement to take account of benefits is a summary only of the requirement of Condition F3.3, which requires account to be taken of a broader range of matters as follows:

"(a) the benefit (if any) to be obtained or likely in the future to be obtained by Network Rail or any other operator of trains as a result of the proposed Vehicle Change; and

(b) the ability or likely future ability of Network Railto recoup any costs, losses and expenses from third parties including passengers and customers."

So if a Vehicle Change is established, in assessing compensation it is necessary to establish what is a consequence of the change, what are the benefits and likely future benefits and the range of means whereby costs may be recouped now and in the future.

5.8 Finally Network Rail notes:

"However, the Panel concluded that Network Rail should not be compensated to any extent for the costs incurred as a consequence of implementing the Vehicle Change. This was based on the rationale that Network Rail was already funded, one way or another, for the costs incurred. Network Rail disputes that this is the case. "

FGW supports the Panel's conclusion, but notes in addition its challenge to the decision that there was a Vehicle Change and, if a Vehicle Change was established, the need to establish the extent to which the costs claimed are a proper consequence of the Vehicle Change and the need to take into account benefits as well as other sources of present and future funding.

6 Response to Appeal Ground 1 - Network Rail's Funding position and the Sectional Appendix

6.1 In its Appeal Ground 1 Network Rail sets out the Panel's considerations regarding the Sectional Appendix and concludes:

" In simple terms, the Sectional Appendix contains details of those vehicles/units which have been route cleared i.e. that it has been demonstrated that the vehicles/units are compatible with the infrastructure. The 142s are included in the Sectional Appendix for the routes concerned. "

- 6.2 Network Rail then goes on to distinguish the proof of physical capability and its obligation to maintain the capability of the Network from the funding for running vehicles on the relevant route:

"The Panel stated that the Sectional Appendix is one of the key documents of reference for Train Operators and there must be an expectation that where a class of rolling stock is classified as Y in the relevant table, an application for rights to use that class of vehicle will not be contested on the grounds of physical 'fit'. Network Rail would not dispute this from a safety perspective. In fact, Network Rail acknowledges that it is funded to maintain the capability of the network for broadly existing use as at the April 2001 levels. It could be argued that the network therefore has to have the capability to run a 142 vehicle on that part of the network, but in any event, it does not follow that Network Rail is funded for FGW to run a fleet of such vehicles along the route."

It then goes on to identify that the Sectional Appendix does not set out the economic consequences in relation to the use of rolling stock. This is plainly correct: the regulated charges regime and the related charging provisions of the track access contracts address this issue.

- 6.3 Network Rail then identifies the distinction between freight and charter train operator contracts, where the permission to use vehicles is related to what is cleared in the Sectional Appendix, and passenger access contracts, where the Model Clauses require particular Specified Equipment to be identified. It concludes that while Network Rail is funded to run whatever is cleared for freight and charter use, it is only funded to run listed Specified Equipment for passenger train operators. It concludes:

"Therefore, it may be argued that Network Rail is funded to maintain the capability for a limited number of 142s to use the route (consistent with a charter train go anywhere rights) with no additional funding requirement. However, Network Rail contends that it does not therefore follow that it is funded for any level of service run by the 142s for any operator other than the one for which it has a contractual commitment to do so."

Network Rail goes on to distinguish what it maintains should be the Part F outcome for a freight or charter operator compared with a passenger train operator, having regard to likely volumes of usage:

"Network Rail can, if necessary, operate a very limited number of 142s on the route in question to meet its contractual commitment to a charter customer without the need for

lubricators and therefore any additional funding requirement. However, in order to accommodate FGW's Vehicle Change and therefore add to Network Rail's contractual commitments by the introduction of fleet of vehicles on the route, Network Rail requires additional funding. "

