



Office of the Rail Regulator
Freightliner LTD
Freightliner Heavy Haul LTD

By Email and Post

Date: 16 January 2015

Dear Sirs

NOTICE OF APPEAL UNDER PART M OF THE NETWORK CODE

1 NOTICE OF APPEAL

- 1.1. Under Part M of the Network Code, on 12 December 2014 Network Rail Infrastructure Limited (the **Appellant**) served a notice of appeal in relation to paragraph 5.1 of a determination of the Timetabling Panel of the Access Disputes Committee dated 8 December 2014 (the **Determination**) in respect of TTP371, TTP513, TTP514, TTP570 and TTP571.
- 1.2. As part of this notice, the Appellant sought an extension of time to formulate and serve further detailed grounds of appeal. The Office of the Rail Regulator granted this request, allowing an extension for the submission of the Appellant's appeal to 16 January 2015.
- 1.3. This notice, together with the Appellant's notice dated 12 December 2014, constitutes the Appellant's complete Notice of Appeal in accordance with Clause 3.1.1 of Part M of the Network Code (the **Notice of Appeal**).
- 1.4. Unless otherwise defined, the terms used herein adopt the definitions provided under the Network Code (the **Code**).
- 1.5. The evidence in support of this Notice of Appeal is attached to this notice as an exhibit.

2 SUMMARY

2.1. The Appellant wishes to appeal paragraph 5.1 of the Determination, which provided that

"a Timetable Planning Rule change related solely to a Network Change should not be put into effect before the associated Network Change is implemented";

2.2. The Appellant believes that paragraph 5.1 of the Determination is wrong for the reasons set out in detail below, summarised as follows:

2.2.1. paragraph 5.1 introduces an express link between a Timetable Planning Rule (TPR) change under Part D of the Code, and a Network Change under Part G of the Code which does not presently exist in the Code, and for which there is no precedent;

2.2.2. this link will create a precedent in the form of a TTP determination which is likely to have a significant detrimental impact on the operation of Parts D and G of the Code;

2.2.3. implementation is the enactment of physical changes to the infrastructure of the Network, and can only take place after a Network Change is established;

2.2.4. paragraph 5.1, and the wording "put into effect" is unclear as to intent and scope, which creates uncertainty. The determination at paragraph 5.1, on the face of it, introduces a simple link: TPR changes being introduced as a result of a Network Change are unable to take effect until the Network Change is implemented. As an example if the Network Change is planned to be implemented on the 1st April 2015 then the associated TPR change can only take effect from 1st April 2015 and any alterations to the Working Timetable shall be introduced from that date. However the determination at paragraph 5.1 could also be interpreted so that until the Network Change is implemented Network Rail is unable even to propose a TPR change, or to progress the Part D procedure;

2.2.5. in the latter scenario, there could be significant delay in using infrastructure, whilst the TPR went through the Part D procedure to establish the Working Timetable;

2.2.6. paragraph 5.1 is therefore of importance to the industry as a whole;

2.2.7. the Hearing Chair also relied on an agreement between the Dispute Parties which did not exist in the form on which paragraph 5.1 is based. The Dispute Parties used the term defined in Part G, "established", rather than the word used by the Hearing Chair, which is "implemented";

2.2.8. paragraph 5.1 is also unjust because of a serious procedural irregularity because:

2.2.8.1. the Hearing Chair for the TTPs exceeded his jurisdiction under Part D of the Code and Chapter H of the Access Dispute Resolution Rules (**ADRR**) in making paragraph 5.1, which affects Part G of the Code; and

2.2.8.2. the Hearing Chair failed to record his decisions and conclusions reached with regard to paragraph 5.1, and did not distinguish clearly or at all his decisions upon legal entitlement, remedy, guidance, the reasons for his decision (including any relevant legal principles or rules of law applied).

2.3. The Appellant therefore asks the ORR to hear an appeal in respect of paragraph 5.1, and then to remove paragraph 5.1 from the Determination.

3 FACTS AND BACKGROUND

3.1. Between 30 July 2010 and 22 February 2013 Freightliner Ltd and Freightliner Heavy Haul Ltd (together, **Freightliner**) notified the Access Dispute Committee of a series of disputes with Network Code brought under Part D of the Network Code. These disputes were registered by the Secretary of the Access Disputes Committee as TTP371, TTP513, TTP514, TTP570 and TTP571.

