

THE OFFICE OF RAIL REGULATION’S DETERMINATION OF THE APPEAL BY NETWORK RAIL INFRASTRUCTURE LIMITED (“NR”) PURSUANT TO PART M OF THE NETWORK CODE (“THE CODE”) AGAINST DETERMINATION ADP40 OF THE ACCESS DISPUTES PANEL OF THE ACCESS DISPUTES COMMITTEE IN RESPECT OF A JOINT REFERENCE BY NR AND FIRST SCOT RAIL LIMITED (“FSR”) AND THE APPEAL BY FSR PURSUANT TO PART M OF THE NETWORK CODE AGAINST DETERMINATION TTP317 OF THE TIMETABLING PANEL OF THE ACCESS DISPUTES COMMITTEE.

DETERMINATION: The Office of Rail Regulation determines the appeals in the manner set out in paragraphs 85 to 87 below.

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I Introduction

1. This is the determination by the Office of Rail Regulation (“ORR”) of two related appeals. The first appeal is that brought by NR (“the NR Appeal”). Its Notice of Appeal, served in a preliminary form on 18 December 2009 and in final form on 8 January 2010, challenges the Access Dispute Panel’s determination in reference ADP40 dated 19 November 2009 (“the ADP40 Determination”). The second appeal is that brought by FSR (“the FSR Appeal”). Its Notice of Appeal dated 4 January 2010 and served on 8 January 2010 challenges the Timetabling Panel’s determination in reference TTP317 dated 23 December 2009 (“the TTP317 Determination”). For the purposes of these consolidated proceedings, the date on which the appeals are considered to have been brought is 8 January 2010.

II Background to this Appeal

2. Both appeals arise out of the same factual background. Following the conclusion of the West Coast Route Modernisation Project, NR planned a change to the pattern of possessions for the purpose of maintaining the West Coast Main Line (“WCML”). Instead of the previous pattern of midweek single line blocks for a period of 1248 hours per annum applied prior to the project, NR planned to carry out double line blockages over 14 weekends per year. This proposal necessitated a diversion for 14 weekends each year of all FSR’s sleeper services (these being two Sunday night services in each direction between London Euston and destinations in Scotland, calling at Watford Junction, Crewe, Preston and Carlisle) via the East Coast Main Line (“ECML”). FSR understood, and NR has not denied, either in the hearing before the Access Disputes Panel or in the hearing before ORR, that the diversions, which started following the completion of the WCML route modernisation project in 2009, will continue throughout

2010-11, 2011-12 and 2012-13¹. Therefore, there is an expectation the pattern will continue for the foreseeable future.

3. FSR has maintained that this plan constitutes a 'Network Change' within the meaning of Part G of the Network Code ("the Code")². NR denies this. It has suggested that FSR's objections are access issues which can properly be addressed through the Rules of the Route and pursuant to the dispute provisions in Part D of the Code.
4. The parties submitted a Joint Reference to the Access Disputes Panel. NR maintained that there had been no change in its maintenance policy or standards and those standards have all been in place since before the WCML modernisation started. It stated that the possessions will be used for normal maintenance activities and that the change was to 'the footprint of the disruptive engineering access taken to deliver the required maintenance activities,' which NR alleged was a matter of access rather than policy, and should be dealt with through the Rules of the Route. NR emphasised that FSR was not being asked to do anything it had not contracted to do and argued that possessions which took place on 14 nights per year could not satisfy the six month test required by the definition of 'Network Change' in limb (b)(i).
5. FSR submitted that the changed pattern of possessions and *'their consequent material impact upon the operation of its trains are a change of policy falling within the definition of Network Change'* and that *'FSR should have the benefit of the protection (including compensation) afforded by Part G of the Network Code.'* It emphasised the fact that the presence of the diversionary route in its Track Access

¹ Access Dispute Panel's Determination in ADP40, para 11; Transcript p.60, line 20 to p.61, line 7.

² <http://www.networkrail.co.uk/browseDirectory.aspx?dir=\Network%20Code\Network%20Code%20and%20incorporated%20documents&pageid=2889&root=>

Agreement (dated 10 December 2004) after the completion of the modernisation of the WCML *'was not a licence for NR to change its possession strategy to the extent that the quanta of diversions is such that it has a material effect on the provision of Firm Contractual Rights over the Main Routes.'* It argued that *'given the contents of the change documentation FSR had every reason to expect routes to be available on the WCML such that it could operate the quanta specified within its Track Access Contract, at the same level as had existed prior to the change.'*

6. A hearing before the Panel was held on 14 October 2009.

III The ADP40 Determination

7. The Access Disputes Panel was asked to determine:
 - (i) whether the change to the maintenance policy for the WCML which requires FSR regularly to divert sleeper services over the ECML constitutes Network Change;

It was also asked by NR to confirm that:

- (ii) the disruptive engineering access taken between Preston and Carlisle does not constitute a Network Change and that the Rules of the Route, coupled with the compensation available through Schedule 4 of the Track Access Contract, are the appropriate mechanisms for dealing with this issue.
- (iii) In the event that it determined that the change to the maintenance policy did constitute a Network Change, it was asked to determine that NR should issue the appropriate Network Change notice with retrospective effect from the date of change of the policy, in order to enable those Access Beneficiaries materially affected by the change in policy to respond in accordance with Condition G2 of the Code.

8. The Access Disputes Panel was unanimous in its view that the requirements of paragraph (a) of the definition of Network Change in Part G were not satisfied in this case but was unable to achieve unanimity on the issue of whether the requirements of paragraph (b) were satisfied. Paragraph (b) defines 'Network Change' as:

(b) any change to the operation of the Network (being a change which does not fall within paragraph (a) above) which:

(i) is likely materially to affect the operation of trains operated by, or anticipated as being operated in accordance with the terms of any access option, by or on behalf of that Access Beneficiary on the Network; and

(ii) has lasted or is likely to last for more than six months

...

9. Therefore, in accordance with Rule A1.70 of the Access Dispute Resolution Rules, the Chairman of the Panel made a determination. His main findings are summarised as follows:

'Change to the Operation of the Network'

- (i) The maintenance of the network forms part of NR's "operation" of the network. This accorded with the findings of the Rail Regulator in NV33.
- (ii) A change to the delivery of the maintenance regime is just as capable of being a 'change to the operation of the network' as a change to the maintenance regime itself.
- (iii) In this case, a change from single line closures to double line blocks amounted to a 'change to the operation of the network.'

'Likely Materially to Affect the Operation of Trains' by FSR

- (iv) The fact that the diversionary route is pre-agreed in this case is irrelevant to the question of whether the change is 'likely materially to affect the operation of trains.'
- (v) *'The fact that over the course of a year FSR's sleeper service will be affected on only 14 out of 312 nights would be a relevant consideration if the test was whether the change was likely materially to affect 'the operation of FSR's service or 'a material number' of trains operated by it. However, the test is whether the test is 'likely materially to affect the operation of trains operated by FSR: "trains in the plural".'*
- (vi) On each of the 14 weekends in question, four FSR trains (two in each direction) are diverted onto the ECML, travelling on a different route, requiring different route knowledge and unable to serve passengers at the usual calling stations. *'On any commonsense view, the operation of those trains is materially affected.'*
- (vii) The question of whether the financial implications for FSR would justify the same conclusion was left over.

