



OFFICE OF RAIL REGULATION



**Determination by the
Office of Rail
Regulation:**

**Appeal made by
Network Rail
Infrastructure Limited
pursuant to Part M of
the Network Code
against a Determination
of the Timetabling
Panel of the Access
Disputes Committee
dated 12 June 2015**

15 October 2015

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Introduction

Summary

1. This determination by the Office of Rail Regulation (“ORR”)¹ concerns an appeal made by Network Rail Infrastructure Limited (“the Appellant”) pursuant to Part M of the Network Code (“Part M”) against part of a determination of the Timetabling Panel of the Access Disputes Committee (“the TTP”) dated 12 June 2015 (“the June 2015 TTP Determination”).
2. The matters subject to appeal concern whether paragraphs 6.1.1, 6.1.2, 6.1.3 and the final sentence of paragraph 6.1.5 of the June 2015 TTP Determination were wrong and should be struck out. In respect of these paragraphs, the June 2015 TTP Determination found that Timetable Planning Rules (“the TPRs”) changes should be conditional on the Network Change being established and implemented, which introduced an explicit link between Part D of the Network Code (“Part D”) and Part G of the Network Code (“Part G”).
3. Various other substantive issues were raised in the June 2015 TTP Determination including, among other things, the interpretation of Condition D2.2.7 of the Network Code and whether the Appellant had supplied sufficient evidence to substantiate the newly proposed TPRs values as part of its consultation. The Appellant has chosen to limit its appeal to the matters set out in paragraph 2 above. As a result, the TTP’s determination on those other substantive issues remains in force and ORR will not consider them further in this determination.

Network Code

4. The Network Code² is a set of rules which is incorporated into, and forms part of, each access contract between Network Rail and holders of rights of access to the track owned and operated by Network Rail.
5. Part D sets out the process for revision of the timetable for the Network, while Part G is concerned with the procedures which Access Parties must go through when certain types of change to the Network occur or are proposed.

¹ Also known as the “Office of Rail and Road” reflecting the new highways monitor functions conferred on ORR by the Infrastructure Act 2015. Until this name change is confirmed by legislation, we continue to use the name “Office of Rail Regulation” in all documents, decisions and matters having legal effects or consequences.

² <http://www.networkrail.co.uk/browseDirectory.aspx?root=&dir=%5Cnetwork%20code>

6. Part M provides the process by which a party dissatisfied with either a decision of a Timetabling Panel in relation to a dispute arising under Part D, or a decision reached by Access Dispute Adjudication in relation to a dispute arising under Part J of the Network Code, can appeal the matter to ORR for a determination.
7. This determination is primarily concerned with whether paragraphs 6.1.1, 6.1.2, 6.1.3 and the final sentence of paragraph 6.1.5 of the June 2015 TTP Determination were wrong and should be struck out on the basis that the Appellant claims:
 - paragraphs 6.1.1, 6.1.2 and the final sentence of paragraph 6.1.5 conflict with a determination by ORR in relation to an appeal made by the Appellant pursuant to Part M against a determination of the TTP dated 11 June 2015 (“the ORR Determination”);
 - paragraphs 6.1.1, 6.1.2 and the final sentence of paragraph 6.1.5 introduce an express link between a TPRs change under Part D and a Network Change under Part G which does not presently exist in the Network Code; and
 - paragraph 6.1.3 purports to extend the obligations of the Appellant and Timetable Participants under Condition D2.2.7 of the Network Code.

Background

The ORR Determination

8. The ORR Determination concerned an appeal by Network Rail against a determination of the TTP dated 8 December 2014 (“the December 2014 TTP Determination”)³, which related to disputes TTP570 and TTP571. The December 2014 TTP Determination involved the relationship between Part D and Part G.
9. The relevant part of the December 2014 TTP Determination set out 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;”
10. The appellant, Network Rail, asked that paragraph 5.1 be struck out because, among other reasons:
 - it introduced an express link between a TPRs change under Part D and Network Change under Part G, which does not exist in the Network Code; and
 - the agreement between the parties on which paragraph 5.1 was based, used the word “established” rather than “implemented”, which meant that the December 2014 TTP Determination did not reflect the agreed position.
11. The ORR Determination struck out paragraph 5.1. In reaching this decision, ORR considered whether the Network Code should be interpreted to include an express link between Part D and Part G and, if so, how that should be expressed (in particular, would it be preferable to amend paragraph 5.1 by substituting the word “established” for “implemented”). The ORR Determination stated the following:

