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| **Costs Decision** |
| Inquiry opened on 19 January 2021  |
| **by Heidi Cruickshank BSc, MSc (Hons), MIPROW** |
| **an Inspector appointed by the Secretary of State for Environment, Food and Rural Affairs** |
| **Decision date: 3 November 2021** |

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| **Costs application in relation to Order Ref: ROW/3207992** |
| * The application is made under the Highways Act 1980, Schedule 6 (as amended), and the Local Government Act 1972, section 250(5).
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| * The application is made on behalf of Spelthorne Borough Council for a partial award of costs against Network Rail.
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| * The Inquiry was held in connection with the (Footpath 18, Parish of Staines) Borough of Spelthorne, Surrey Rail Crossing Extinguishment Order 2021[[1]](#footnote-1).
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Decision

1. The application for an award of costs is refused.

The submissions by Mr J Darby for Spelthorne Borough Council

1. The application for costs was submitted by email dated 2 February[[2]](#footnote-2) with the formal application made orally at the close of the Inquiry, on 3 February 2021.
2. The application was for a partial award of costs against Network Rail (NR) on the grounds that they had acted unreasonably as set out below.

*Delay in providing information and otherwise failing to adhere to deadlines*

1. The Planning Inspectorate requested the submission of Proofs of Evidence (PoE) by 22 December 2020. Where a PoE exceeds 1,500 words, parties are required to provide summaries of no more than 1,500 words. NR provided two PoE in compliance with the deadline, both exceeding 1,500 words by a considerable margin, but without summaries. This was raised at the pre-Inquiry event held on 7 January 2021 but summary PoEs were only provided on 13 January 2021.
2. At the pre-Inquiry event reference was made to a third PoE. That PoE had not been provided by 22 December 2020 and was only provided to Spelthorne Borough Council (SBC) as part of a larger bundle of documents on 14 January 2021 (at 18:13hrs). The late provision of summary PoEs and a new PoE was neither in compliance with the timetable nor reasonable. This put SBC to additional time and expense as, being outside the anticipated timeline, it required SBC to revisit issues in preparation in an inconvenient manner.
3. In accordance with the Inquiry timetable, NR was required to submit its Statement of Case (SoC) and supporting documentation on 13 October 2020. At that stage, the only risk assessment documentation that was made available by NR dated back to 2015; itself a document that was later – and somewhat ironically - described by NR during cross examination as not being their finest work. It is relevant to note that no documentation whatsoever had been provided to support NR’s historical (i.e. pre-2014) decision-making, despite the nature of SBC’s objection.
4. No ‘new’ documentation should accompany the submission of PoEs. However, NR provided a lengthy, and highly relevant, Narrative Risk Assessment (NRA) (dated December 2020), at the same time as its submission of the two PoEs referred to above. The late provision of this document required SBC to revisit issues in an inconvenient and duplicative manner, after the point at which it could have addressed relevant issues in its own PoE.
5. Furthermore it was known from the PoE of Mr Pead that there was an NRA dating from April 2020, which was clearly available but not provided. When the bundles were provided the NRA attached was the April 2020. It would be expected that the version being relied on was submitted at the earliest stage possible. This clearly caused additional work, as it was only SBC who identified the inclusion of the wrong document.