'Likely to last for more than six months'

- (viii) Since NR has not disputed that the new possession regime will remain in place for the foreseeable future, and certainly for more than six months, condition (b)(ii) is satisfied.
- (ix) The fact that only 14 days are affected in any given year does not militate against this conclusion. The provision as worded does not stipulate that the change must affect an Access Party on no less than 183 days in a given year.
- (x) These conclusions do not undermine the purpose of Part D, since a Part G Network Change includes requirements as to materiality and duration and therefore does not apply to all changes in access arrangements.

- (xi) The change to the pattern of possessions in this case constitutes Network Change.
- (xii) NR should issue the appropriate Network Change notice with effect from the date on which the new possessions regime was introduced.

IV The TTP317 Determination

10. The reference to the Timetabling Panel concerned amendments to the Rules of the Route, under which NR proposed to take double line blockages necessary to give effect to the changed pattern of possessions for 2010. FSR asked the Panel to determine:
- (i) that NR may not implement the proposed possessions prior to issuing the Network Change Notices and carrying out due consultation;
 - (ii) that FSR is entitled to be granted paths via the WCML in the ...May 2010 Timetable, or via those diversionary paths which were previously used, this only in order to facilitate maintenance in the manner that historically applied on the WCML.

NR asked the Panel to determine:

- (iii) that NR has correctly applied the Decision Criteria in implementing the engineering access plan as detailed in the V4 2010 Rules of the Route and subsequent Confirmed Period Possession Plans and First ScotRail must now comply with those Rules.

A hearing was held before the Timetabling Panel on 17 December 2009. The Panel determined, in its determination dated 23 December 2009, that:

- (iv) FSR, by virtue of its Track Access Agreement, retains the right to bid for and be granted Train Slots corresponding to a six day service over the WCML in the May 2010 Timetable, unless it

has agreed to or been directed to accept Restrictions of Use which would be incompatible with such paths. It was the Panel's understanding that, *'at the time of the hearing no such agreement had been reached, and that any determination (subject to appeal) was in the hands of the Panel itself.'*

- (v) The Panel was concerned that the impact upon FSR of the 14 proposed double line blockages was, if the cost was to be borne exclusively by FSR, disproportionate, and is in effect a de facto subsidy to other train operators. However, this alone was not viewed by the Panel as being powerful enough to support FSR's contention that the Restrictions of Use should be rejected.
- (vi) NR's arguments in support of the proposed possessions *'may substantiate its view that they facilitate the delivery of NR's maintenance responsibilities. If that is the case, it is a function of NR's discharge of its past responsibilities and does not of itself create an entitlement for NR to set aside FSR's Firm Rights to a Sunday/Monday service via the WCML.'*
- (vii) Nevertheless, the Panel's view was that the Restrictions of Use and associated Confirmed Period Possession Plan (ie. the 14 6 hour double line blockages between Preston and Carlisle) is justifiable by reference to the Decision Criteria and should be established within the Rules of the Route.
- (viii) However, if the parties can agree to a rescheduling which is less detrimental to FSR's business, they are not precluded from doing so by the terms of the Panel's determination (subject always to taking into account the need to meet Informed Traveller timescales and to make best use of the Short Term Planning process.)
- (ix) In relation to FSR's first question at (i), the Panel found that *'FSR's principal objection, namely the scale of financial penalty, was not a ground for determining that NR was not entitled to*

establish the disputed possessions.’ It noted that ‘the potential remedies for this situation were known to the parties, but any determination of the absolute merits of such solutions was beyond the competence of a Timetabling Panel.’³

- (x) Finally, the Panel drew the parties’ attention to the fact that any determination in another place that may require a modification to the Rules of the Route or to the allocation of Train Slots will need to be dealt with under the Short Term Planning process and that compliance with Informed Traveller timescales required bids for diversion to be lodged by the first week of February 2010.

V Conduct of the Appeal before ORR

11. On 14 December 2009, NR served a preliminary Notice of Appeal on ORR in respect of the recent determination of ADP40, sought an extension of the formal deadline for submission of the appeal until 8 January 2010 to allow it to amend the Notice and requested an interim order staying the implementation of the decision in ADP40.
12. Juliet Lazarus, Director of Legal Services, was appointed by ORR as director in charge of the appeal of ADP40 and, in due course, of the appeal of TTP317.
13. FSR provided some written representations on NR’s appeal and its request for an interim order in an email dated 15 December 2009 and in a Response dated 21 December 2009.
14. ORR sought FSR’s views on NR’s application for an extension in a letter dated 21 December 2009. FSR replied promptly, raising no objections, and, on 22 December 2009, ORR granted an extension to the deadline for submission of NR’s appeal until 8 January 2010.

³ ORR notes that, in effect, the Panel recognised that it did not have the standing to determine whether or not the change to double line blockages amounted to a ‘Network Change’ under Part G but proceeded on the basis of ignoring that issue.

15. On 8 January 2010, Network Rail served its Amended Notice of Appeal in respect of ADP40 dated 4 January 2010. The same day, FSR also served a Notice of Appeal on ORR in respect of the determination of TTP317.
16. On 14 January 2010, ORR sent a letter to the parties informing them that it was minded to hear both appeals and to stay the appeal against the decision in TTP317 until a determination of the appeal against ADP40 was made because the nature and outcome of the appeal against TTP317 was dependent, at least in part, upon the outcome of the appeal against ADP40. It invited any submissions on those preliminary views and any submissions from either party if it considered itself to have any interests requiring protection which necessitated determination of the appeals in a certain order or by a certain date, and in particular, which could not be protected by monetary compensation, by 18 January 2010.
17. FSR provided representations in response in a letter dated 19 January 2010, in which it requested that the appeals be heard together, and opposed NR's application for an interim order staying the implementation of ADP40. NR confirmed in a voicemail left on the same day that it would not be making further representations on the issues raised in ORR's letter.
18. In a letter to the parties dated 21 January 2010, ORR informed them that it would hear both appeals but that the timetable and process for doing so required further discussion with the parties, particularly in view of FSR's representations that determining the appeal should not be delayed. It requested a conference call on 22 January 2010 to discuss those issues.
19. A conference call was held with the parties on 22 January, during which the timetable, procedure and NR's application for an interim order were discussed. Both parties agreed to provide representations on the two appeals within a shortened timescale. As a result of the call,

ORR sent a letter to the parties dated 25 January 2010 in which it informed them that both appeals would be determined through a single process based on that agreed by the parties and set out a timetable for the service of representations by both parties. It requested that both parties keep 8 March 2010 free for an oral hearing, should it prove necessary to hold one.