“... ORR is concerned that the resultant interaction between Parts D and G would be inflexible. ORR considers some examples of these effects are...:

 - *An inability of Network Rail to draft a timetable that would take effect immediately after the implementation of a Network Change, which might prevent use being made of new infrastructure until a subsequent timetable change date*
 - *An inability of Network Rail to draft a timetable to replace one that could not be operated on altered infrastructure”⁴*

³ Determination of the Timetabling Panel of the Access Disputes Committee, 8 December 2014.

⁴ Determination by the Office of Rail Regulation, 11 June 2015 (in respect of disputes TTP570 and TTP571), paragraph 40

*“To amend the Determination in this way (so that it reads “establish” rather than “implement”) would, as is stated in the Appeal, maintain a link between Parts D and G of the Network Code that was not previously expressly stated in the Network Code. ORR would need to give a full and detailed consideration to the impact of such a link and ensure that it was desirable in all of its potential consequences”.*⁵

*“The Network Code contains a change mechanism that is designed to consider this type of issue and would allow all relevant parties an opportunity to influence the outcome. It remains open to the industry to utilise the change process set out in the Network Code to put in place a link between Parts D and G if it considers it appropriate for specific circumstances and after due industry process”.*⁶

12. Accordingly, ORR decided that:

*“... the express link as set out in paragraph 5.1 of the Determination should be overturned”.*⁷

*“... that Paragraph 5.1 of the Determination of the Timetabling Panel of the Access Disputes Committee dated 8 December 2014 shall be struck out”.*⁸

13. The ORR Determination, was dated 11 June 2015, and was issued on 12 June 2015, the same day that the TTP issued the June 2015 TTP Determination below.

Background to the June 2015 TTP Determination

14. On 2 March 2015, the Appellant notified GB Railfreight Ltd (“GBRf”), Freightliner and Freightliner Heavy Haul Ltd (together, “FL”), DB Schenker Rail (UK) Ltd (“DBS”), First Greater Western Ltd (“FGW”) and other relevant train operating companies of its decision to amend the TPRs applying from December 2015 on the Western Route, around the West Ealing area. In conjunction with this proposal, the Appellant also proposed a Network Change for a new, altered physical layout at West Ealing.

15. On 3 March 2015 and 9 March 2015 respectively, GBRf and FL issued a Notice of Dispute regarding the Appellant’s decision to the Access Disputes Committee. These

⁵ Determination by the Office of Rail Regulation, 11 June 2015 (in respect of disputes TTP570 and TTP571), paragraph 42

⁶ Determination by the Office of Rail Regulation, 11 June 2015 (in respect of disputes TTP570 and TTP571), paragraph 42

⁷ Determination by the Office of Rail Regulation, 11 June 2015 (in respect of disputes TTP570 and TTP571), paragraph 43

⁸ Determination by the Office of Rail Regulation, 11 June 2015 (in respect of disputes TTP570 and TTP571), paragraph 50

disputes were registered as TTP807 and TTP808. Subsequently, DBS and FGW were also confirmed as Dispute Parties.

16. Among other issues in dispute between the Dispute Parties was again the relationship between Part D and Part G, namely whether TPRs changes could be implemented if an associated Network Change had not been established and implemented under Condition G.10 of the Network Code. This is the same issue that was previously considered by ORR in the ORR Determination⁹.

The June 2015 TTP Determination

17. The TTP heard disputes TTP807 and TTP808 together on 1 June 2015. As stated above, the TTP issued the June 2015 TTP Determination on 12 June 2015¹⁰, the same day as ORR issued the ORR Determination.

18. The determination was as follows:

“6.1.1. That Timetable Planning Rule changes may not be implemented if the associated Network Change has not been established and implemented under Condition G.10 of the Network Code. Accordingly the present decision by Network Rail published on 2 March 2015 in relation to Timetable Planning Rules 2016 at West Ealing together with the consultation document dated 13 February 2015 shall be withdrawn.