6. At the pre-Inquiry event on 7 January 2021, NR undertook to provide bundles to the Inquiry. Unfortunately, NR’s efforts in this regard were woefully inadequate and materially hindered efficient document management efforts. On 14 January 2021 (at 18.13hrs), SBC received a bundle from NR, which i) was split across multiple pdf files; ii) was lacking any pagination or useable index; and iii) contained a number of documents that SBC had not seen previously.
7. SBC raised these concerns with NR’s representative by email dated 15 January 2021 (at 12.03hrs). Notwithstanding those concerns, and given the timing of NR’s provision of the bundles, SBC had to prepare for the Inquiry on the basis of those documents. In the absence of pagination or an index, navigating those documents took much longer than ought to have been the case.
8. NR’s representative responded by email dated 15 January 2021 (at 20.55hrs), in an attempt to clarify the position in respect of the documents referred to above. The clarification was welcome but it came too late, being on a Friday evening outside of working hours, which gave rise to difficulties with regards to SBC providing further instructions to its own representative.
9. On 18 January 2021 (at 00.33hrs), NR informed the Planning Inspectorate that the bundle “*include[d] some documents that are either strictly confidential in nature (and must please be discarded) or irrelevant to this Inquiry, and should equally be discarded*”. However, given the proximity of the Inquiry and although unsure as to their relevance, SBC had already wasted time considering those documents. NR then indicated what appeared to be a non-exhaustive list of such documents (i.e. by preceding the list with “especially…”), before also indicating that at least two other documents had been included in error. NR confirmed that a “*new, updated version of the Inquiry Bundle will be circulated later today, reflecting the above changes*”, without specifying the time by which that updated bundle would be circulated. This was the day before the Inquiry opening and 11 days after the test event.
10. The updated bundle was only received by SBC on Monday 18 January (at 17.11hrs) and then only sent to a limited sub-set of SBC’s team, which clearly provided very limited time for preparation in advance of the Inquiry opening at 10.00hrs on 19 January 2021 (all of which necessarily fell outside of usual office hours). The updated bundle was again split across multiple pdf files and lacking any pagination or useable index.
11. When SBC reviewed the updated bundle, it became evident that it was not only the ‘erroneous’ documents that had been removed, but other documents were also missing. Such (unexplained) discrepancies were noted during the opening exchanges at the Inquiry on 19 January 2021, whereupon it became evident that NR’s representative was unaware that other documents were missing and he was working from a different (assumed to be the earlier) bundle instead.
12. It is unreasonable that these discrepancies and errors occurred on more than one occasion; not least because NR offered to provide a bundle on 7 January but did not manage to do so until late on 18 January 2021 and even then did so in a manner that was riddled with errors that were only identified by SBC. Whilst NR indicate that the bundles were volunteered rather than being required, there is a reasonable expectation that once offered they would be provided soon thereafter and suitable for use. As they were not NR clearly gave rise to unnecessary and wasted expense, including abortive work.