20. ORR sent a further letter dated 26 January 2010 in which it informed the parties of its decision to grant an interim order staying the implementation of ADP40. The minutes of the conference call which took place on 22 January were also sent to the parties on 26 January.
21. In accordance with the timetable set out in ORR's letter dated 25 January, FSR served an Amended Response dated 5 February 2010 to NR's Amended Notice of Appeal.
22. NR served a Response to FSR's Notice of Appeal against TTP 317 and its Reply to FSR's Amended Response in ADP40, both dated 12 February 2010.
23. FSR's legal representatives, Burges Salmon, sent a letter of the same date to ORR concerning the issue of further directions.
24. On 16 February 2010, ORR requested a final set of consolidated submissions from each party by 26 February 2010. It informed them that it would shortly issue a checklist of issues to be covered in those submissions, which was intended to be indicative but not exhaustive. ORR informed the parties that it would decide whether an oral hearing was necessary on receipt of those submissions. The parties were invited to make any representations on those procedural matters by 17 February 2010.
25. No representations on the procedural matters were received and ORR issued its checklist of issues to the parties on 18 February 2010.
26. Both parties provided consolidated submissions on 26 February 2010 and FSR's legal representatives sent ORR a letter dated 1 March 2010 requesting that an oral hearing take place. ORR informed the parties in

a letter dated 2 March 2010 that in the light of the parties' consolidated submissions, there would be an oral hearing on 8 March 2010. It stated that it would particularly like to discuss the issue of the nature of a change which can amount to a 'Network Change' and indicated that it would be helpful if both parties could come equipped to give examples of different changes which illustrated their arguments on this issue.

27. On 4 March 2010, NR submitted a corrected version of its final submission, which corrected some erroneous references to 'NV55' to read 'NV33'. In a letter of the same date, NR made an additional submission, relying on condition G1.9 of the Code.
28. On the same day, FSR provided to NR and ORR examples of how the definition of 'Network Change' might be applied and an 'Extract Reference Sheet' for use at the hearing.
29. On 8 March 2010, the parties attended the appeal hearing ("the Hearing") before a panel of ORR representatives ("the ORR Panel"): Juliet Lazarus, Director of Legal Services (Chair), Brian Kogan, Deputy Director of Railway Markets and Economics, Gerry Leighton, Head of the Network Code, Ian Williams, Track Access Manager and Paul Hadley, Head of Operations. The hearing concerned only the issues surrounding the definition of 'Network Change' arising in the NR Appeal and did not concern issues raised in the FSR Appeal.
30. The transcript of the Hearing was provided to the parties on 7 April 2010 and they have had the opportunity to make any necessary amendments.

VI Relevant Provisions of the Code

31. The relevant provisions of the Code are annexed to this Determination at Annex A.

VII ORR's consideration of the Appeals

32. While certain parts of the submissions and evidence will specifically be referred to in the course of this Determination, ORR has taken into account all the parties' written and oral submissions and evidence in reaching its decision. A summary of the parties' main arguments, focusing mainly on the final consolidated written submissions, has been appended to this Determination at Annex B.
33. ORR has determined the following issues:
- (i) Whether the change in the pattern of possessions on the WCML from midweek single line blockages for a total of 1248 hours per annum to 14 Sunday/Monday double line blockages amounts to a 'Network Change' as defined in Part G;
 - (ii) The meaning of Condition D2.1.9.
34. ORR has not at this stage determined the appropriate directions to make to give effect to this Determination. ORR will write to the parties shortly about the further information it requires to make those directions.
35. The first issue which it is necessary to determine in these appeals is whether the change in the pattern of possessions falls within paragraph (b) of the definition of Network Change in Part G of the Code:

"Network Change"

means...

(b) any change to the operation of the Network (being a change which does not fall within paragraph (a) above) which:

(i) is likely materially to affect the operation of trains operated by, or anticipated as being operated in accordance with the terms of any Access Option, by or on behalf of that Access Beneficiary on the Network; and

(ii) has lasted or is likely to last for more than six months

...

36. The Access Disputes Panel held that paragraph (a) of the definition of Network Change did not apply in this case and neither of the parties challenged this finding before ORR. Accordingly, the three limbs of paragraph (b) of the definition will be considered in turn.

Change to the Operation of the Network

The parties' submissions

37. In their oral submissions, the parties were in agreement that 'operation' of the network included 'maintenance.'⁴ However, NR's submissions made clear that the delivery of the maintenance regime is an aspect falling outside the definition of 'change in the operation of the Network.' While it emphasised the fact that it did not see fine distinctions between 'policy,' 'procedure' and 'delivery' as being the key to understanding the meaning of this limb of the provision, it made clear that it was the practical effect of any policy or procedure which determined whether or not it constituted a Network Change.⁵ It further clarified this 'practical effect' as being a reference to a change in activity: for a change to be a 'change to the operation of the network', there needs to be a change in the actual maintenance activity taking

⁴ This is consistent with the finding of the Rail Regulator in Network Rail Infrastructure Limited –v- Great North Eastern Railway Limited [2003] RR2.

⁵ Transcript p.3, lines 18-30 and p. 13, lines 10 and 32.

place.⁶ Its argument was that if the same basic activity was taking place before and after the decision or proposal in question, there was no change in operation.

38. Taken to its logical conclusion, this approach excludes from the definition of 'Network Change' all changes of policy and practice which are not reflected in a change in maintenance activity itself even if there is an impact upon train operators. By contrast, it was this latter aspect, namely the impact of changes upon train operators in terms of the way services ran on the ground which was emphasised by FSR in its interpretation of 'change to the operation of the network'.⁷
39. The difference between the parties' approaches was highlighted by their responses to the hypothetical examples posed by the ORR Panel.⁸ NR's responses made clear that a change to the timing or the method of maintenance did not amount to a 'change in the operation of the Network' if the overall 'output' in terms of the maintenance activity being performed had not changed. For example, if the issue was lubrication, provided this was the task being effected, there was no 'change' for the purposes of the definition, irrespective of the manner in which it was being delivered.⁹ Similarly, when asked to respond to the examples concerning a change of the timing of an activity from weekends to weekdays, daytime to night time or winter to summer, NR indicated that these are not encompassed by the definition of Network Change. By contrast, FSR regarded all hypothetical examples suggested by the ORR Panel to be capable of satisfying the first limb

⁶ Transcript p.15, lines 4-15 and lines 23-28.

⁷ See, for example, transcript p. 22 line 29 to p.23, line 9.

⁸ Examples were discussed, such as changes from mid-week to weekend possessions, from daytime to night time possessions and from a greater number of weekend possessions, each of shorter duration, to a smaller number of weekend possessions, each of greater duration. See, for example, transcript, p.65, lines 4-23 and p. 65, line 30 to p. 66 line 27 to p.69, line 4.

⁹ Transcript, p.69 lines 3-17 and lines 26-28.

of the definition of Network Change, subject to satisfying the requirements of materiality and duration.¹⁰

ORR's analysis – 'Change to the Operation of the Network'

40. As has been submitted by FSR,¹¹ and as stated in the Rail Regulator's determination of the appeal against the determination NV33 of Network and Vehicle Change Sub-Committee of the Access Dispute Resolution Committee¹², the primary purpose of Part G is to protect train operators in respect of a Network Change. Part G forms part of the obligations in place to ensure NR's accountability for its management and stewardship of the network. The obligations include duties of notification and consultation and the obligation to compensate train operators for losses incurred.
41. Given that context and in accordance with the usual rules of contractual interpretation, ORR has accorded the words used in the definition their ordinary and natural meaning in order to ascertain the objective meaning of the definition. It has also ensured that the words in each limb of the definition are considered in context.
42. NR's submissions, which effectively attempt to draw distinctions between different aspects of maintenance when deciding which activities fall within the definition, do not accord with the contractual wording. On its ordinary and natural meaning, the phrase does not exclude high-level changes which are necessary to run a railway if they

¹⁰ See footnote 8 above. For example, it appeared to consider that a change from fourteen one night possessions scattered over a certain period to thirteen one night possessions over a similar period, year on year, would be addressed primarily by the materiality limb of the definition, because, on its argument, the threshold for a change to satisfy the first limb was very low: see transcript p.65, lines 14-25.