6.1.2. This determination does not prevent Network Rail proposing TPRs changes but these should be conditional upon the Network Change being established and implemented and the changes to the Rules need to state whether TPRs changes are subject to the implementation of Network Changes.

6.1.3. This determination does not remove the onus upon Network Rail and Timetable Participants to discuss and agree TPRs values in the absence of established Network Change.

6.1.4. Network Rail is permitted to use Condition D2.2.7 to propose alterations to the Rules after Version 2 of the Rules has been issued provided that Version 2 has been published prior to D-44 and Network Rail considers, acting reasonably, that such alterations are necessary or desirable in order to optimise the relevant New Working Timetable.

6.1.5. There is reasonable doubt as to the information contained in the TPRs Notice, or that it accurately reflects the capability of the Network. Accordingly the Network Rail

⁹ Determination by the Office of Rail Regulation, 11 June 2015 (in respect of disputes TTP570 and TTP571)

¹⁰ Determination of the Timetabling Panel of the Access Disputes Committee, 12 June 2015.

decision of 2 March 2015 in relation to Timetable Planning Rules 2016 at West Ealing shall be withdrawn together with the consultation document dated 13 February 2015. If I had been able to support the Network Rail decision on March 2015 then the reasons set out at paragraph 6.1.1 of this determination would have prevented me from doing so.

6.1.6. *There is no award as to costs.*”

19. The TTP Hearing Chair, in his analysis of the issues, also made the following comment¹¹:

“In a wider context, and outside the jurisdiction of the present Panel, it is clear that the relationship between Parts D and G of the Network Code is a matter of debate in the industry which has led to a number of difficulties beyond the present case relating to West Ealing. In the circumstances it must be sensible for urgent consideration to be given to clarifying this important relationship between two substantial parts of the Network Code and the subsequent dependent procedures”.

¹¹ Determination of the Timetabling Panel of the Access Disputes Committee, 12 June 2015, paragraph 5.16.

The appeal

ORR's handling of the appeal

20. On 18 June 2015, the Appellant gave notice that, in accordance with Condition 3.1.1 of Part M, it wished to challenge paragraphs 6.1.1, 6.1.2, 6.1.3 and 6.1.5 of the June 2015 TTP Determination. The Appellant gave brief grounds for appeal but also requested an extension to the timescales in order to formulate and serve further more detailed grounds.
21. ORR considered that it would be appropriate to allow an extension in accordance with Condition 2.1.1(b)(i) of Part M and agreed that the further notice of appeal should be served on ORR by 9 July 2015.
22. On 8 July 2015, the Appellant served a valid notice of appeal containing further detailed grounds, again stating it wished to appeal paragraphs 6.1.1, 6.1.2, 6.1.3 and 6.1.5 of the June 2015 TTP Determination. The Appellant stated that paragraphs 6.1.1, 6.1.2, 6.1.3 and the last sentence of paragraph 6.1.5 were wrong and should be struck out. This notice was shared by e-mail with GBRf, FL, DBS and FGW.
23. On 14 July 2015, ORR wrote to the Appellant and the other Dispute Parties to advise them that ORR was minded to hear the appeal. ORR reminded them that, in accordance with Condition 5 of Part M, they had until 22 July 2015 to serve a notice on the Appellant, ORR and the other Dispute Parties a notice stating that they opposed the appeal and, insofar as reasonably practicable, attach any evidence on which they wished to rely.
24. On 22 July 2015, DBS served notice on ORR and the other Dispute Parties that it opposed the appeal and set out its reasons. On the same day, FGW advised ORR that it supported the appeal.
25. On 30 July 2015, ORR wrote to the Appellant and the other Dispute Parties to confirm that ORR would hear the appeal and inform them of its determination in due course.
26. Subsequent to ORR's confirmation that it would hear the appeal, on 13 August 2015, the Appellant wrote to ORR commenting on DBS' notice opposing the appeal.