- 3.2. On 17 April 2013, following correspondence with Freightliner and the Appellant, the Hearing Chair of the Timetabling Panel, Clive Fletcher-Wood (the **Hearing Chair**), formally ordered that these disputes be heard together.
- 3.3. This Notice of Appeal relates specifically to disputes TTP570 and TTP571 and particularly, items 17 and 21 of those disputes. Disputes TTP570 and TTP571 related to the Paisley Canal line in Scotland and the proposed TPRs to be put in place by the Appellant following the introduction of a non-standard electrification scheme.
- 3.4. This constituted a Network Change made under Part G of the Network Code (the **Associated Network Change**). The Network Change under Part G on the Paisley Canal line was to introduce reduced clearance electrification. This is cheaper than installing "normal" height electrification as it avoids the need to raise bridges or lower tracks under structures. In four instances the overhead line equipment was replaced by an insulated wire under structures as the clearances were too limited to allow live equipment which could short out when a train went past. This had been introduced by the Appellant under Part D, on the basis that this may require adjustment to the Working Timetable, so requiring TPR change.
- 3.5. The downside to the use of the reduced height wire system was that diesel trains were unable to be operated under the electrification with the electrification live. This is because the diesel trains are larger than the electric trains with the top of the locomotive close to the contact wire. This could allow the current to arc across the gap between the contact wire and the locomotive and cause a short circuit between the wire and rails, through the diesel train, so the electrification has to be turned off for diesel trains to run. In fact this was an operational issue rather than one which required TPR changes, because diesel trains could still be planned to run down the route, and it would then be up to the operations staff to provide the isolation before that took place. The only proposed TPR change was for the Sectional Running Times to be used by the ScotRail electric trains. They are the same as the diesel Sectional Running Times which were 2 minutes deficient for diesel trains but correct for electric trains. These changes were not challenged by Freightliner.

- 3.6. On 10 May 2013 Freightliner provided its sole reference document claiming in respect of items 17 and 21 that the Associated Network Change had not been established because the Appellant had not addressed the possible operation of trains (such as diesel trains) other than the electrical multiple units which were operated by the local franchised operator at the time. Given that the proposed TPR changes were only brought about because of the Associated Network Change, Freightliner also alleged that it was premature to propose TPRs relating to the Associated Network Change. Freightliner requested that the Timetabling Panel "*...rule that changes pertaining to a Network Change should not be included in TPRs until that Network Change has been established (as defined by Part G10), or, are at the least unenforceable until establishment and that fact should be references against the TPR entry.*"¹
- 3.7. Following separate discussions between the Appellant and Freightliner, on 23 May 2013 the Appellant wrote to the Hearing Chair and confirmed that both parties had agreed to remove items 17 and 21 from the dispute. The Appellant also noted that "*...Items 17 and 21 arise solely from the Network Change process and that this Network Change is still under discussion.*"²
- 3.8. Items 17 and 21 were subsequently removed from the Appellant's Sole Reference Document dated 7 June 2013. In reference to these items, the Appellant stated: "*We accept that changes arising from a Network Change should not be included in the TPRs until that Network Change has been established. Therefore we don't believe that this element of Freightliner's reference needs to be addressed by the panel.*"³
- 3.9. On 10 June 2013 the Hearing Chair sent a note for the Appellant and Freightliner's consideration, stating:

"3. In Network Rail's Sole Reference Document, NR accepts the proposition made by FL that changes in the Timetable Planning Rules (TPRs) resulting from Network Change should not be introduced until the Network Change itself is implemented. The Hearing Chair concurs with this view, while recognising that there may be merit in suitable cases in advising operators of

¹ See Exhibit 1. Freightliner's Sole Reference Document, dated 10 May 2013.

² See Exhibit 2. Appellant's letter to Hearing Chair, Access Disputes Committee, dated 23 May 2013.

³ See Exhibit 3. Appellant's Sole Reference Document, dated 7 June 2013.

*such changes in TPRs in advance, so that they can become effective immediately following implementation of the related Network Change."*⁴

3.10. The Hearing Chair also commented that, as far as he was aware, there was no determination of a Panel on this particular point which would provide a precedent for the industry and, as such, invited the parties to comment on whether they thought it would assist the industry if a determination were to be made on this point.⁵

3.11. In a directions letter dated 24 June 2013 (the **Directions Letter**), the Hearing Chair stated that both Freightliner and the Appellant had submitted that it would assist the industry if this agreed point was recorded in a determination, thus providing an authority for the industry.⁶

3.12. The Hearing Chair also considered whether such determination could be made without a oral hearing, and invited any Resolution Service Party (as defined in the Access Dispute Resolution Rules) to make representations or provide comments on whether this proposal could be reached without an oral hearing by 12 July 2013.