*Only supplying relevant information during the Inquiry when it was requested, but not provided, at an earlier stage and introducing fresh and substantial evidence (and documentation more generally) at a late stage necessitating extra expense for preparatory work that would not otherwise have arisen.*

1. As noted in Opening Submissions[[3]](#footnote-3), SBC’s objection focused largely upon NR’s consideration of available safety mitigation options and the proposed alternative routes. It should be noted that SBC did not offer support for closure at the outset, as suggested; it is only the case that at officer level no objection to closure was raised.
2. The substance of SBC’s objection with regard to optioneering was set out in the SoC (e.g. paras 4.7 – 4.18) and PoE (e.g. paras 1.11 – 1.21); the essence being that SBC has long held concerns in relation to the transparency of NR’s options analysis and decision-making processes. In particular, SBC was concerned that NR had not fully considered alternative safety mitigation options, including those that came to be described during the Inquiry as ‘S1-type interventions’. In doing so, SBC noted the work that had recently been carried out at an apparently similar crossing at Moor Farm / Footpath 13 (e.g. SoC, para 4.8; 4.12 and 4.13) (the Moor Farm crossing).
3. Neither NR’s SoC nor the evidence filed on its behalf addressed either of these points in any proper detail, still less was any underlying documentation supplied to substantiate NR’s case, which was only developed further during evidence. Indeed, and as acknowledged by NR’s witnesses during cross examination, NR took the decision to rely upon what it considered to be a sufficient, but clearly limited, set of documents alongside the three PoE’s discussed above.
4. In the same vein (and one assumes on the basis that SBC had noted the apparent similarities between the draft Order crossing and the Moor Farm crossing), on 12 January 2021 the Inspector requested that NR provide a copy of its NRA for the Moor Farm crossing. However, NR only supplied that document on 14 January 2021 (at 18:13hrs). The document is dated 2 October 2019, and so was clearly already available when the Inspector first requested it. No explanation was provided as to the delay in its provision, nor as to why NR considered the two crossings to be distinguishable from one another.
5. NR’s evidence on both points[[4]](#footnote-4) developed during cross examination, before a NR witness suggested that there were an (unspecified) number of (hitherto unmentioned and undisclosed) ‘reports’ behind NR’s historical options analysis and decision-making process. When those ‘reports’ were requested by SBC NR withdrew the characterisation of those documents as ‘reports’, but nevertheless maintained that there would be a ‘range’ of emails and notes of meetings that would be available to substantiate NR’s position. SBC repeated its request that those documents be provided to the Inquiry in a timely fashion, before raising the same issue with another NR witness during cross examination.
6. On 25 January 2021 (at 15.15hrs), NR belatedly circulated a number of additional documents, including a Note on the Consideration of Various Options at the Crossing (NR7)[[5]](#footnote-5). The late production of those documents both in terms of when they were received in the Inquiry process and the time of the day in question, placed SBC in difficulty as it meant that they had to be reviewed outside of usual office hours, with instructions then only capable of being provided immediately prior to the Inquiry re-opening on 26 January 2021 at 09.30hrs. Despite best endeavours, it was not possible for SBC to complete that process in time and, therefore, additional time had to be set aside by the SBC team prior to the Inquiry re-opening on 29 January 2021.
7. Upon having had a proper opportunity to review those documents and to consider their implications in combination with the evidence heard by the Inquiry, SBC withdrew its objection[[6]](#footnote-6).
8. SBC considers that those documents gave rise to a number of issues that rendered NR’s conduct unreasonable, in addition to the lateness of their provision. A number were supplied under cover of generic ‘notes to the Inquiry’, rather than as addendums or similar to any particular PoE. They were not produced or formatted in a manner that enabled the ready comprehension of the supporting documents. With reference to NR7 in particular, it listed and appended a set of the documents that clearly was not the comprehensive set of emails and meeting minutes that had previously been referenced, for example, the documents appended to NR7 barely referenced any alternatives that might properly be described as ‘S1-type interventions’.
9. All of the above issues gave rise to additional work on the part of SBC. Moreover, and given the nature of SBC’s objection, it is difficult to understand why NR7 and the documents appended thereto were not provided in a proper format at a much earlier stage, for example, as part of NR’s SoC or even a PoE responding to what was known to be an important part of SBC’s objection. Had NR done so, then there is a realistic prospect that SBC may have adopted a different position with regards to the proposed closure at an earlier stage.
10. To address a matter which may be argued to caution against requiring parties to submit all documents behind their case, SBC’s complaint is not limited to simply that we raised this as part of case and deserve a response. If NR felt that this was obvious from the evidence before us they could have said that at a much earlier stage. The first we heard of any of the background documents was in cross-examination. The real complaint relates to manner of production, formatting and timing which was unhelpful giving rise to abortive work for SBC.
11. With regard to historical recording of decision-making in these documents, it is part of Inquiry to test and explore the transparency of decision-making. For SBC and other objectors to make their case they needed to know NR’s evidential basis. It may be said no positive suggestions or points have been made but that does not assist NR. To run a positive case objectors needed to see the documents of the scoping exercise, which did not happen until partway through the Inquiry.
12. Although said by NR to have always been ‘on the table’, nothing was previously committed to writing in relation the proposed alternative route improvement works in a legally enforceable manner. SBC is pleased to note that progress has been made during this Inquiry, with the scope of those works, as well as their funding, now appearing to be guaranteed. However, given the nature of SBC’s objection, it is difficult to understand why the letter of undertaking and funding agreement were not provided to Surrey County Council (SCC) at a much earlier stage. Had NR done so, then there is a realistic prospect that SBC may have adopted a different position with regard to the suitability of the alternative routes at an earlier stage. The nature and scope of the agreement and funding could have been dealt with in the SBC witness’s evidence.
13. In relation to all the documents it is not just their substance but a reasonable expectation that they will be easy to digest, with pagination and an index and not provided so late in day. Their production was unreasonable, giving rise to additional work, without which it would not have been known that there were erroneous documents until asking questions on the first day of the Inquiry.