¹¹ Transcript p.5, line 33 – p.6, line 6; p.83, lines 17-29.

¹² Network Rail Infrastructure Limited –v- Great North Eastern Railway Limited [2003] RR2, paragraph 224.

have an effect on the operation of services on the ground, as NR has suggested.

43. It is clear that the definition can only be concerned with changes which manifest themselves in some way in an alteration to the way in which the network is or can be used, and indeed, this is the means by which change impacts operators. This interpretation is supported by the non-exhaustive definition of 'Change' in Part G which places emphasis on the effect of change:

“change” includes:

- (a) *improvement or deterioration, enlargement or reduction;*

...

44. Further, this limb concerns a change which has an impact on the 'operation of the network.' The perspective of a particular operator is a consideration which is addressed in the second limb, concerning materiality. It is, therefore, necessary to consider this limb, and the definition of 'change' from the perspective of the overall running of the network.
45. When this overall perspective is taken, it is clear that it is necessary to consider the 'operation of the network' in broad terms. The operation of the network in this definition simply means the normal running of the railway. This normal running of the railway encompasses, for example, routine periods of maintenance which require taking possessions. Furthermore, it is worth bearing in mind that normal maintenance activities, by their very nature, are not conducted to a fixed schedule which repeats identically period by period. The precise activities and method and timing of their delivery vary over time, in accordance with the maintenance requirements of the network. ORR therefore considers that a 'change to the operation of the network,' where it

encompasses maintenance, must mean a change that goes beyond the normal variations inherent in conducting routine maintenance of the railway.

46. Therefore, the provision must be understood in the context of normal railway activity and of the purpose of Part G. The practical consequences of taking any other approach could lead to an interpretation which encompasses numerous isolated incidents of minor re-scheduling of routine activities, which cannot be said to have the effect on the overall operation of the network envisaged by the definition.

ORR's conclusions

47. On the basis of the above, ORR has concluded that it is clear that the ordinary and natural meaning of the words requires the 'operation of the network' to be understood in a general sense and in context. To fall within this limb of the definition, a 'change' to that operation, whether it be a decision or activity, must affect the running of the network in a practical sense and in some appreciable manner, which departs from the normal variations experienced on a regular, day-to-day basis. For that reason, while NR's approach to the first limb is unduly narrow in its understanding of 'change,' FSR's approach, which does not adopt an overview of the 'operation of the network' is too broad, as its responses to some of the hypothetical examples indicated. For example, in all examples, it considered the rescheduling of the same maintenance to be encompassed by the definition.¹³
48. ORR recognises that establishment of whether or not a particular change does amount to a departure from the normal running of the network so as to satisfy the first limb of the definition will involve a degree of judgment and will depend very much on the particular facts.

¹³ See footnotes 8 and 10 above.

It considered the present case to be a finely balanced one. However, although the present case involves the carrying out of substantially similar maintenance activities, ORR considers the particular change in question, being a change from midweek single line blockage for a total of 1248 hours per annum to 14 weekend double line block closures on the WCML, to be a case which goes beyond the normal variation in maintenance inherent in the 'operation of the network.' ORR therefore concludes that it is a 'change to the operation of the network.'

Materiality

The parties' submissions

49. NR and FSR focused on different factors in their consideration of the materiality requirement contained in the definition. NR focused on the number of trains affected as a proportion of FSR's overall night sleeper service.¹⁴ In the present case, that proportion amounted to 4.5%, which NR did not consider to be material. It also emphasised the fact that much of the additional cost of running the contractual diversionary route could not be compensated pursuant to Schedule 4 of the Track Access Agreement¹⁵ and, therefore, should not be taken into account when judging materiality, and that the number of passengers affected by the omission of intermediate stations in this instance was small.¹⁶
50. FSR rejected NR's approach. It pointed to the fact that the definition refers to change which is 'likely materially to affect the operation of trains (operated by FSR)' and not a requirement that a material number of trains be affected.¹⁷ Therefore, it is only the effect on certain identifiable services affected by the change which needs to be considered. FSR pointed to what it considered to be a quite extreme

¹⁴ Transcript p.38, line 27 to p.39, line 2.

¹⁵ Transcript p.39, line 32 to p.40, line 34.

¹⁶ Transcript p.40, lines 26-31.

¹⁷ Transcript p.46, lines 8-14.

effect on the operation of the trains in question, since the diversion necessitated the use of a completely different route, the omission of stations, different route knowledge and the use of two locomotives to enable entry into Euston station.¹⁸ It also considered the fact that the operation of trains on the diversionary route cost FSR up to £250,000 more per year to be a relevant factor in the assessment of materiality, irrespective of whether that cost could be compensated under Schedule 4 or not.¹⁹

ORR's analysis - materiality

51. In deciding whether the materiality requirement is satisfied, it is important closely to consider the actual words of the provision and to apply their ordinary and natural meaning, given the context in which they are used. ORR agrees with FSR that the requirement is for there to be a 'material effect' on the operation of trains rather than an effect on a material number of trains. Beyond that, however, there is no more prescriptive guidance as to materiality expressly provided by the contractual wording.
52. Both parties were agreed that in this context, 'material' means an effect which is not insignificant and more than trivial. ORR agrees with that approach. However, this does not provide a full guide to the meaning of the word for the purposes of the definition, as the word needs to be interpreted in context. The definition requires the change materially to affect trains operated by a particular operator. ORR considers the assessment of whether that test is satisfied to involve an assessment of the extent of the impact of a change on the operation of those trains affected by that change, in the wider context of the trains or service operated by that operator. It follows that consideration of whether the

¹⁸ Transcript p.48, line 32 to p.49, line 11.

¹⁹ Transcript p. 49, lines 13-27.

effect is indeed material will depend very much on the facts of each case.

53. In the present case, ORR considers that the diversion of a weekend sleeper service (consisting of four trains, two in each direction) via a completely different route, with the consequent requirement for different route knowledge and a different locomotive formation and the inability to provide a service for customers (some of whom would be regular customers on a sleeper service) at the intermediate stations, at an additional cost to FSR of up to £250,000 are all factors which would support a conclusion that the effect of this particular change on trains operated by FSR was material.
54. Further, it should be noted that, in ORR's view, there is a qualitative and not merely numerical aspect to consideration of materiality. As was argued at the hearing, certain services may be of such significance or uniqueness that, although they might represent a small proportion of the overall number of services operated, the effect of their alteration or cancellation would be disproportionate to the percentage of overall services which they represent. If this is the case, it would have a bearing on the assessment of the materiality of the effect of any change.²⁰ In the present case, ORR is persuaded that the weekend sleeper services affected do possess such a significance.
55. Against that, ORR has also considered those factors which do not support a finding of materiality in the present case: in particular, the fact that only two trains in each direction per week, representing only 4.5% of FSR's total sleeper services, are affected and that, as FSR admitted, a limited number of passengers use the intermediate stations omitted as a result of the diversion. Further, the diversion does not

²⁰ Transcript p. 45 lines 10-22 and p.45 line 28 to p.46 line 7.

result in a breach of FSR's Service Level Commitment in its franchise²¹.