3.13. The Directions Letter was then published on the Access Disputes Committee website, with a note to the effect that if the adjourned dispute was to be resolved without an oral hearing, the Panel was minded to issued a determination on this point regarding Network Change, at the request of the parties and for the benefit of the industry. The Secretary to the Access Disputes Committee also circulated this letter by e-mail to Resolution Service Parties, using the contact details for Resolution Service Parties maintained for the purpose of ADR Rule H52. Three Resolution Services Parties responded, all being Train Operating Companies (TOCs)⁷, with no dissent expressed.⁸

3.14. The procedure then continued without further reference to issues 17 and 21, for the rest of 2013 and all of 2014.

⁴ See Exhibit 4. Note from Hearing Chair to Appellant and Freightliner in relation to disputes TPP371, 513,514,570 and 571.

⁵ See paragraphs 4 and 5, Exhibit 4. Note from Hearing Chair to Appellant and Freightliner in relation to disputes TPP371, 513,514,570 and 571.

⁶ See paragraph 10, Exhibit 5. Directions Letter relating to Timetabling Disputes TTP371, TTP513, TTP514, TTP570 and TTP 571.

⁷ Responses were received from: Southern Railways Ltd, West Coast Trains Ltd and XC Trains Ltd.

⁸ See paragraph 3.5, Exhibit 6, the Determination.

3.15. The Determination was finally issued on 8 December 2014 and the Hearing Chair determined, *inter alia*, that:

"5.1 a Timetable Planning Rule change related solely to a Network Change should not be put into effect before the associated Network Change is implemented..."

...I confirm that, so far as I am aware, this Determination and the process by which it has been reached are compliant in form and content with the requirements of the Access Disputes Resolution Rules."⁹

4 GROUND OF APPEAL

Importance to the Industry: Parts D and G of the Network Code are distinct and operate separately and should not be linked

- 4.1. The Hearing Chair found that the Network Code is not explicit, and there is no existing precedent on whether proposed TPRs, arising solely from a Network Change should be implemented before a Network Change.¹⁰ In the absence of precedent, the Appellant submits that Parts D and G of the Network Code are distinct and do not provide for the link set out in the Determination. If such a link is introduced, this will lead to significant operational issues for the industry.
- 4.2. Parts D and G of the Network Code operate as contractually separate parts of the Network Code. For instance, they provide for different processes: Part D sets out the process for revision of the timetable for the Network whereas Part G outlines the consultation and compensation process for "Network Changes" which, although broadly defined, generally relate to either physical or operational changes which may have a material effect on the operation of the Network or trains operated on the Network.
- 4.3. Parts D and G of the Network Code also differ in that Part D has clearly defined timescales for consultation and implementation of amendments of the TPRs in support of developing the New Working Timetable, whereas Part G has no timescale either for establishment or for implementation of Network Change. This distinction is made for sound operational reasons, as described below.

⁹ See paragraph 5, Exhibit 6, the Determination.

¹⁰ See paragraph 3.3, Exhibit 6, the Determination.

4.4. Part D has clearly defined timescales and steps in relation to the bi-annual revisions of the Working Timetable, so that the Working Timetable can come into effect on time twice a year. This timetable is expressed as a week in the period prior to the relevant implementation dates for the two annual revisions of the Working Timetable (which is cited as "D"), for which the main stages are:

4.4.1. between D-64 and D-60 the Appellant must consult with Timetable Participants in respect of any changes to the Rules (that is, TPRs and the Engineering Access Statement)¹¹;

4.4.2. following such consultation and no later than D-59, the Appellant is to provide all Timetable Participants with a draft of the revised Rules¹²;

4.4.3. the Appellant then issues the final revised Rules to all Timetable Participants by D-44¹³;

4.4.4. between D-40 to D-26 there is then a timetable preparation period during which a draft of the emerging New Working Timetable is available online and any Access Proposals which are submitted by Timetable Participants may be incorporated into the New Working Timetable;

4.4.5. the New Working Timetable is then fixed at D-26, 6 months before it comes into effect, and the prescribed dates apply even where the Rules are dated so that they begin later in the timetable period.