6.4 FGW's reply is as follows:

- (a) The Sectional Appendix does establish route clearance. This is agreed.
- (b) The regulatory charges regime and the tariffs for vehicle operation deals with the financial consequences of what is cleared to run on the route. Network Rail's proposal is contrary to the established charges regime, which already addresses the consequences of running the Class 142 vehicles on a consistent, tariff-based charging methodology. (This is commented on further at paragraph 6.5 to 6.8 below.)
- (c) It is false to distinguish the application of Part F and the consequences of its application in relation to a charter operator and a passenger train operator, both seeking to operate the same class of vehicle over a route, both subject to the same range of charging tariffs. It would also be discriminatory to make such a distinction.
- (d) Part F does not take account of the volume of usage: changes in volume of usage of vehicles in respect of which a Vehicle Change has been established is not a "Vehicle Change" within the definition of Part F, but serves to be addressed only by the application of the tariff charges under the track access contract and the regulatory charges regime. (This is commented on further at paragraph 6.9 and 6.10 below.)
- (e) Therefore once the relevant class of vehicles are established as route cleared, the further consequences of their operation must be treated as addressed through the combination of (i) the regulatory tariff charges structure in relation to their operation; and (ii) as applicable, the process of agreement and approval of the amendment of the access contract to permit their operation.

6.5 The current tariff based charges regime was established as part of the CP2 Charges review. FGW notes the following sections from the Regulator's Final Conclusions in support of its analysis of the charges regime:

"Usage charges

9.10 The usage charge is intended to recover the variable costs to Railtrack of running additional trains over the network. This covers the cost of wear and

tear on all infrastructure assets excluding electrification assets. There has been considerable debate, as part of the periodic review, about the level of these costs and the Regulator has consulted widely on these issues. Railtrack has developed a detailed bottom-up engineering model to estimate these costs and Booz Allen & Hamilton (BAH) have developed a top-down model based on the work done by Railtrack. This top-down model assumes an overall level of variability by asset type and allocates the variable expenditure to individual vehicle types. Other respondents, in particular EWS, have also commissioned detailed work on specific aspects of usage costs.

9.11 Research into cost causation in the railway industry is developing and the Regulator believes that the top-down model is the most appropriate way to set usage charges for the next control period. However, he expects to see continued research on usage costs and this will inform decisions at subsequent reviews.

Methodology

9.12 The Regulator believes that usage charges should represent the variability in the long run steady state expenditure required by Railtrack due to traffic growth. As a result, the top-down model will be applied to the expected expenditure by Railtrack on relevant asset types averaged over the second and third control periods.

9.13 The Regulator also set out his proposed treatment of efficiency in the draft conclusions. He concluded that the usage charges should be set based on the assumed level of efficiency over the next control period as a whole and that they should therefore remain constant in real terms over the period. Railtrack has continued to argue against the Regulator's proposed approach, claiming that step changes in usage can affect expenditure relatively quickly and that operators' incentives may be distorted by having a step change in charges at the end of the next control period."

And

"9.51 In conclusion, the Regulator believes that a tariff-based system of variable charges will reduce the transaction costs associated with developing new services and provide a suitable environment for promoting the use and development of the railway network. The Regulator has also concluded that

the arrangements for introducing these changes represent the appropriate balance, improving incentives, being equitable and practical. These conclusions are supported by an independent report from Halcrow Rail which examined the impact of the overall structure of charges on TOCs. The new structure of charges will also be consistent with the infrastructure package charging proposals of the EU in their current form. It will send rational economic signals to Railtrack and operators, allow Railtrack to recover its costs from operators, and help to avoid undue discrimination."

- 6.6 These statements are reinforced by the ORR statement in the *Criteria and procedures for the approval of passenger track access contracts: fourth edition* which includes at paragraph 5.3 the statement:

"An important aspect of our role is to protect train operators from being charged unduly high prices by the monopoly facility owner (Network Rail) for access to its network whilst ensuring that the access charges paid by operators are sufficient to enable it to recover the costs of operating, maintaining and renewing its network. Our role in setting variable charges is intended to provide incentives for train operators (and their funders and suppliers) to make efficient use of the network and to consider costs implied to Network Rail when appraising choice and design of rolling stock..."

