



**OFFICE OF RAIL REGULATION'S DETERMINATION OF AN APPEAL BY NETWORK RAIL INFRASTRUCTURE LIMITED AGAINST A DETERMINATION OF THE ACCESS DISPUTES PANEL REGARDING PART F – VEHICLE CHANGE OF THE NETWORK CODE (REF. ADP14)**

*DETERMINATION: The Office of Rail Regulation determines that the partial appeal of Network Rail Infrastructure Limited in respect of determination reference number ADP14 of the Access Disputes Panel is upheld.*

**Introduction**

1. On 28 April 2006, Network Rail Infrastructure Limited ("Network Rail") served on the Office of Rail Regulation ("ORR") a notice of appeal against paragraph 26.8.2 of Determination ADP14 of the Access Disputes Panel ("ADP") of the Access Disputes Committee published on 17 March 2006, pursuant to Condition F5.2 and Part M (Appeals) of the Network Code.

2. ADP had been asked to determine whether or not First/Keolis Transpennine Limited ("TransPennine Express") should meet all costs associated with:

- (a) any increase in track wear and resulting increased maintenance requirements, compared to existing vehicles being used over approved routes; and
- (b) work required to the network resulting from monitoring and attributed to its Vehicle Change application,

in relation to a Vehicle Change application, under Part F of the Network Code, regarding TransPennine Express' proposal to introduce Class 185 Diesel Multiple Units ("DMUs") on to the network.

*ADP's Determination*

3. Following a hearing held at King's Cross, London on 22 February 2006, ADP determined that TransPennine Express was required to pay the Variable Track Usage charge for the Class 185 DMUs, but otherwise, Network Rail was not entitled to claim, and TransPennine Express was not under any obligation to pay compensation in respect of either:

- (a) costs associated with any increase in track wear and resulting increased maintenance requirements, compared to existing vehicles being operated over approved routes (**paragraph 26.8.1 of the Determination**); or
- (b) any costs of special or additional "monitoring [of] the track condition following the introduction of the vehicles, as per Line Standard RT/CE/S/103 (Track Inspection Requirements)" (**paragraph 26.8.2 of the Determination**).

The appeal was only concerned with paragraph 26.8.2 of the Determination.

## **Background**

### *ORR's initial consideration of the appeal*

4. Following receipt of the notice of appeal on 3 May 2006, ORR sought representations from TransPennine Express as to whether it considered ORR should hear this appeal. Following receipt of its representations made on 8 May 2006, ORR informed the parties on 12 May 2006 that, having reviewed both the notice of appeal and TransPennine Express' representations, it had decided that ORR should hear the appeal.

### *Joint submission*

5. On 17 May 2006, Network Rail and TransPennine Express made a joint submission to ORR in relation to Network Rail's appeal. The joint submission stated that the parties had discussed their respective positions on the appeal and reached an agreement on what directions they were seeking from ORR.

6. On 2 June 2006, ORR confirmed to the parties that it was willing to consider the revised grounds of appeal. In addition, ORR informed the parties that it was minded to conclude that it would not be necessary to hold a formal hearing and that it had received sufficient information from the parties to enable it to determine the appeal. In response, both parties confirmed that they were content with this approach. TransPennine Express did not provide a response pursuant to Condition M5 of the Network Code.

## **Relevant provisions**

### *Part F of the Network Code*

7. Part F of the Network Code establishes a procedure by which changes may be made to railway vehicles, the use of which is permitted in an access contract, from the specifications in an access contract. It includes any alteration to the physical characteristics of the vehicles, any increase in the length beyond that specified in the relevant access contract and any introduction of different vehicles on to the relevant routes which, in any case, is likely materially to affect the maintenance or operation of the network or operation of trains on the network.

8. Condition F5.2 – 'Right of appeal to the Office of Rail Regulation or the Court' states:

"If any Access Party is dissatisfied with any decision of the relevant ADRR panel in relation to any matter referred to it under Condition F5.1, that Access Party may refer the matter to the Office of Rail Regulation for determination under Part M."

### **Grounds for appeal**

9. Network Rail's appeal was limited to paragraph 26.8.2 of ADP's determination, which it considered to be wrong and/or unjust because:

- (a) this issue was not the subject of the reference to ADP, had not been properly pleaded in the reference or properly argued before ADP at the hearing; and
- (b) it is a requirement of Railway Group Standard GC/RT5022<sup>1</sup> (which in terms is reflected in Network Rail Line Standard RT/CE/S/103) that Network Rail initiates a "*special examination of the route*" prior to the introduction of significant numbers of new rolling stock. Network Rail stated that this is a direct and quantifiable cost to Network Rail arising from a Vehicle Change proposal, which should be paid by the party proposing the Vehicle Change, in this case TransPennine Express, pursuant to Condition F3.2 of the Network Code.

10. In their joint submission of 17 May 2006, the parties explained that they had discussed their respective positions on the appeal and agreed that ORR should be requested to make the following directions:

- (a) paragraph 26.8.2 of Determination ADP14 should be struck out, as this was not a matter referred to or argued before ADP; and
- (b) the parties be bound by the agreement reached between them in relation to the costs of the special examinations required by Railway Group Standard GC/RT5022, as evidenced by the correspondence between the parties of December 2005.

11. The parties agreed that in all other respects, the appeal submitted by Network Rail on 28 April 2006 need not be considered. The grounds of appeal were therefore modified by this letter.