4.4.6. Thus all Timetable Participants know the Working Timetable is fixed, 6 months before it comes into effect.

4.5. In contrast, there are only a few timescales cited in Part G¹⁴ and in particular, there are no fixed dates required for the Network Change to be issued, responded to, established and finally implemented. This allows the Access Parties to consider carefully, and discuss, whether notice should be given by the Access Beneficiary that the conditions of Part G have been satisfied such that the Network Change should not be implemented. Fixed deadlines are not

¹¹ See Condition D 2.2.2 of the Code.

¹² See Condition D2.2.3 of the Code.

¹³ See Condition D2.2.5 of the Code.

¹⁴ For example, Network Rail has to allow at least 60 days for a response between issuing a Network Change notice and a response from each Access Beneficiary.

applied, which might otherwise frustrate this process. Part G thus works independently of Part D, allowing the industry to deal pragmatically with the introduction of Network Change.

- 4.6. By contrast, all the timescales of Part D are strictly adhered to. If objection could be made to a TPR change on the basis that a Network Change has not yet been implemented, or established, this could prevent the implementation of the Working Timetable at D.
- 4.7. There are also different objectives and considerations which the Appellant must apply when determining either TPR changes or a Network Change. Any bi-annual revisions of the TPRs must be made in accordance with the Decision Criteria at Condition D4.6.¹⁵ These Decision Criteria include 11 wide ranging considerations, varying from *"maintaining, developing and improving the capability of the Network"*¹⁶ to *"mitigating the effect on the environment"*¹⁷ which the Appellant must consider when making any decision under Part D for the Objective of *"the safe carriage of passengers and goods in the most efficient and economical manner in the overall interest of current and prospective users and providers of railway services."*¹⁸ There is no requirement within Part D that the Appellant must also have consideration as to whether there is a Network Change under Part G that is related to TPRs, still less as to whether such Network Change has been either established or implemented.
- 4.8. There is only one instance where reference to Part G is made in Part D, at Condition D6.6.1.¹⁹ This is not applicable to the current case as Condition D.6 deals with Possessions Strategy Notices, for the implementation of Works which require a programme of Restrictions of Use. Condition D.6 provides for a procedure of issuing a Possessions Strategy Proposal, consultation, and serving a Possessions Strategy Notice. Even that procedure expressly provides that, *"the process under this Condition D6... does not in any way affect the applicability of the process set out in Condition D2.2."*, this being the bi-annual process set out above. D6.6 also says, under the heading "Relationship with

¹⁵ See Condition D4.1.1 and D4.6 of the Code.

¹⁶ See Condition D4.6.2(a) of the Code.

¹⁷ See Condition D4.6.2(i) of the Code.

¹⁸ See Condition D4.6.1 of the Code.

¹⁹ Condition D6.6.1 of the Code in full provides that *"This Condition D6 is without prejudice to Part G."*

Part G", "*This Condition D6 is without prejudice to Part G*". In other words, it preserves the distinction between Part D and Part G. It allows Part G to continue without interference by Condition D.6, and Part D to continue without interference by Part G.

4.9. Similarly, under Part G, the Appellant is under no obligation to consider TPR change or provide detail as to whether and/or how the TPRs might change as a result of a proposed Network Change.²⁰ The content of a notice of proposed Network Change under Condition G1.2 does not include any requirement of, or reference to, Part D, the TPRs, or to the Working Timetable.

4.10. Given the clear distinctions between Part D and Part G of the Network Code, the link which the Determination provides is wrong to the extent that it has created an inappropriate contractual link between two parts of the Network Code. The two parts operate and apply to two separate and distinct processes. Indeed, there is only one instance in Part D where reference is made to Part G, in Condition D6.6.1, and that in itself preserves the separation of the two parts.

4.11. Paragraph 5.1 of the Determination now establishes a link, which is not provided for in either Part. This link between Parts D and G provided in the Determination gives rise to difficulties as to how the bi-annual timescales will apply as it is not clear how the fixed timescales could be followed where the Appellant is under an obligation to only implement TPRs following a Network Change being implemented. This leads to the risk of significant operational problems, as described further below.