The submissions by Mr J Lopez for Network Rail

1. There has been no failure to adhere to Inquiry submission “deadlines”: all deadlines were met, save in respect of summary PoEs upon which nothing substantially or procedurally, turns. The “information” which has been produced by NR after the commencement of Inquiry, in the form of the NR Notes, have been either valuable responses to issues already dispatched; invitations made for information, which was provided without question to further assist all; and already addressed, if in briefer terms, in NR’s punctual evidence, for example NR4 [flooding]. There is nothing unusual, still less unreasonable in such Notes coming forward during the course of a public Inquiry, and this discloses no substantive or procedural unreasonableness. The information belatedly requested by SBC during the Inquiry, which could have been requested beforehand if SBC thought it so material to their case, was ultimately unnecessary, but NR were obliged to help, nonetheless. It would be odd for queries to be made and information not submitted, but there needs to be an eye to proportionality in these matters.
2. In relation to the claim that NR only supplied relevant information during the Inquiry when it was requested, but not provided, at an earlier stage, this substantially adds nothing to arguments above and misses the point that such information was forthcoming for the reasons referred to. With regard to those NR Notes directed at SBC, these were not required to make NR’s already-stated points. SBC’s view on public safety and/or the expediency balance could not rationally be said to have turned on any of this information. You need only look at the SoC and PoE to see that the evidence was present. The Notes were not changing anything, just responses to assist SBC further.
3. That information simply further amplified what either should reasonably have been well known to SBC (e.g. NR8: Bridge 3/66) and/or which courteously met late invitations for information on issues upon which SBC has never advanced any positive case against extinguishment or NR. The SBC witness in cross-examination agreed the fundamental and obvious distinction between making a positive case and merely mooting an enquiry over approach; the latter has characterised SBC’s approach throughout.
4. The claim that NR introduced fresh and substantial evidence, and documentation more generally, at a late stage necessitating extra expense for preparatory work that would not otherwise have arisen, is self-contradicting and illogical. SBC cannot suggest, on the one hand, that it reasonably invited further information to be produced, which is not the case as the requests were late, which then proved transformative to its view, as it unconvincingly suggests, only to then characterise the production of that information as unreasonable.
5. In relation to public safety matters generally, the plain reality has been that whilst SBC had historically enquired, at points, of the potential for one or more S1 interventions[[7]](#footnote-7) to come forward at the crossing, SBC could never have reasonably suggested, and never have suggested, that this would have made any transformative difference to the obvious, key safety critical factor which is sighting deficiency, in conjunction with all user types, not just the vulnerable. This is contrary to NR’s clear, continued presentation that has come forward long before Inquiry SoC stage. There are also observations in the NR closing submissions[[8]](#footnote-8) that should be considered in conjunction with this response.
6. It is also not the case that SBC has somehow been ‘frozen out’ of information regarding the ineffectiveness of either primary or secondary mitigations. SBC has been able to involve itself since around 2013. SCC has known of all of them. NR has liaised with SCC and SBC. Seemingly, SBC has been content to continually await approach after approach to be made to them, yet it has its own responsibility to makes its own approaches for clarifications, both to SCC and NR. This is not a case where SBC are saying there has been obstruction from NR, such that they have made an enquiry and NR has not followed through with information. SBC has its own responsibilities and resources to make positive approaches at the relevant time.
7. Even any realignment of the angled approach to the crossing, which could not be dealt with, jurisdictionally, at this Inquiry in any event, would not materially have improved the situation to a position of adequate public safety. These essential, determinative points were well known to SBC before the Inquiry process and restated again, at the SoC stage and beyond.
8. Uninformed, ill-evidenced speculation by SBC, which seemingly has fuelled its own enquiry, has simply been the product of its own failure to appreciate the obvious, and to react to clear and unequivocal statements made on safety, from the earliest stage. It was also perfectly open to SBC to approach NR, at any stage, if it actually was unclear on any of these matters, despite what was already in front of them. It was unreasonable for SBC to carry their enquiry forward, into Inquiry, at SoC stage and subsequently against this background, see SBC PoE 1.8, 1.12, 1.13, 1.17, 1.19 as examples, the author was still claiming, without any evidence, their unsupported, since u-turned claims that went to the safety case.
9. Moreover, NR had replaced the surfacing to the crossing before extinguishment and it was shown, and known to SBC at that time, that it made no material difference. This was a position entirely consistent with the crossing being temporarily closed, and SBC never objected to that course of action.