### **ORR's consideration of the appeal**

12. ORR's consideration of the appeal has been limited to a review of the decision of ADP in respect of paragraph 26.8.2 of its determination. The central questions for this appeal are:

- (a) whether Network Rail and TransPennine Express referred the issue of monitoring costs to ADP for its determination; and
- (b) if it was not referred to ADP for determination or argued at the hearing, should ADP have made a determination on this issue.

13. Based on the documents supplied to ADP and having regard to the additional documents provided in connection with the appeal, ORR has concluded that the issue of monitoring costs was not referred to ADP for determination or argued at the hearing and, as such, ADP was wrong to

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<sup>1</sup> Available at <http://www.rgsonline.co.uk/>

determine this issue. Accordingly, ORR considers that paragraph 26.8.2 of ADP's determination ADP14 should be struck out.

14. The revised grounds of appeal requested ORR to direct that the parties be bound by the agreement they reached in respect of the costs of the special examinations. ORR has concluded that it is not appropriate for it to make such a direction in respect of this commercial arrangement as part of its determination. In any event, on the basis of ORR's determination that ADP's determination under paragraph 26.8.2 is wrong and should be struck out it is not necessary for ORR to make such a direction.

15. The remainder of this determination explains the reasons for this decision.

*The factual background*

16. On 7 February 2005, Network Rail, on behalf of TransPennine Express, issued a Vehicle Change notice for the proposed introduction of Class 185 DMUs. On 17 November 2005, Network Rail provided its formal response to TransPennine Express, under Condition F3, confirming that it would accept the Vehicle Change, subject to a number of preconditions ("The Formal Response"). In this context, it is helpful to set out the relevant extract from the Formal Response, which highlights the preconditions in full:

"First/Keolis Transpennine Limited will meet all costs associated with any increase in track wear and resulting increased maintenance requirements, compared to existing vehicles being operated over approved routes. **Network Rail is concerned at the risk of additional track wear and will be monitoring the track condition following the introduction of the vehicles, as per Line Standard RI/CE/S/103 (Track Inspection Requirements).** All costs associated with work required to the network resulting from this monitoring and attributable to this Vehicle Change application will be paid by First/Keolis Transpennine Limited." (Emphasis added).

17. On 21 December 2005, TransPennine Express wrote to Network Rail and the parties reached an "in principle" agreement on the matter of payments for special examinations of the route in the following terms:

"TransPennine Express accepts, in principle, Network Rail's entitlement to recover the costs of special examination of the route at monthly intervals for six months after introduction of the new fleet, but requires an understanding of the quantum of costs before it is prepared to accept these as legitimate assessment costs as defined in Condition F2.5 of the Network Code."

TransPennine Express explained to ORR in its letter of 8 May 2006 that this was a commercial agreement between the parties and that it disposed of a peripheral issue as between the parties at the time.

This letter was not included in the evidence that was submitted in support of the parties' Joint Reference to ADP, but was provided with other correspondence to ORR by TransPennine Express in connection with the appeal.

18. After further negotiations, the parties were unable to agree to the following preconditions to the Vehicle Change, as detailed in paragraph 5.2 of the parties' Joint Reference to ADP:

- (a) "... all costs associated with any increase in track wear and resulting increased maintenance requirements, compared to existing vehicles being used over approved routes"; and
- (b) "all costs associated with work required to the network resulting from monitoring and attributed to this Vehicle Change application."

Paragraph 5.2 of the Joint Reference also stated that:

"The parties' differences over the other pre-conditions in this [Network Rail's] Formal Response ... have been satisfactorily resolved."

19. In light of the parties' disagreement, as detailed in paragraph 18 above and in line with Condition F5.1 of the Network Code, the parties made a joint reference to ADP on 6 January 2006. As described in paragraph 3 above, following a hearing on 22 February 2006, ADP issued its determination on this matter.

#### *ORR's assessment*

20. ORR has concluded that ADP should not have made the determination in paragraph 26.8.2 in respect of costs of special or additional monitoring for the following reasons. Paragraph 5.2 of the Joint Reference stated the parties had reached an agreement on all of Network Rail's preconditions to accepting the Vehicle Change, except the costs referred to in paragraph 18 above. These costs did not include the costs of special or additional monitoring. It would seem that confusion may have been caused by the formulation of paragraph 5.2 of the Joint Reference, which identified the matters in dispute by reference to extracts from the Formal Response of 17 November 2005 and that these extracts came from the same paragraph in the Formal Response which had referred to monitoring (see paragraph 16 above). ORR also notes that the parties had reached agreement on payment of the monitoring costs after the date of the Formal Response. Nonetheless, ORR agrees that the parties did not ask ADP, in the Joint Reference, to make a determination regarding who should pay the costs of undertaking the monitoring.

21. Accordingly, ORR considers that the two preconditions to Network Rail's approval of the Vehicle Change referred to in paragraph 18 above were the only matters referred by the parties to ADP for its determination. Part A paragraph 1.1 of the Access Dispute Resolution Rules states that "the purpose of a Panel [ADP] is to determine disputes referred to it by industry parties...". ADP should not, therefore, have made a determination in respect of this issue.

**Conclusion**

22. For the reasons given above, ORR upholds the appeal by Network Rail (as modified) and directs that paragraph 26.8.2 of Determination ADP14 should be struck out.

*Michael Lee*

  
**Michael Lee**  
**Director of Industry Monitoring and Analysis**  
**Duly Authorised by the Office of Rail Regulation**

**11 August 2006**