ORR's conclusions

56. The assessment of whether a change is material involves an exercise of judgment. Taking all relevant information into account and having regard to the competing factors, ORR considers that the factors in paragraphs 53 and 54 above outweigh the factors in paragraph 55 and concludes that, in the present case, the change from single to double line block closures is indeed 'likely materially to affect the operation of trains' operated by FSR.
57. ORR notes that the Access Disputes Panel left open the question of whether the financial implications for FSR of the proposed possessions would justify the conclusion it reached on the materiality of their effect.²² ORR had representations from the parties on this issue and in the circumstances, it is appropriate to reach a conclusion. ORR considers the financial implications to FSR to be a relevant factor to consider, along with the other factors listed in paragraphs 53 to 55 above, in the assessment of materiality in this case.
58. However, whether or not the additional cost to FSR of running trains on the diversionary route might be able to be compensated is a separate question which is not relevant to the assessment of materiality required by the definition of 'Network Change'. The function of Part G is not purely to provide compensation but to provide for consultation. The question of whether the change is a 'Network Change' under that Part is a prior question, and a separate question, from whether compensation is or is not recoverable under other provisions, such as Schedule 4 of the Track Access Agreement. The definition must be

²¹ Transcript p.44, lines 29-31.

²² Access Disputes Panel's Determination in ADP40, para 29.

treated on its own terms and in accordance with the usual rules of contractual interpretation.

Duration

The parties' submissions

59. The parties also had differing interpretations of the meaning to be attributed to the duration provision in the definition. NR stated that the requirement that a change should have lasted 'or be likely to last for more than six months' should be understood to mean that a change must be *'if not continuous over a period of six months, something near continuous so that it's an ongoing activity which lasts over six months.'*²³ When presented with different factual scenarios by the ORR Panel, NR's responses indicated that it considered a sufficient level of continuity to be an activity which, for example, took place on more days of the week than not: an activity which took place every weekend, for example would not satisfy the requirement.²⁴ NR stated that it could not point to or formulate any language test to indicate how it applied this continuity test. It did not consider that the time period in consideration should span more than a single timetable period. This argument appeared to be based on pragmatic arguments concerning the practical difficulties which could ensue for NR and the fact that this might allow the definition to encompass many changes which NR might otherwise deal with under Part D.²⁵
60. FSR does not accept that there is an in-built requirement for continuity as asserted by NR. It also points to the practical consequences of such an interpretation: such a high level of continuity would equate to significant disruption for a change which is to last more than six

²³ Transcript p. 2, lines 31-33.

²⁴ Transcript p.59, line 19 to p.60, line 4.

²⁵ Transcript p.63, lines 4-29.

months.²⁶ Further, by making the overall time period of the change referable to the period of continuous activity, the interpretation would exclude from the definition of duration consecutive periods of change which last just short of six months, with short periods in between, despite the fact that over a number of years, the total time period for which the change is in place would be considerable.²⁷

61. FSR's approach focused instead on whether the overall time period from start to finish spans a timeframe of more than six months. Its submissions included reliance upon the decision in NV4, in which instructions were given which *'had been issued as standing instructions and had been invoked as circumstances required over significant periods that cumulatively comfortably exceeded six months,'* although it did not know the length of the periods referred to or how they were spread.²⁸
62. When directed by the ORR Panel to more extreme examples in order to test the logical conclusion of its stance, FSR indicated that, for example, a change which lasted for one day a year for ten years would satisfy the definition of being 'likely to last for more than six months,' despite the fact that the total number of days fell far short of six months, because it was taking place for the foreseeable future.²⁹

ORR's analysis – duration

63. ORR is not satisfied that NR's approach to this limb of the definition is correct. There is nothing on the face of the wording to support the implication of a requirement of continuity. The definition simply refers to a change which has lasted or is likely to last for more than six months. This is clearly a phrase which concerns overall duration.

²⁶ Transcript p.62, lines 19-24.

²⁷ Transcript p.83, lines 3-9.

²⁸ Transcript p.61, lines 12-26.

²⁹ Transcript p.61, line 31 to p.62, line 4.

64. Further, the overall duration is that of the 'change' in question. The duration is not simply linked to the carrying out of any discrete activity. Therefore, where the change which has an impact on an operator is one of policy or instruction, the change will begin when the policy comes into effect and will end when the policy ceases to have effect.
65. Further, the wording of the provision does not support an artificial limitation of that duration to one timetable period. If the overall duration is known to be likely to amount to a number of years or the foreseeable future, this is the period of time for which the change, on its natural and ordinary meaning of the words 'is likely to last.'

ORR's conclusion

66. Therefore, ORR concludes that, in the present case, the change to the pattern of possessions from single to double line blocks is one which 'has lasted' or is 'likely to last' for more than six months.
67. Applying the analysis in paragraph 64, the change started when the plan to continue to take the possessions (after the completion of the WCML project) came into effect. The parties are agreed that NR's plan is intended to last 'for the foreseeable future,' and it is, therefore, likely to last for more than six months. The argument before ORR focused on whether or not any change was 'likely to last' more than six months. However, ORR notes that, on its analysis of the application of this limb of the definition, the period of change has already lasted for six months.

Applicability of the definition of 'Network Change' in the present case

68. It follows from the above analysis that the change from single to double line blocks under consideration in this appeal does satisfy the definition of 'Network Change' as set out in the Code. However, it should also be clear from the above analysis, that this is a decision which turns on

its facts. The definition needs to be applied to cases on an individual basis. It is not a definition which clearly excludes or includes certain categories or types of 'change' based on the type of activity, whether that change involves delivery of maintenance, or similar criteria. It is one which includes only changes which have an impact on an operator in a way which goes beyond the usual fluctuations in capacity, availability or condition inherent in the usual operation of the network.

Condition G1.9

69. In the light of the above finding, it is clear that NR is now obliged to commence the Part G process and ORR does not understand NR to contest the fact that, should it be determined that the change in question is a Network Change, it must do so.³⁰

70. NR made an Additional Submission in its letter dated 4 March 2010 relating to Condition G1.9, which it relies upon as entitling it to implement a change prior to serving a Network Change notice. Condition G1.9 reads as follows:

'In the case of a Network Change within the meaning of paragraph (b) of that term's definition, Network Rail may commence implementing the procedure set out in this part G and shall, upon being given notice by the relevant Access beneficiary to Network Rail at any time after the expiry of the relevant period, promptly commence implementing and thereafter comply with that procedure as if that change were a Network Change proposed by Network Rail.'

71. ORR would emphasise that NR's obligation, as set out in Condition G1.1, which is stated to be subject to Conditions G1.9 and G1.10, is to give notice of its proposal for change if it wishes to make a Network

³⁰ See for example, transcript p.73, lines 25-33 and minutes of conference call on 22 January 2010, paragraph 20.