10. There was not a late PoE and, whilst regrettable that the summary PoEs were slightly later-in-time, ultimately that provides no support for SBC’s allegation of unreasonableness. SBC fails to identify a single issue that it suggests suddenly came through the summary POEs that did not come through the on time PoEs. Since SBC did not withdraw until mid-Inquiry, nothing obviously did lie in the summary PoEs for them. It is entirely unclear what additional time and expense was therefore incurred, on what specifically and, reasonably, how? An 18 January communication to Planning Inspectorate included exchanges regarding there being no late submissions. It seems they may not have received documents on time from the Planning Inspectorate, rather than from NR.
11. The NRA December 2020 was not ‘late’. However, even had it not been submitted punctually, this NRA was not produced specifically for this Inquiry, but rather, is a document which performs a freestanding internal NR function. It was produced in parallel with this Inquiry, but separately from it, and in knowledge that this Inquiry would greatly benefit from an up-to-date, outline assessment of essential safety related matters; it has rightfully been put before this Inquiry, at an appropriate stage. SBC’s claim of unreasonableness in the context of the NRA fundamentally misunderstands why they are produced, and very much invites that such updates, and the best evidence, be sheltered from Inquiry, for fear of being labelled unreasonable, which would regrettably serve the very antithesis of what a public Inquiry is tasked to explore.
12. The essential issues set out in the NRA were also not news to SBC. Whilst the issues within the NRA are fundamental and comprehensive, it was never a lengthy read. Tellingly, the costs application provides no detail as to what SBC found within the NRA that they either did not already know, could not reasonably have already known from what was obvious and logically clear, or could not reasonably have uncovered from NR had it simply asked even if it did not know. There is a clear difference from an authority waiting for approaches to be made to it and one waiting for approaches from another public authority.
13. A fundamental limb of this costs application is on the preface of imposing duties on NR that are not theirs to discharge. NR have sought to assist the Inquiry over and above what they were required to do. As to bundles, NR did not need to produce any of these ‘bundles’ for the Inquiry. It volunteered an additional role, to help all. Comparatively, SBC offered nothing in this regard. NR’s evidence was already lodged, on time, save for the summary PoEs. In producing the bundles, NR simply responded to an appropriate invitation of the Inspector; NR was, and always will be, happy to oblige. Within the time available and given limited resourcing at a resourced-stretched time, NR did the best that it was able to do. NR do not suggest that the bundles were perfect but that criticism goes nowhere.
14. SBC did not itself circulate any such bundle between the parties, not producing anything beyond its own thin SoC and PoE. SBC’s approach was not to make any active enquiries of the Planning Inspectorate or NR after the relevant start date had passed, still less suitably in advance of the Inquiry, of documents that might not have reached it in time from the Planning Inspectorate, not NR. Such an apparent lack of engagement with the pre-Inquiry process is not productive and should not be encouraged, by characterising other parties as behaving unreasonably. It has long since been the known practice that principal objecting parties should liaise with the Planning Inspectorate, and also with the providing party, to source documents if they have not received them on time. Evidently, SBC did not act in this respect, as they have not said that they did liaise with the Planning Inspectorate or NR, but now complain as to what should have been a foreseeable outcome.
15. In relation to the optioneering assessment SBC has never raised a positive case with regard to any option, to suggest that its implementation would probably render the crossing safe for public use. This includes S1 interventions, and realignment, which were the source of SBC’s enquiry. Even had SBC made a positive case on either of these two interventions, it was perfectly plain that they were not going to change the end outcome on public safety and the information that was before SBC, provided by NR, confirmed this. The circumstances of the crossing and its surrounds plainly confirmed this. SBC has either not considered the obvious or has chosen to either not consider, or to shut its eyes to this reality; neither is an appropriate way forward.
16. “Additional work” is opaquely referenced as having been incurred in consequence of the NR Notes, which were, in part, provided at SBC’s own request and otherwise would not have come forward, but with no detail given. Those Notes would have been very easily digested, quickly and well within the course of the Inquiry sessions themselves; any other suggestion is untenable. SBC were not cross-checking with any independent expert or third party.
17. In relation to the alternative route, SBC has never queried, as SCC has never queried, the reliability of NR to fund the delivery of the works. Today, SBC is not a party to the Letter of Understanding or Funding Agreement[[9]](#footnote-9). There is no basis then for SBC to suggest that it privately held a concern, never once expressed, over the security of this funding. It is not as if SBC has any historic experience to cast any doubt over the credibility of NR to follow through with committed funding. SBC’s opportunist assertion is deeply regrettable and provides a further indicator as to the complete lack of credibility of the costs application.