27. On 14 August 2015, DBS wrote to ORR with further representations in response to the Appellant's comments¹².
28. On the basis that no new substantive points were raised in the letters of 13 August 2015 and 14 August 2015, on 17 August 2015, ORR wrote to the Appellant and the other Dispute Parties, among other things, to: acknowledge receipt of the further letters; confirm that ORR would take account of the information contained in those letters; note that Part M contains no specific procedure for ORR to receive further representations once a Respondent has served an initial notice stating it opposes an appeal; and confirm that ORR would continue with its consideration of the appeal based on the information it held at that time.

The Appellant's grounds for appeal

29. The notice of appeal dated 8 July 2015 set out the following grounds¹³:
- The June 2015 TTP Determination relies on the December 2014 TTP Determination, which was struck out by ORR in the ORR Determination
 - The June 2015 TTP Determination thereby conflicts with the ORR Determination
 - The June 2015 TTP Determination conflicts with Access Dispute Resolution ("ADR") Rule A7 (which sets out that, *"In reaching its determination each and every forum shall..(b) be bound by any relevant decisions of the ORR on a regulatory issue [sic]..."*)
 - The June 2015 TTP Determination introduces an express link between a TPRs change under Part D and a Network Change under Part G which does not presently exist in the Network Code
 - This link will create a precedent which is likely to have a significant detrimental impact on the operation of Part D and Part G
 - Paragraph 6.1.3 of the June 2015 TTP Determination purports to extend the obligations of the Appellant and Timetable Participants under Condition D2.2.7 of the Network Code.
30. As set out above in paragraph 3, the Appellant is not appealing the substantive issues which were raised in the June 2015 TTP Determination. As a result, the findings of the TTP on those issues remain in force.

¹² The letters detailing DBS' response, the Appellants comments & DBS' further comments are on [the Network Code section](#) of www.orr.gov.uk

¹³ Appeal made by Network Rail Infrastructure Limited pursuant to Part M of the Network Code, dated 8 July 2015, paragraphs 2.2.1. to 2.2.5 and paragraph 4.24.

Responses to the appeal

31. In DBS' 22 July 2015 response, DBS disagreed with the Appellant's view that the relevant paragraphs of the June 2015 TTP Determination were wrong and should be struck out. The reasons are set out further below.

32. In its letter, DBS, stated, regarding the Appellant's view that Part D and Part G were not linked, that:

"... there is a link between Network Change proposals in accordance with Part G of the Network Code and associated changes to TPRs (particularly if those TPRs also constitute Network Change in their own right) as they all refer to and depend upon the same "Network" as defined in Part A of the Network Code".¹⁴

33. DBS also commented on the Appellant's view that the June 2015 TTP Determination did not comply with ADR Rule A7 (as it failed to take account of ORR's Appeal Determination of 11 June 2015 as a binding precedent). DBS stated that it disagreed that the ORR Determination was a binding precedent as the issues it considered were matters of contractual interpretation and not regulatory issues. DBS also stated that it would have instead been considered as having persuasive authority. However, DBS further noted that, as the ORR Determination was issued on the same day as the June 2015 TTP Determination, it would have been difficult for it to be taken into account by the TTP.¹⁵

34. DBS also stated that it disagreed with the Appellant that the introduction of a link between Part D and Part G would lead to significant operational and practical uncertainties for the wider industry.

35. The Appellant wrote to ORR on 13 August 2015 with a brief response to certain points raised by DBS. In particular, the Appellant commented on its understanding of DBS' position on whether there is a link between Part D and Part G through the shared definition of "Network" in Part A of the Network Code. The Appellant stated that, although the definition is shared, that does not constitute an actual link.

36. DBS wrote to ORR on 14 August 2015 with further representations in response to the Appellant's letter of 13 August 2015. In particular, DBS clarified that its view was that the processes in Part D and Part G need to be carried out in parallel and implemented together.

¹⁴ Letter from DB Schenker Rail (UK) Ltd, dated 22 July 2015, paragraph 2.12

¹⁵ Letter from DB Schenker Rail (UK) Ltd, dated 22 July 2015, paragraph 3.1

ORR's consideration of the appeal

37. ORR has carefully considered the issues involved in this appeal, in particular, the submissions from the Appellant and DBS. ORR's consideration of the appeal is set out below.