This confirms that the variable charges are set to cover costs of operation, maintenance and renewal. It confirms that charges are set to allow operators to rely on them when selecting rolling stock.

- 6.7 These extracts from the Final Conclusions and the Criteria demonstrate a structure of charges which:

- (a) Has been established to cover the variable costs of running additional trains on the network , that is not just trains covered by then existing contracts;
- (b) Adopts a modelled approach to establishing the level of charges. It is inherent in such modelled approaches that there will be variants in actual practice, but the policy is to hold to the modelled approach rather than adjust for all the local variations. If research throws up better understanding of costs, then that is to be addressed as subsequent reviews, implicitly rather than varying tariffs mid-review;

(c) The methodology is based on long-run steady states, rather than short run variability;

(d) The Regulator's conclusion was that the tariff charges should remain constant over the review period; and

(e) The tariff based charges are part of a structure of compliant charges which are intended to send clear signals, reduce transaction costs, be practical and avoid undue discrimination.

In summary Class 142s were route cleared: the variable charges for their operation were set to cover Network Rail's costs; FGW was entitled to rely on those tariffs as being the charges; and if there were to be any error in the charges, then this is open to resolution at the next relevant charges review.

6.8 Network Rail's analysis would result in effect in differential charging for charter and freight and passenger track access, contrary to the conclusions under-pinning the tariff-based approach. The analysis would provide for the review of charges for some equipment by some operators only, so that the charges they suffer for use of those vehicles are in effect adjusted compared with other operators for which use of those vehicles does not constitute a Vehicle Change. The analysis is inconsistent with the modelled approach to tariff-based charges: it would also be unfair in its own right, providing a mechanism only for selective increases in charges, and not for any reductions. These issues serve to demonstrate the extent to which Network Rail's position is inconsistent with the established structure of charges.

6.9 "Vehicle Change" is defined in Part F of the Network Code. It comprises any change to Specified Equipment and any material variation to an established Vehicle Change which is likely to have a relevant material affect. The examples provided of relevant change are alteration to physical characteristics, increases in length and inclusion of railway vehicles not currently included in Specified Equipment. It is apparent from the definition that once a vehicle is Specified Equipment or part of an established Vehicle Change, then changes in the extent of its use (for example on diagram changes or where the numbers of train slots are revised) is not a Vehicle Change – these do not result in any physical changes to the equipment.

6.10 The emphasis is on satisfying Vehicle Change when a vehicle is first introduced on a route or subject to material physical change or increase in length, but not further or otherwise. There is correctly no requirement to revert for further Vehicle Change as

fleet sizes on the same route build up (or reduce). What is material is the introduction of the change, and the balance of the track access regime (approving the grant of additional slots) and the tariff based charging addresses subsequent change. There is therefore no basis to make distinctions based on the scale of use. In this case the Sectional Appendix confirming route clearance means that the Vehicle Change requirement should be treated as satisfied. The tariff structure of charges deals with any additional use issues.

- 6.11 FGW supports the final conclusions of the Panel at paragraph 31 of the Determination (in which the Panel said):

“...where the Sectional Appendix confirms that the route can already accept the stock, the question [as to the CP3 VTU funding settlement] is academic because it is a reasonable presumption that each CP settlement, however first constructed, aims in its own terms, to enable network Rail to recover all costs that have been acknowledged to vary with the type of rolling stock, through the VTU; and otherwise to provide scope for Network Rail to determine how best, in terms of maintenance practices etc, to discharge its responsibilities economically throughout the network”.