18. SBC’s conclusion over the wider expediency balance, as in paragraphs 4 and 6 of their withdrawal of objection on 29 January 2021[[10]](#footnote-10) could and should have come forward even before this Inquiry, irrespective of its own enquiry regarding public safety. These were obviously discrete issues and so what does SBC specifically say has suddenly turned upon the FP17 works funding issue, in connection with connectivity or use of the alternatives? The costs application and the statements are silent.
19. Prior to the submission of NR’s application, several meetings took place with SCC and SBC regarding the crossing and NR’s pursuit of closure, having fully option assessed the crossing. Those consultations commenced in July 2013. For the next two years and through those meetings, SBC, in October 2014, offered its support for closure, as confirmed by SBC in their report on consultation responses. It was not until April 2015 at the Spelthorne Local Committee (SLC) meeting, involving members from SBC and SCC, that the position changed. Yet at the meeting NR presented the same information regarding the options, that would fail to control the risk, and the preferred option of closure.
20. Discussions recommenced as NR re-engaged with SBC. In September 2016 a meeting was held, again discussing closure. Other options were also explored such as the slowing of trains, but the meeting resulted in an impasse leading NR to continue to seek closure through the application to the Secretary of State. Even at that stage, it was entirely unclear to NR why SBC were maintaining an enquiry regarding limited secondary mitigations, when SBC knew it would make no transformative difference.
21. The pertinent information, from which a lay individual could ascertain the clear picture of secondary options not making an essential difference, was known to SBC before the Inquiry and subsequently, before SoC stage. Over and above this, early in the Inquiry, both in evidence and cross examination, both relevant NR witnesses repeated the same basic point, that evidence commencing on day 1 of the Inquiry. Therefore, nothing could reasonably be said to have turned on the NR Notes.
22. The provision of NR7[[11]](#footnote-11) merely supports evidence that relates to the large-scale mitigations, showing that SBC were aware of those options that NR thought pertinent to address the risk, for example:
* Item 2 – Meeting notes (with SBC present) indicate that NR were investigating a bridge installation and other viable options in line with those presented in the 2020 NRA and inquiry evidence;
* Item 12 – Letter from NR to SBC setting out a summary of options, stating, ‘The key risk factor at the level crossing is that in one direction the sighting is insufficient.’ It goes on to discuss SBC ‘preferred option’ from the meeting of reducing train speeds, explaining why this would not be possible. It concludes by stating ‘We now find ourselves at a stalemate, and with no option but to now apply to the Secretary of State in order to seek an extinguishment order. We would urge you to re-consider our evidence, SCC’s recommendation for extinguishment (at Officer level) and our offer to fully fund suitable diversionary facilities to enable even greater access to the moor. I (Principal Sponsor) would be happy to meet to discuss the matter further’;
1. In cross-examination the NR witness confirmed that “report” was the wrong word and ‘emails’ was more appropriate. It was repeatedly stated that additional information could be requested from another witness, the Liability Negotiations Manager, as this witness, the Head of Liability Negotiation, was only copied into such emails and would have no input in them. It would be unreasonable for anyone to trawl through around 5,000 archived and deleted emails on the off-chance that they would uncover something of relevance.
2. SBC requested and received additional documents which placed no transformative bearing upon the evidence given; NR’s primary, well telegraphed, concern was for the very limited sighting time of approaching trains, based on a 22m sighting time which is only 0.82 seconds. This evidence was clearly available to SBC prior to Inquiry. What is it over that vividly telegraphed information on the ground and historically and reinforced on the papers that meant SBC maintained their line. NR make no costs application against SBC but characterise their approach as unreasonable in not following individual responsibility to stand back from the evidence and consider where, over and above their lingering historic criticism, it takes them. Had they done that at an earlier stage then they would not have continued on with their enquiry through their SoC, thin as it was, and PoE.
3. NR had installed the non-slip surfacing before the recommendation came through, as noted in the RAIB report, and before the crossing was closed. Nevertheless, it realised an insignificant reduction to the risk and the crossing was still closed on safety grounds.
4. In relation to SBC scrutiny of the documents, new documents which were erroneously part of the bundle and were retracted, and those submitted as NR Notes. The headline conclusion that SBC ran, which was at maximum the S1 interventions, and even including realignment, rationally seen was never going to get them there in terms of the statutory test. What was the continued source driving that same thoroughly bad point at Inquiry: was it politically driven by the membership or was it a considered assessment? We know there was no considered assessment other than the thin SoC and PoE. We entertain and respond to the points raised as a public body but draw a line in assisting where criticised as unreasonable in this way. Responsible parties, such as SBC, should proactively engage and see where on the material they can and should take a different view on the evidence.
5. It is respectfully submitted that this application comes nowhere close to being well-founded and that the Inspector should refuse to make an award of costs.