38. In relation to the Appellants claim that the June 2015 TTP Determination conflicts with ADR Rule A7, ADR Rule A7 provides that:

*"In reaching its determination, each and every Forum shall... (b) be bound by any relevant decision of the ORR on a **Regulatory Issue**..."* (emphasis added)

39. When used in the context of the ADR Rules, "Regulatory Issue" is a defined term which carries the following meaning:

"A principle, issue or process connected with the railway industry (and any interactions between such principles, issues and processes) which

(a) concerns the regulated structure of the industry as a whole or a material part of it, or

(b) relates to or is closely aligned with a matter on which the ORR has regulatory oversight (from time to time); or

(c) is connected with the ORR's duties, functions or powers as a regulator including without limitation under the Railways Act 1993 s4;"

40. ORR has considered the defined term "Regulatory Issue" and is satisfied that consideration of the relationship between Part D and Part G is a Regulatory Issue for the following reasons:

- This issue is connected with the railway industry.
- Timetabling and Network Change affect access to the Network by users. This is therefore an issue which concerns the regulated structure of the industry as a whole or a material part of it.
- The Network Code is incorporated into, and forms part of, each access contract between Network Rail and holders of rights of access to the track owned and operated by Network Rail. Access contracts are subject to regulatory oversight by ORR pursuant to sections 17-22 of the Railways Act 1993.
- Ensuring that the Network Code provides appropriate contractual certainty for all affected parties and does not benefit one contractual party to a greater extent than another is connected with ORR's duties, functions and powers as a regulator including without limitation under section 4 of the Railways Act 1993.

41. For the reasons set out above, the ORR Determination would therefore have been a binding precedent, had the TTP chosen to delay its process.
42. It is however clear that although the TTP was aware of the appeal in relation to the December 2014 TTP Determination, it chose to ignore it¹⁶ and did not choose to delay its process. As a result, it appears the TTP was not aware of the final decision taken in the ORR Determination and was therefore not able to treat the ORR Determination as a binding precedent. Equally, as a result of this timing, it appears that the TTP was not aware of the conflict between the June 2015 TTP Determination and the ORR Determination.
43. ORR believes that it would have been beneficial for the TTP to have consulted with ORR once it became aware that it was being asked to determine a dispute raising very similar issues to those already in the process of being determined by ORR on appeal from a previous TTP determination. If the TTP had done so, then ORR could have considered expediting the ORR Determination. Alternatively, the TTP could have agreed to delay its hearing until after the ORR Determination had been issued. ORR would recommend that this approach be taken in future to avoid conflicting determinations on the same issues as has occurred with the June 2015 Determination and the ORR Determination.
44. Although due to timing the TTP did not and probably could not have treated the ORR Determination as binding precedent, on the basis of the evidence provided, ORR is satisfied that paragraphs 6.1.1, 6.1.2 and the final sentence of paragraph 6.1.5 of the June 2015 TTP Determination are incorrect for the same reasons that ORR gave when it struck out paragraph 5.1 of the December 2014 TTP Determination in the ORR Determination.
45. While ORR notes the representations of DBS, ORR remains satisfied that there is no explicit link in the Network Code between Part D and Part G which requires that a TPRs change related solely to a Network Change should not be implemented if the associated Network Change has not been established and implemented. ORR further remains satisfied that it would not be appropriate to introduce such a link without thoroughly considering all the implications of doing so.
46. ORR has considered the effects of the June 2015 TTP Determination and, for the same reasons set out in the ORR Determination, ORR is concerned that the resultant interaction between Part D and Part G would be inflexible.

¹⁶ Determination of the Timetabling Panel of the Access Disputes Committee, 12 June 2015, paragraph 5.4.

47. On the basis of the evidence provided, ORR is satisfied that the June 2015 TTP Determination is incorrect by virtue of its potential and likely effects on the industry's ability to take full and prompt advantage of Network Changes.