Change. Condition G1.9 makes that general obligation of prospective notification conditional in the circumstances set out in the condition where the change falls within paragraph (b) of the definition of Network Change. However, the present case does not concern prospective notification. Further, as set out in paragraph 69, ORR understands NR to accept that if a finding is made that the change to the pattern of possessions in question amounts to a 'Network Change', the Part G process must apply.

72. In the light of these facts, ORR does not consider that any issue in this appeal turns on the interpretation of Condition G1.9 and it is, therefore, not necessary to make further findings concerning the scope and meaning of that Condition. However, as stated at paragraph 34 above, ORR will write further to the parties shortly about the further information it requires to make the appropriate directions to give effect to this Determination. It would be prepared to make findings on the meaning of this Condition at a later stage, should it prove to be of relevance to the appropriate directions.

Condition D2.1.9

73. Since ORR has held that the change to the pattern of possessions in this case constitutes a 'Network Change' and since ORR understands the parties to accept that a Network Change notice would be required in the present case should ORR make that finding, the only outstanding issue in TTP317 which falls to be addressed is that of the proper construction of Condition D2.1.9; specifically, whether it applies to allow NR to implement Rules of the Route or Rules of the plan pending determination of an appeal only by the relevant ADRR Panel or also by ORR. It has been conceded by FSR that it is not taking any other issue with the manner in which the Part D conditions, specifically the Decision Criteria, have been applied in this case, when

incorporating the proposed possessions in the Rules of the Route.³¹ Clearly, since ORR has now determined that the change in the pattern of possessions on the WCML is a Network Change, the directions that ORR ultimately makes to give effect to this Determination may affect the Rules of the Route.

74. FSR recognises that in the present case, NR has not sought to rely upon Condition D2.1.9 to postpone or avoid compliance with ADP40, since it applied for a stay, which ORR granted. However, it has requested clarification of the meaning of Condition D2.1.9 as a matter of principle.³²
75. The relevant sections of Part D are set out in the Annex to this Determination. Condition D2.1.9 reads as follows:

'Notwithstanding the provisions of Conditions D2.1.7 and D2.1.8, but subject to Condition D2.1.10, NR shall be entitled to implement (in particular for the purposes of developing the Working Timetable to be implemented on the next succeeding Passenger Change Date) any aspect of the applicable Rules of the Route or the applicable Rules of the Plan which has been referred for determination pursuant to that Condition, pending the outcome of that determination.'

76. Condition D2.1.9 states that NR is entitled to implement aspects of the Rules of the Route or Rules of the Plan *'referred for determination pursuant to that Condition'* pending the determination. The issue between the parties turns on the meaning of the words in italics. Both parties accept³³ that the provision applies only to matters referred for determination pursuant to Part D. The issue between them is whether

³¹ Transcript p.80, lines 1-15.

³² FSR's Final Submissions, paragraph 4.3.

³³ NR's Final Submissions, paragraph 2.10; FSR's Consolidated Submissions, paragraph 3.15. Initially, the parties' submissions suggested that there was disagreement on this issue but a consensus was reached in final submissions.

'referred for determination pursuant to that Condition' is apt to cover only matters appealed to an ADRR Panel or also matters appealed to ORR.

77. Condition D2.1.9 refers to Conditions D2.1.7, D2.1.8 and D2.1.10. *'Referred for determination pursuant to that condition'* must refer to matters referred for determination pursuant to one of those conditions. Condition D2.1.7 provides a right to refer a decision of NR in relation to the Rules of the Route or Rules of the Plan for determination *'by the relevant ADRR Panel under Condition D5 provided that such referral is made within the period specified in Condition D5.1.'*
78. Unlike Condition D2.1.7, Conditions D2.1.8 and D2.1.10 are not concerned with a right of referral to determination. These Conditions do, however, mention appeals to ORR as well as appeals to the Panel. This may have contributed to the parties' differing interpretations of Condition D2.1.9.
79. ORR considers that, since Conditions D2.1.8 and D2.1.10 do not concern an entitlement to refer a matter for determination, it is not correct to interpret the words *'referred for determination pursuant to that Condition'* in Condition D2.1.9 as applying to those Conditions.
80. ORR considers that those words instead apply to matters referred for determination pursuant to Condition D2.1.7. That Condition gives a right explicitly to appeal to the first instance panel and refers to the time limit specified in Condition D5.1, which relates only to the *'Right of Appeal to relevant ADRR Panel'* (Condition D5.2 relates to the *'Right of Appeal to the Office of Rail Regulation'*). It is, therefore, clear that the entitlement to implement a decision pending determination on appeal enshrined in Condition 2.1.9 only applies pending the outcome of ADRR determinations, rather than appeals to ORR.

81. A consideration of the purpose and practical workings of the provision also support such an interpretation. FSR states that to allow decisions to be implemented pending an appeal to ORR would be to assume that the TTP is wrong.³⁴ It would not give effect to the findings of the TTP.
82. ORR considers that it is sensible to permit NR to implement a decision it has itself made, on the assumption it is correct, until any appeal is determined by the first instance tribunal. Once that tribunal has made a finding, the normal procedure in other areas of law would be for that finding to be implemented. In cases such as the present, that would be by NR continuing to implement its decision if it has been upheld or reversing it if it has not. A further appeal to ORR could also be made by the losing party. A party appealing to ORR is entitled to apply for an interim order staying the implementation of the ADRR decision which is unfavourable to it, pending the outcome of the further appeal to ORR.
83. If Condition D2.1.9 were interpreted to give NR an entitlement to continue to implement its own original decision, in spite of a finding against it by the ADRR Panel, the Panel's finding would have no effect if an appeal to ORR were made. Furthermore, a train operator would not be able to apply for an interim order from ORR to give effect to the Panel's finding by staying implementation of NR's decision, since a request for such an order would amount to an application for the disapplication or suspension of an express contractual entitlement on the part of NR. Such an entitlement would, therefore, be at odds with the usual workings of the appellate process.
84. For this reason, ORR considers that the practical workings of the provision support ORR's interpretation of the clause. ORR, therefore, concludes that Condition D2.1.9 applies only to entitle NR to implement Rules of the Route or Rules of the Plan, pending

³⁴ FSR's Consolidated Submissions, paragraph 3.14.

determination by the relevant ADRR Panel pursuant to Part D of the Code.

VIII Conclusion

85. ORR determines the appeals from the decisions in ADP40 and TTP317 as follows:
- (i) the change to the pattern of possessions for the WCML from midweek single line blockages for a total of 1248 hours per annum to 14 weekend double line block closures, which requires FSR regularly to divert sleeper services over the ECML, constitutes a Network Change. Therefore, the process set out in Part G applies to this change;
 - (ii) Condition D2.1.9 applies only to entitle NR to implement Rules of the Route or Rules of the Plan, pending determination by the relevant ADRR Panel pursuant to Part D of the Code.
86. ORR therefore upholds the decision of the Access Disputes Panel in ADP40 and specifically, its finding at paragraph 32, summarised at paragraph 9(xi) above, but on the basis of the reasoning set out in paragraphs 47-48, 56-58 and 66-68 of this Determination.
87. Given its findings in relation to the appeal of ADP40 and the parties' submissions, ORR has not needed to revisit the findings of the Timetabling Panel in TTP317.
88. As stated at paragraph 34 above, ORR will write to the parties shortly concerning the further information it requires to make the appropriate directions giving effect to this Determination. These directions will replace the direction of the Access Disputes Panel at paragraph 33 of the ADP40 Determination set out at paragraph 9(xii) above. They may also affect the Rules of the Route.