Importance to the industry: examples of the impact on the industry of a link between Part D and Part G

4.12. To take the present case, items 17 and 21 should never have been subject to a TPR dispute under Part D of the Network Code. As explained above at paragraphs 3.4 and 3.5, in fact the proposed Network Change required no change to the TPRs, so Parts D and G should not have been linked in the relevant Determination.

²⁰ Under Part G of the Code, when there is a change to the infrastructure proposed, Appellant only required to make proposal with enough detail for an operator of railway assets to assess the change including the reasons for change, the specification of the works, when the works are to be done and the division of costs of carrying out the charge.

- 4.13. As another example, several significant infrastructure changes are proposed for Control Period 5 (CP5), which runs until 2019. The proposed Network Changes for those changes are subject to the Part G Network Change procedure. Independently, they are also subject to Part D proposals for timetable revision, so that the increases in capacity within CP5 which those Network Changes will lead to can be accommodated. If Part D must wait until those Network Changes are established, or even finally implemented, the capacity increases (for which demand already exists) will be delayed, possibly even into Control Period 6.
- 4.14. A further example is that Network Changes are often introduced in packages, to save multiple Network Change Notices being served. Similarly, as in this Determination, there are also sometimes packages of proposed TPRs amendments. A link between Part D and Part G would allow a Network Change, not yet established, or implemented, to prevent the introduction of changes in TPRs which have no relation to any Network Change, simply because a Network Change affecting part of the Determination has not been established or implemented.
- 4.15. As an example Nottingham remodelling was introduced in July 2014 in mid timetable. The old timetable would not work on the new layout. If the Appellant was unable to implement the TPRs changes until the new layout was implemented then a temporary timetable would be required between July 2014 and December 2014, when the Working Timetable changed.

The term "implementation" was not used by the parties and was adopted in error by the Hearing Chair

- 4.16. The term "establish" is defined in Part G of the Code, under the definition of "Established Network Change":

"establish Network Change" means a change falling within the definition of "Network Change" and which:

(a) in the case of a Network Change proposed by Network Rail, Network Rail is entitled to carry out having complied with the procedural and other requirements of this Part G; and

(b) in the case of a Network Change proposed by an Access Beneficiary, Network Rail is required by this Part G to carry out,

and "establish" and "establishment" of a Network Change shall be construed accordingly. "

4.17. The practical effect of this is that a Network Change can only proceed when the Appellant, and the relevant Access Beneficiaries, have signed off on the Network Change.

4.18. Part G does not provide a specific definition of "implement", although the term is used throughout Part G. The Oxford English Dictionary defines "implement" as *"To complete, perform, carry into effect (a contract, agreement, etc); to fulfil (an engagement or promise)..."*²¹ The context in Part G in which this word is used is consistent with that definition, for example, G.10.1, which states *"Network Rail shall be entitled to implement a proposed Network Change if: (a) it has not received a notice from any Access Beneficiary under Condition G2.1 by the relevant response date..."*. In other words, the Network Change is first "established" under the procedure in Part G, and then "implemented" by being put into effect, a process in itself which can take many months, even years.

4.19. This distinction is preserved throughout Part G. Specifically:

4.19.1. Condition A1 states that it is the Appellant's obligation to facilitate Network Change and that the Appellant shall take all reasonable steps to facilitate the development, establishment and implementation of any proposal for Network Change.

4.19.2. Condition G10 is entitled "Establishment and Implementation" and is *"concerned with the processes that may be adopted for establishing and implementing Network Changes."*²²

4.19.3. Conditions G10.1. and G10.2 then set out the circumstances in which the Appellant and Sponsor are entitled to implement a proposed

²¹ See Exhibit 7. Extracts from the Oxford English Dictionary.

²² See Explanatory Note to Part G of the Code, paragraph G.

Network Change.²³ In each case the wording clearly provides that, as a precondition of the implementation, there must be an entitlement to implement a proposed Network Change, the entitlement being analogous with establishment.

4.20. When reference was made to the Timetabling Panel, both parties clearly referred to establishment rather than implementation. In Freightliner's sole reference document they stated "*The panel is therefore asked to rule that changes pertaining to a Network Change should not be included in TPRs until that Network Change has been established (as defined by Part G10), or, at least unenforceable until establishment...*"²⁴ In the Appellant's sole reference document, they also stated that "*We accept that changes arising from a Network Change should not be included in the TPRs until that Network Change has been established.*"²⁵ (our emphasis added).