Reasons

1. Costs may be awarded against a party who has behaved unreasonably and thereby caused the party applying for costs to incur unnecessary or wasted expense. This application relates to procedural grounds.
2. I agree that the provision of summary PoEs was outside the usual deadlines. Nevertheless, it would be unusual for cross-examination not to rest on the full POE and, therefore, I do not consider that this would have wasted time for SBC. With regard to the missing PoE I am satisfied that this was not a fault of NR, as all 3 PoEs were submitted on time. I apologise on behalf of the Planning Inspectorate that one PoE was late in circulation. However, although apparently aware from at least 7 January of a PoE that had not been received, this document does not appear to have been actively sought from SCC, NR or the Planning Inspectorate.
3. I agree with SBC that no new documents should be appended to PoEs, the opportunity for documents to be submitted being at the SoC stage. In this case for NR that was by 13 October 2020, such that responding SoCs, due by 24 November, could reasonably deal with matters arising therein. The December 2020 NRA was attached to a PoE, submitted by 22 December 2020. Whilst I accept that it is useful to have up-to-date information before the Inquiry – and I note NR’s comment that this was a usual piece of work not produced specifically for the Inquiry - an indication as to such late evidence could have assisted everybody. Nevertheless, I am satisfied that the NRA was of assistance and dealt with appropriately through the Inquiry process.
4. At the pre-Inquiry event on 7 January NR offered to assist with the provision of the evidence, which had been submitted by all parties, in ‘bundles’. This was intended to assist everyone, given that we did not have the advantage of a dedicated webpage with the documents catalogued therein. Unfortunately, it is the case that the bundles first produced, on 14 January, were found to have documents which should not have been present. An updated bundle was sent out on 18 January, with the Inquiry opening on 19 January.
5. I am bound to note, as set out in paragraphs 9 and 10 of the decision on the draft Order, that the bundles were intended to pull together the documents which had already been submitted. These were available, as usual, from SCC, as set out in the Notice of Order. Due to difficulties in accessing documents on deposit in the normal way SCC had also made clear that they could email documents to parties and had done so in the lead-up to the Inquiry.
6. Taking a wider view of the proceedings I have some sympathy for the position that Counsel for SBC found himself in. However, it was always open to the wider SBC team to seek out the documents they may require. The provision of the bundles was undertaken by NR to assist the Inquiry, which was running in unusual circumstances, and I thank them for that effort.
7. I do not consider the lack of index and pagination to be a matter which demonstrates any unreasonable behaviour. The inclusion of erroneous documents was unfortunate and may have led to some wasted time, and therefore expense, to SBC. I bear in mind, however, that the Inquiry documents included in the bundle – that is the documents which should have been there and not the erroneous documents - were available to SBC, having been placed on deposit with SCC as required at the appropriate times and, therefore, at the latest all available from December 2020.
8. As a party to the Inquiry, SBC should have been provided with the SoCs and PoEs direct from the Planning Inspectorate, however, the expectation is that parties will obtain copies of the appendices thereto from the relevant local authority. Had NR not undertaken to provide the bundle on 7 January 2021, I have to ask myself whether SBC would, therefore, still not have asked SCC, or the Planning Inspectorate, to assist by provision of the relevant documents. Sitting and waiting for the documents via the bundles seems to be a difficulty of their own making, rather than a matter of unreasonableness on the part of NR.
9. I agree with SBC that it was set out in their SoC that their concern related to what could be done to improve and, therefore, reopen the crossing. This appeared to arise from a view that optioneering was incomplete and was bound to be affected by the recent changes at the Moor Farm crossing, for which I therefore requested the relevant NRA. I also find that there appeared to be a ‘political’ slant to matters raised by SBC, taking account of the desires of local residents, as referred to in paragraph 108 of the decision on the draft Order.