7 Response to Appeal Ground 2 – Network Rail’s Funding Position and the VTU

- 7.1 Network Rail rejects the Panel conclusion that it is reasonable to presume that the CP3 funding settlement covered Network Rail for the introduction of the 142s through the VTU charge.
- 7.2 FGW maintains that it is of the essence of the tariff-based charging structure that the usage charges cover all Network Rail's variable costs in relation to the operation of the Class 142s, as explained in further detail in paragraphs 6.5, 6.7 and 6.8 above. The tariffs are expressly constructed to cover additional usage issues. The modelled approach to establishing the charges is intended to support the objectives of a pragmatic approach which reduces costs and ensures consistency. It is implicit that there will be variations in the correlation between national tariffs and local-based actual charges, but this is not grounds for selective variation of charges to those train operators for which introduction of a vehicle happens to be treated as a Vehicle Change. The overall structure of charges is designed to enable Network Rail to recoup all the variable costs.

7.3 In this case, the Class 142s were already route cleared. The implications of operation for wear and tear is a variable costs issue for Network Rail. Network Rail may choose to address these by fitting lubricators, but this is part of its operational decision regarding how to manage the variable costs associated with their operation.

7.4 Network Rail refers to step changes in costs resulting from the use of a fleet of Class 142s, as opposed to isolated Class 142 use. It is again noted that the scale of use is not a matter addressed by Part F: scale of use is a consequence of the nature and extent of access rights granted, which will vary over time after any required Vehicle Change is implemented, without there being a further Vehicle Change. The usage charge tariffs which vary with the extent of usage and are part of the larger national charging arrangements are rather the means by which these costs are addressed.

8 Response to Appeal Ground 3 - Business Process Document (NR/SP/TRK/8006)

8.1 Network Rail argues that the costs of complying with the Business Process Document regarding fitting flange lubricators should be treated as an additional cost recoverable under Part F.

8.2 FGW supports the Panel's conclusions that the decision regarding the fitting of lubricators is part of Network Rail's decision on how best to manage the wear and tear consequent on the operation of the Class 142s. As such this is part of Network Rail's costs covered by the usage charges which it receives and which it should therefore meet without requiring further compensation in addition to the usage charges.

8.3 Network Rail seek to challenge this approach by analogy with the claims for increased costs which Train Operator's may claim in the event of a Network Change under Part G. This analogy is false and misleading. Under Part G, Train Operators are entitled to compensation where there are changes to the Network which affect their costs of operation, noting that they will be paying Network Rail access charges to be able to use the Network and are entitled to assume a Network in a certain continuing state. In contrast, the Part F situation concerns a situation where the train operator will be paying Network Rail a regulated charge to operate the vehicles covered by the change: it is already liable to pay a charge calculated to cover the variable costs.

8.4 Network Rail claims that this approach under which it bears the costs of compliance with its business process document, is contrary to the principle that parties should be held neutral in the face of a relevant change. As indicated above, this is a mistaken

approach. Network Rail will receive charges for the use of the vehicles and in the context of the national-based tariffs, these funding arrangements cover its costs.

9 Further Responses

Status of Vehicle Change

9.1 FGW raises the prospect that the inclusion of the Class 142s in its specified equipment for the relevant routes was not in fact a Vehicle Change because there is no adequate material affect as required by the definition of Vehicle Change, because:

- (a) The stock is already route cleared;
- (b) Following through the process revealed no effect on third party operators; and
- (c) The variable usage charges address the impacts of its operation.

Vehicle Change is focussed on the significance of introduction of a change to rolling stock and not subsequent changes in quantum of use (which are outside the scope of its definition). The requirement for a "material affect" must be for an affect more than is covered by the tariff usage charges – as these always apply, and otherwise there would be no need for this aspect of Vehicle Change definition. In this case the Class 142s are already route cleared and the usage charges will cover the variable costs of operation, so it may be argued that there is no Vehicle Change on their being included as Specified Equipment in the FGW track access contract.

This is appropriately consistent with the treatment of freight and charter access.

No compensation is therefore payable under Part F, but the relevant track charges will apply in the usual way.