4.21. The word "implement" was first used by the Hearing Chair in his text to the parties on 10 June 2013 when he stated "*...NR accepts the proposition made by FL that changes in the Timetable Planning Rules ('TPRs') resulting from Network Change should not be introduced until the Network Change itself is implemented...there may be merit in suitable cases in advising operators of such changes in TPRs in advance, so that they can become effective immediately following implementation of the related Network Change.*"²⁶ (our emphasis added).

4.22. The Hearing Chair's use of "implement" rather than "establish" thus did not correctly reflect the use of the terms by the parties. The Determination is therefore wrong for that reason. This also leads to further practical operational difficulties.

There are significant practical implications for using "Implement" and "Implementation" rather than establish, which was not intended by the Appellant

²³ See, for example, G10.1.1; G10.1.2; G10.1.3; G10.2.1; G10.2.2; G10.2.3; and the explanatory note to Part G, Notes D and (H)(iv) of the Code.

²⁴ See Exhibit 1, Freightliner's Sole Reference Document, dated 10 May 2013.

²⁵ See Exhibit 3, Appellant's Sole Reference Document, dated 7 June 2013.

²⁶ See Exhibit 4, Note from Hearing Chair to Appellant and Freightliner in relation to disputes TPP371, 513,514,570 and 571.

4.23. Determination of the link between Parts D and G was not a matter of dispute between Freightliner and the Appellant from May 2013 when the Appellant confirmed to the Access Disputes Committee that Items 17 and 21 were removed from the dispute list. It was at the Hearing Chair's suggestion that this point be included in the Determination, based on the intention that such a Determination would assist the industry by providing an authority for the industry.

4.24. However, the Hearing Chair's use of "implement" rather than "establish" as the parties had stated, has significant practical ramifications.

4.25. There is practical uncertainty. Where, for example, the Network Change is established and planned for implementation for the start date of 15 December, even though the Network Change has not been implemented due to the lag time in the development of the timetable, is the Appellant able to use the new TPRs? While a Network Change is being implemented, is the Appellant able to change and plan on new TPR values to match the planned implementation date for the Network Change?

4.26. Moreover, what happens if a Network Change is not implemented as established? It is foreseeable that projects may change and as such its plan is re-dated. How might this impact of the timetable written? How also might this affect rapid timetable changes?

The Determination is unjust due to procedural irregularities: jurisdiction and failure to give reasons

4.27. Chapter H of the ADRR provides the determinative process rules which apply to Timetabling Panel. Rule H1 of the ADRR states:

"The purpose of a Timetabling Panel is to determine disputes referred to it by parties to an access agreement which incorporates Part D of the Network Code which arise out of or in connection with issues of timetabling, timetable change and the allocation of capacity..."²⁷

²⁷ See Rule H1 of the ADRR.

4.28. Paragraph 5.1 of the Determination includes a determination which directly relates to Part G of the Code and as such, is beyond the scope of Rule H1. In providing this determination the Hearing Chair was acting *ultra vires*.

4.29. Furthermore, the Hearing Chair did not follow the correct procedure in making paragraph 5.1 of the Determination.

4.30. Rule H16 of the ADRR provides that the overriding objective of the ADRR is that disputes referred to a Timetabling Panel shall be administered in a way that is proportionate to, *inter alia*, the objective importance of the dispute to the Dispute Parties, the complexity of the issues and the significance of the issues involved to the railway industry.²⁸ Under Rule H16, the Hearing Chair may adapt the procedures adopted in respect of the dispute to reflect its specific requirements in terms of the subject matter, timescales and significance. Rule H20 provides that the Hearing Chair may give directions as to any or all aspects of the procedure to be followed as well as having the power to make or amend the procedure to be followed by the parties in the TTP, in accordance with the Principles and Chapter H of the ADRR, at any time.²⁹

4.31. In the Directions Letter, the Hearing Chair relied on Rule H20 of the ADRR to direct:

*"That any Resolution Service Party which is not an Involved Party which wishes to make any representations on the proposal that a Determination may be reached without an oral hearing recording a decision by the Panel that TPR changes which arise from a proposed Network Change should not be implemented before the associated Network Change, shall advise the Committee Secretary and the Dispute Parties of its representations by 12 July 2013. If such representations are made, further Directions may be required to indicate how these representations will be considered by the Timetabling Panel."*³⁰

4.32. In ordering this direction, the Hearing Chair noted that *"If, however, the outstanding items in dispute are capable of settlement, then the Panel does not*

²⁸ See Rules H16(a), H16(b) and H16(c) of the ADRR.