48. ORR notes DBS' comment in paragraph 3.5 of their 22 July 2015 letter that if there was no link between Part D and Part G that there would be far worse practical difficulties as Train Slots could be planned over infrastructure that does not exist. ORR does not however agree with DBS' view. The definition of Timetable Planning Rules contained in Part D begins as follows:

*“a document... regulating, for any part of the **Network**, the standard timings and other matters necessary to enable trains to be included in the New Working Timetable or scheduled into the Working Timetable applicable to that part of the **Network**...”* (emphasis added)

49. It is clear from this definition that TPRs relate to the Network. This will either be the Network pre-Network Change, or the Network post-Network Change. TPRs have to be in place so that the timetable that is supported by the post-Network Change Network can be prepared before the Network Change takes place. This enables the new timetable to take effect immediately after the implementation of the Network Change.

50. TPRs which relate to the post-Network Change Network in practice do not take effect until the Network Change has been implemented, because they apply to the post-Network Change Network. If for any reason the Network Change was delayed, then a timetable capable of operating on the pre-Network Change Network would be required. In all probability, the old timetable would continue to operate in this event and as a result it would be unlikely that any practical difficulties would arise.

51. It is important to note however that the practical consideration above still does not mean that there is an express link between Part D and Part G contained within the Network Code. That lack of an express link *within the Network Code* forms both part of the reasoning behind the ORR Determination, and also ORR's determination here.

52. As ORR set out in the ORR Determination, the Network Code contains a change mechanism that is designed to consider this type of issue and would allow all relevant parties an opportunity to influence the outcome. It remains open to the industry to utilise the change process set out in the Network Code to put in place a link between Part D and Part G if it considers it appropriate for specific circumstances and after due industry process. ORR does not believe that it would be appropriate to use this appeal process to establish a link between Part D and Part G and thereby bypass the need for due industry process.

53. ORR has considered the drafting of paragraph 6.1.3 of the June 2015 TTP Determination and is satisfied that is incorrect by virtue of the fact that it would require the Appellant and Timetable Participants to *agree* TPRs values (emphasis added). Condition D2.2.7 only requires the Appellant to consult with Timetable Participants.

ORR Conclusions

54. In light of the considerations above, ORR therefore determines in relation to each ground of appeal as follows:

- that the June 2015 TTP Determination conflicts with ADR Rule A7; and
- that the June 2015 TTP Determination relies on the December 2014 TTP Determination and thereby conflicts with the ORR Determination,

ORR determines that the TTP should normally have been bound by the ORR Determination as consideration of the relationship between Part D and Part G is a Regulatory Issue. However, due to the fact that the June 2015 TTP Determination and the ORR Determination were issued on the same day, the TTP was not in a position to be so bound. In addition, the conflict between the June 2015 TTP Determination and the ORR Determination did not become known until after the June 2015 TTP Determination was issued. Accordingly, it is not appropriate for ORR to strike out paragraphs 6.1.1, 6.1.2 and the final sentence of paragraph 6.1.5 of the June 2015 TTP Determination on these grounds.

- that the June 2015 TTP Determination introduces an express link between Part D and Part G which does not presently exist; and
- that the link will create a precedent which is likely to have a significant detrimental impact on the operation of Part D and Part G,

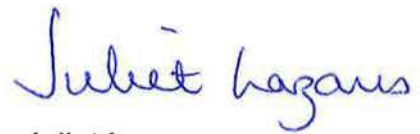
ORR, determines that paragraphs 6.1.1, 6.1.2 and the final sentence of paragraph 6.1.5 of the June 2015 TTP Determination are wrong and should be struck out for the same reasons as ORR struck out paragraph 5.1 of the December 2014 TTP Determination in the ORR Determination.

- that paragraph 6.1.3 of the June 2015 TTP Determination purports to extend the obligations of the Appellant and Timetable Participants under Condition D2.2.7 of the Network Code,

ORR determines that paragraph 6.1.3 of the June 2015 TTP Determination is wrong and should be struck out and replaced with the Appellant's suggested wording, namely:

"This determination does not affect Network Rail's and Timetable Participants' respective obligations under Condition D2.2.7 of the Network Code."

55. ORR therefore determines that paragraphs 6.1.1, 6.1.2, 6.1.3 and the final sentence of paragraph 6.1.5 of the June 2015 TTP Determination shall be struck out and that paragraph 6.1.3 shall be replaced with the wording set out above.



Juliet Lazarus

Director of Legal Services

Duly authorised by the Office of Rail Regulation

15 October 2015