89. ORR's interim order of 26 January 2010 staying NR's implementation of the determination in ADP40 was expressed to have effect until the final determination by ORR of NR's appeal against ADP40 or further order. ORR now extends that interim order to continue in effect until ORR issues its final directions to give effect to this Determination.



Juliet Lazarus
Director of Legal Services
Duly Authorised by the Office of Rail Regulation
12 May 2010

ANNEX A

Relevant Provisions of the Code

PART D

2.1.7 *Referral to the relevant ADRR Panel*

Following notification of Network Rail's decisions in accordance with Condition D2.1.5(b) or D2.1.6 a Bidder may refer any aspect of those decisions (including any decision of Network Rail not to make an amendment or any decision by Network Rail as to whether or not a revision is a Subsidiary Rules Revision) for determination by the relevant ADRR Panel under Condition D5, provided that such referral is made within the period specified in Condition D5.1.

2.1.8 Possessions Strategy Notice

No such reference under Condition D2.1.7 shall be made in respect of any matter referred to in a Possessions Strategy Notice which is within and consistent with the method of implementation established pursuant to Condition D2.2 and which has:

- (a) not been referred to the relevant ADRR Panel for determination prior to the date referred to in Condition D2.2.4;
- (b) been finally determined by either the relevant ADRR Panel or the Office of Rail Regulation pursuant to that Condition or Condition D5.2; or
- (c) been determined by the relevant ADRR Panel and is not the subject of an appeal to the Office of Rail Regulation pursuant to Condition D5.2;

2.1.9 *Implementation pending outcome of determination*

Notwithstanding the provisions of Conditions D2.1.7 and D.2.1.8, but subject to Condition D2.1.10, Network Rail shall be entitled to implement (in particular for the purposes of developing the Working Timetable to be implemented on the next succeeding Passenger Change Date) any aspect of the applicable Rules of the Route or the applicable Rules of the Plan which has been referred for determination pursuant to that Condition, pending the outcome of that determination.

2.1.10 Procedure for amendment of the Rules of the Route/Plan and amendment of scheduled Train Slots

Network Rail shall include within the Rules of the Plan a procedure to enable amendment of the Rules of the Route and the Rules of the Plan and consequential amendment of scheduled Train Slots other than as provided for in the foregoing provisions of this Condition D2.1.

Notwithstanding the provisions of Condition D2.1.9, Network Rail shall not be entitled to implement any change to that procedure until any appeal against any such change has been determined pursuant to Condition D5.

Condition D5 – Timetable Appeal Procedure

5.1 Right of appeal to relevant ADRR Panel

5.1.1 Grounds for making an appeal

Without prejudice to Conditions D4.6.2, D4.7.1 and D4.8.6, if any Bidder is dissatisfied with any decision of Network Rail made under this Part D, including:

- (a) the application by Network Rail of the Decision Criteria;
- (b) the acceptance or rejection by Network Rail of any Bid;
- (c) the exercise by Network Rail of a Flexing Right; and

(d) any relevant decision of Network Rail which may be referred to the relevant ADRR Panel under Condition D2.1.7, D2.1.11, D2.2.4 or D2.2.7,
it may refer the matter to the relevant ADRR Panel for determination.

5.1.2 Timescales for making an appeal to the relevant ADRR Panel

- (a) A reference to the relevant ADRR Panel under Condition D5.1.1 shall, save as shown in paragraph (b) or (c) below, be made within five Working Days of receipt of the relevant decision from Network Rail. If Christmas Day occurs within such period of five Working Days then the period shall be lengthened to 10 Working Days.
- (b) A reference to the relevant ADRR Panel in respect of a decision by Network Rail regarding Train Slots notified to Bidders in accordance with Condition D2A.3 or Condition D3.2.7 shall be made within 10 Working Days of receipt of the relevant decision.
- (c) A reference to the relevant ADRR Panel pursuant to Condition D2.2.4 shall be made within 30 days of receipt of the notification referred to in Condition D2.2.3

5.2 Right of Appeal to the Office of Rail Regulation

If Network Rail or any Bidder is dissatisfied with any decision of the relevant ADRR Panel in relation to any matter referred to it under Condition D5.1, that person may, within 5 Working Days of receipt of the relevant ADRR Panel's written reasoned determination, refer the matter to the Office of Rail Regulation for determination under Part M. If Christmas Day occurs within such period of five Working Days then the period shall be lengthened to 10 Working Days.

PART G

Definitions

In this Part G unless the context otherwise requires:

...

“change” includes:

(a) improvement or deterioration, enlargement or reduction; and

(b) for the purposes of paragraph (b) of the definition of ‘Network Change,’ a series of changes.

...

“Network Change”

means...

(b) any change to the operation of the Network (being a change which does not fall within paragraph (a) above) which:

(i) is likely materially to affect the operation of trains operated by, or anticipated as being operated in accordance with the terms of any Access Option, by or on behalf of that Access Beneficiary on the Network; and

(ii) has lasted or is likely to last for more than six months.

Condition G1 – Network Change Proposal by Network Rail

1.1 Notice of Proposal

Subject to Conditions G1.9 and G1.10, if Network Rail wishes to make a Network Change, it shall:

(a) give notice of its proposal for Network Change to:

- (i) each Access Beneficiary that may be affected by the implementation of the proposed Network Change;

- (ii) the Secretary of State, and Scottish Ministers if they may be affected by the implementation of the proposed Network Change;
 - (iii) the Office of Rail Regulation; and
 - (iv) each Passenger Transport Executive that may be affected, Transport for London if it may be affected and the Welsh Assembly Government if it may be affected, by the implementation of the proposed Network Change;
- and

(b) without delay publish on its website a summary of its proposal for Network Change.

1.9 *Changes to the operation of the Network*

In the case of a Network Change within the meaning of paragraph (b) of that term's definition, Network Rail may commence implementing the procedure set out in this Part G and shall, upon notice being given by the relevant Access Beneficiary to Network Rail at any time after the expiry of the relevant period, promptly commence implementing and thereafter comply with that procedure as if that change were a Network Change proposed by Network Rail.

ANNEX B

SUMMARY OF THE PARTIES' ARGUMENTS

ORR considered all written and oral submissions from the parties in reaching the Determination. This is a summary of the main arguments, focusing mainly on the parties' final consolidated written submissions. The oral submissions made at the hearing are referred to, where relevant, in the text of the Determination.

Network Change

Definition

Change to the operation of the Network

NR's submissions

1. NR relied upon NV33 and argued that the decision in NV33 had not determined that all changes in maintenance were a change in the operation of the Network and in particular, that it did not decide that a change in the delivery of a maintenance regime amounted to a change in the operation of the Network. NR submitted that the present case did not constitute a change to the maintenance of the railway in the sense that there was in the examples considered in NV33.
2. NR submitted that to construe a change in delivery of maintenance as a 'Network Change' despite the absence of change in the maintenance itself would amount to an unreasonable result and would present difficulties in

terms of distinguishing between categories of change which fall within the definition and those which do not.