²⁹ See Rule H20 of the ADRR.

³⁰ See paragraph 13 of Exhibit 5, Directions Letter dated 24 June 2013.

consider it to be an appropriate use of resources, including the time of the Parties and the Panel members, to convene an oral hearing solely to reach a Determination on a point agreed by the Parties."³¹

4.33. This reasoning and the directions appear to relate only to whether there should be an oral hearing. The Hearing Chair overlooked the significance of the principle to which paragraph 5.1 related. For the reasons already provided, the link established between Parts D and G of the Code under paragraph 5.1 of the Determination warranted much greater consideration than the Hearing Chair allowed for. Such consideration could have been by an oral hearing or by seeking further commentary from the Resolution Dispute Parties in this case: the Appellant and Freightliner. The time given to respond to the Directions Letter dated 24 June 2013 was less than a month. This was too short a period to provide adequate time for all Resolution Service Parties to consider and comment on this point given its significance to the industry.

4.34. ADRR principles regarding Determinations and Remedies state that "*Each and every Forum shall reach its determination on the basis of the legal entitlements of the Dispute Parties and upon no other basis.*"³² Rule H51 then expands upon this principle, outlining that the Hearing Chair's determination should be writing and comprise, *inter alia*, "*an identification of the issues of fact and law considered by the Timetabling Panel*"³³ and, more particularly,

"(j) the decisions and conclusions reached, distinguishing clearly between

- (i) decisions upon legal entitlement;*
- (ii) decisions upon remedy;*
- (iii) guidance to the Dispute Parties or other observations not forming part of a decision upon either legal entitlement or upon remedy;*

³¹ See paragraph 11 of Exhibit 5, Directions Letter dated 24 June 2013.

³² See Rule B5 of the ADRR.

³³ See Rule H51(f) of the ADRR.

(k) the reasons for those decisions and conclusions (including any relevant legal principles or rules of law applied);..."³⁴

4.35. In the Determination, the Hearing Chair did not record his decisions or conclusions reached with regard to paragraph 5.1 of the Determination, concentrating instead on commentary as to whether it would be appropriate or not to hold an oral hearing on this point.³⁵ There was no legal, or other consideration of the substance of paragraph 5.1 of the Determination.

4.36. In the circumstances, there has been serious procedural irregularity in relation to paragraph 5.1 of the Determination and, as such, it would be unjust to uphold it.

5 DECISION SOUGHT

5.1. The Appellant submits that this Notice of Appeal should proceed to appeal as it raises matters which are significant importance to the industry and that the grounds outlined in the Condition 4.1. of Part M of the Code do not apply.

5.2. The Appellants seeks that paragraph 5.1 of the Determination should be overturned on any or all of the following grounds:

5.2.1. paragraph 5.1 is wrong as it establishes an express link between the TPR changes under Part D of the Code and Network Changes under Part G of the Code which;

5.2.1.1. does not currently exist nor which has been provided by other precedent;

5.2.1.2. is likely to have a significant detrimental impact of the operations of Parts D and G of the Code, and relevant parties understanding of such operation;

5.2.1.3. is likely to cause significant difficulties if applied in practice, as there is likely to be significant delays in using infrastructure whilst

³⁴ See Rule H51(j) and (k) of the ADRR.

³⁵ See, for example, paragraphs 3.4 and 3.5 of Exhibit 6, the Determination.

the Network Change is implemented prior to the application of TPRs to establish the Working Timetable.

5.2.2. paragraph 5.1 is based on an agreement between the Dispute Parties which did not reflect the actual agreement of the Dispute Parties, the Dispute Parties agreeing to adopt the term "established" rather than "implemented".

5.2.3. paragraph 5.1 is unjust because of serious procedural irregularity because:

5.2.3.1. the Hearing Chair exceeded his jurisdiction to determine disputes in relation to Part D of the Code and Chapter H of the ADRR in establishing a link which relates and affects Part G of the Code; and/or

5.2.3.2. the Hearing Chair failed to record those decisions and conclusions on which paragraph 5.1 was based, in particular by not distinguishing clearly or at all his decisions upon legal entitlement, remedy, guidance within the Determination or the reasons for paragraph 5.1, which should include relevant legal principles or rules of law.

Please acknowledge receipt of this Notice of Appeal

Yours faithfully