Consequences of Vehicle Change

9.2 If a Vehicle Change is found to apply (which is not admitted), FGW questions the extent to which fitment of lubricators is a consequence of the introduction of Class 142s onto the routes. A range of maintenance responses were possible. FGW has not been engaged by Network Rail in its business case evaluation to determine the case for fitting lubricators or the range of considerations to be taken into account to ensure this is the most cost effective response. It appears that fitment is consistent with Network Rail's best practice being generally assumed by Network Rail, and not just where triggered by use of Class 142s.

- 9.3 In the Network Rail *Strategic Business Plan issued October 2007: Supporting Document: Structure of Charges*, Network Rail states in its approach to the calculation of the proposed new rail surface damage term to the VTU formula, that, for taking into account rail lubrication, the consultant should "assume that all curves with radius less than or equal to 1,500 metres to have the gauge face of the high rail lubricated". Fitment of lubricators on routes as sinuous as those affected by this appeal was therefore in 2007 being treated as sufficiently assured to be the stated assumption on which rail surface damage should be calculated. There appears to be a larger policy at work and against this background fitment does not appear to be the consequence alone of the operation of Class 142s.

Offset of Benefits where there is Vehicle Change to be compensated

- 9.4 It is established as set out above that the funding already provided or reasonably likely in the future to be provided to Network Rail needs to be taken into account in calculating any compensation due where there is a Vehicle Change. FGW maintains that this is sufficient to offset any requirement for compensation for which it might potentially be liable.
- 9.5 In addition the fitment of lubricators may be expected to constitute an enhancement of the network having a longer term value to Network Rail, and subject to funding under the RAB and the forthcoming charges review. It is also envisaged that if any correction is required to the tariff usage rates for Class 142s, then this will be appropriately addressed under the forthcoming CP4 Charges Review. To the extent (which is not admitted) that the existing funding and tariff charges are insufficient to cover any relevant costs, losses and expenses, these benefits must also be taken fully into account in reducing any compensation payable, potentially to nil.
- 9.6 It would be particularly inequitable for a potentially short term operator of a type of rolling stock to be required to fund the improvement of the Network, leaving Network Rail with the ongoing benefits and avoiding Vehicle Change costs for subsequent operators.

10 Conclusion

- 10.1 The Class 142 rolling stock being introduced by First Great Western was already route cleared for the relevant routes as confirmed by the Sectional Appendix. First Great Western will pay all applicable track access charges in relation to its use of the

Class 142s, including the variable usage charges which are designed to cover the variable charges associated with rolling stock operation.

- 10.2 In this context there is no relevant Vehicle Change, because there is no sufficiently material impact on the Network or the operation of trains on the Network to give rise to a Vehicle Change as defined in Part F of the Network Code.
- 10.3 If there is determined to be a Vehicle Change, then this is limited to the fact of operation Class 142 rolling stock, rather than the scale of its operation, which is a function of the nature and extent of the access rights granted from time to time and the actual rolling stock diagramming. The rolling stock is already route cleared, so this aspect does not give rise to any compensatable circumstance.
- 10.4 The manner of establishment of the track charges which FGW will pay makes it reasonable to treat them as covering all the reasonably forecast costs, losses and expenses of operation of the rolling stock over the routes, which in the absence of track charges being payable might otherwise be claimed by Network Rail.
- 10.5 Network Rail's decision to fit lubricators is within the sphere of its decision taking over the manner in which it maintains the railway and should accordingly be treated as covered by the usage charge. It would be open to Network Rail to adopt other approaches to maintenance. The case for this chosen solution being the most efficient in this circumstance has not yet been made out by Network Rail.
- 10.6 In addition it is challenged as to the extent to which the decision to fit lubricators is a consequence of the introduction of Class 142, given the wider state of Network Rail best practice and the assumptions it had previously adopted for CP4 usage charge calculations. In any event there are benefits from the enhancement of the network in this manner, bringing it into line with best practice and opportunities to offset or recoup costs which should in addition be taken into account in assessing the amount (if any) of compensation due.
- 10.7 The ORR is therefore respectfully requested to dismiss the appeal by Network Rail and make the directions sought in paragraph 4.

First Greater Western Limited

27th May 2008