10. The NR SoC set out that options had been explored since 2013 with consideration of whether any feasible and effective mitigation measures, whether taken individually or together, could be implemented in order to make the Crossing (adequately) safe for public use. Section 15 of the PoE of the Route Level Crossing Manager for NR Wessex Route set out a number of mitigation options but these did not include certain measures, as mentioned at paragraph 53 of the decision on the draft Order. Section 10 of the PoE of the Liability Negotiations Manager gave an overview of the optioneering process but again focussed on potential larger changes, rather than small-scale issues.
11. I consider that it was clear from the general tone of many objections that there remained a view that NR had not looked at small-scale practical matters, which it was felt could easily resolve the problem. Again, I consider that these views were influenced to some extent by the very local improvements made at the Moor Farm crossing, with a natural inclination to draw comparison.
12. There could have potentially been some short-circuiting of questions through early responsive - by which I mean responsive to the original objections - provision of information to show that these matters had been addressed at an earlier stage. However, I agree with NR that, given their involvement through the Spelthorne Local Committee[[12]](#footnote-12), SBC could have asked questions to satisfy themselves, on behalf of their local constituents, on such matters at any time; it did not require the Inquiry process to do so. Whilst I would not necessarily expect lay people, or local organisations, to ask such questions of NR I consider that a public authority bears some responsibility to enter into dialogue.
13. A number of matters were dealt with by way of ‘NR Notes’ through the course of the Inquiry. I was satisfied that it was appropriate for these to come forward when they did. Taking account of the slightly different hours of sitting arising from the Inquiry being held in a virtual format, rather than as a physical event, there were longer breaks between sessions, which should have allowed an opportunity to take account of such evidence. Adjournments can always be requested and I took longer adjournments in relation to certain matters, for example to ensure the ability to download a document from a computer, which could not be done whilst a party was online for the Inquiry itself. I do not find the provision of the NR notes to have been unreasonable in the course of an Inquiry of this nature, with some arising directly from matters on which I requested further information, as well as SBC and other parties to the Inquiry.
14. In relation to the agreement to works between NR and SCC, this was a matter I raised prior to the opening of the Inquiry, as I wanted to understand the weight that I could place on the proposals. I found it helpful to have the final agreements signed off through the course of the Inquiry but I do not find it unreasonable, from the perspective of this costs application, that the matters were not already in such a format at an earlier stage. Whilst not a party to the agreement, I consider it was open to SBC as a local authority to ask questions of either or both NR and SCC and satisfy itself on such matters at a much earlier stage. I do not find such concerns on funding a reasonable footing for the continued SBC objection, or reason why a costs application should succeed.
15. It is possible that SBC would have withdrawn their objection at an earlier stage had certain information been available and laid out more plainly within the Inquiry documents. However, taking account of the matters referred to above, I do not consider that NR have behaved unreasonably in the presentation or timing of their evidence.

Conclusion

1. Taking account of all relevant matters, I therefore find that unreasonable behaviour resulting in unnecessary or wasted expense has not been demonstrated.

Heidi Cruickshank

**Inspector**

1. Subject to modification of the draft Order [↑](#footnote-ref-1)
2. Inquiry Document number 42 [↑](#footnote-ref-2)
3. Inquiry Document number 37 [↑](#footnote-ref-3)
4. That is the consideration of alternative safety mitigation options and the comparison with Moor Farm crossing. [↑](#footnote-ref-4)
5. Inquiry Document number 9 [↑](#footnote-ref-5)
6. Inquiry Document number 39 [↑](#footnote-ref-6)
7. By reference to the June 2015 RSSB document, Research into the causes of pedestrian accidents at level crossings and potential solutions [↑](#footnote-ref-7)
8. Inquiry Document number 16 [↑](#footnote-ref-8)
9. Inquiry document numbers 13 & 14 [↑](#footnote-ref-9)
10. Inquiry Document number 39 [↑](#footnote-ref-10)
11. Inquiry Document number 9 [↑](#footnote-ref-11)
12. Now the Spelthorne Joint Committee [↑](#footnote-ref-12)