FSR's submissions

3. FSR relied upon the decision in NV33 and upon the description of changes to the operation of the network in the Explanatory Notes to Part G of the Code to argue that it was clear that changes to NR's policies and practices for maintenance could amount to 'Network Change' provided they satisfied the other limbs of that definition. It also relied upon decisions in NV1 and NV53 in considering what amounted to a change in the operation of the Network.
4. FSR argued that in the present case, NR's change from its *'long established operating practice of, during routine maintenance, keeping a single line open (a single line block) for the passage of trains'* to state that *'during routine maintenance both lines will in future be blocked for all trains (a double line block)'* is *'a change in practice and policy and a change in the way Network Rail operates the Network over the relevant line sections during maintenance. It is therefore capable of being a Network Change.'*

Materiality

NR's submissions

5. NR defined materiality as being *'something more than trivial or insignificant.'* It also stated that materiality in the current circumstance *'should rather be equated with an effect of real significance in the light of the scale of the operations being undertaken.'*

6. It identified the fact that FSR's trains ran in slots envisaged by the TAC, even on the diversionary route, as a factor which pointed away from materiality. Further, it stated that materiality in the context of the definition '*must...mean more than the permitted diversion with[in] the Firm Rights of a Train Operator of 14 days' services out of a total with a year of 312 days representing 4.5% of the total.*' It also argued that if the present case, involving so few services were regarded as a Network Change, it would result in numerous changes to the Rules of the Route falling within the definition of 'Network Change' which would be an '*unacceptable result.*' It also considered the financial and public services consequences of a change to be relevant to the assessment of materiality. NR stated that FSR's trains were not obliged to miss their contractual monitoring points, journey times were extended but arrival times were maintained and there was therefore no real effect on income or customers. Indeed, FSR accepted similar diversions during the WCML modernisation project without complaining of loss of income or customers. NR also noted that FSR's Service Level Commitment within its franchise agreement did not stipulate any stopping points between London and Edinburgh/Glasgow. It referred to comments made by Mike Price of FSR during ORR's conference call with the parties on 22 January 2010 in which it was acknowledged that the missed stations were more of political than commercial significance and that FSR '*would not be too upset*' about one or two trains being diverted down the ECML route.

7. NR pointed to the availability of Schedule 4 compensation in many instances where possessions were taken and argued that changes to the Rules of the Route should permit it to maintain the Network by taking possessions as long as it complied with its obligations in terms of applying the Decision Criteria, even though it might be the case that certain operator(s) might be more disrupted by a particular possession than others.

8. NR questioned whether the costs incurred by the operator when using a contractual diversionary route ought to be considered when assessing materiality in the context of the definition. It pointed to the fact that FSR operates every other contractual diversionary route in accordance with its TAC without seeking to recover the costs of doing so from NR.

FSR's submissions

9. FSR argues that a wide view of materiality should be adopted and highlights the following factors to be of relevance to an assessment of materiality: the effect upon passengers, including journey times; the frequency of diversions including any impact on the predictability of the timetable for passengers; the route taken, including the intermediate calling points, necessary route knowledge and distance travelled; financial impact upon the operator and any alternative requirements for haulage, maintenance and staff, including drivers. Further, it stated that the test should be applied to the relevant affected trains and not to the TOC or Network as a whole. It also argued that the fact that permission had been granted to use the ECML in these circumstances was irrelevant to the fact that the service had been materially affected by being unable to run over its scheduled route.
10. FSR argued that in the present case, it was being required routinely on the busiest night of the week for sleeper services to divert four FSR sleeper trains (two in each direction) over a different route, omitting three intermediate scheduled stations, increasing travel time, necessitating the use of drivers with different route knowledge and increasing FSR's operating costs by £200,000 - £250,000 per year. It stated that it was hard to see how these circumstances could not satisfy the test of materiality.

Duration

NR's submissions

11. NR submitted that any change must last continuously or very nearly continuously for more than six months to satisfy this part of the definition.
12. It also argued that *'in the context of a discontinuous set of possessions introduced for one six month period under the Rules of the Route, it was not appropriate to look beyond the six month timescale simply because of the uncertainties involved in predicting the future.'*
13. NR recognised that revisions to the Rules of the Route in order to implement a possession for maintenance or renewal work which lasts for more than six months and which has a material effect on trains operated on the network would qualify as a 'Network Change' pursuant to the definition. It stated that in proposing changes, NR seeks to avoid making changes of a length which could potentially constitute a 'Network Change.'

FSR's submissions

14. FSR stated that the relevant change in this case was a change to the way NR routinely maintained track ie. a change to the policy and practice to maintaining the relevant section. The change lasts while the policy and practice is in force and maintenance takes place in accordance with it from time to time. NR's approach of adding up the number of days on which the possessions are taken is therefore flawed. The wording of the clause does not state 'six months worth of days on which maintenance occurs.'
15. FSR points out that NR has indicated that the change is likely to last for the foreseeable future and has already proposed a similar pattern of possessions for 2011.

Interaction between Part G and Part D

NR's submissions

16. NR also made submissions on the practical consequences of requiring it to go through the 'Network Change' process before proposing Rules of the Route changes. It said that the scale and expense of doing so was difficult to predict. It also argued that 'NR is unlikely to have knowledge required to understand whether a possession plan they are proposing is a material change to an operator's business or amounts to a 'Network Change.' It also suggested that there would be a tendency to circularity in administering the Part G and Part D processes and that to run the two processes in tandem would create *'a tendency for Network Rail planners to avoid innovation...so as not to risk the creation of a Network Change.'* NR was of the view that it would be necessary for NR to begin a timetabling process in advance of the Part D timescale to permit any necessary Part G change process to be conducted.

FSR's submissions

17. FSR argues that in the present case, NR's attempt to implement the change without issuing a notice appears to be an attempt by NR to benefit from its own breach of contract, and amounts to a breach of both Condition G.1.1(a), which requires a notice to be issued and Condition G10.3.1, which refers to implementation of a proposed network change once the process is complete and does not refer to a notice being issued. FSR argues that this means that no 'Network Change' as defined should be implemented until the Part G process is complete, regardless of whether or not a notice is issued.

18. FSR therefore argues that NR is in breach of contract and that application of the Decision Criteria to Rules of the Route which are themselves prepared in breach of contract is not meaningful. Therefore, those Rules of the Route should not be able to take effect even if they apply with the Decision Criteria.

Condition D2.1.9

NR's submissions

19. NR placed reliance on Condition D5.1.1 in support of its interpretation that the right referred to in Condition D2.1.9 was intended to apply when a decision was appealed to ORR as well as when an appeal was brought to the ADRR Panel. It pointed to the fact that Condition D2.1.7 states that referral to the ADRR Panel is made under Condition D5 and that D5 permits appeals to ORR.

20. NR also referred to the fact that the referral to the Panel is terms an 'appeal' from NR's 'decision.' The Panel's determination is then referred to in Condition D5.1.2 as a 'decision' which is referred to ORR for 'determination.' In NR's view, the repetition of the terms suggested that the draftsman's intention was to include appeal to the ORR in the determination process to which the condition applied.

21. Finally, NR argued that there was no logical reason why the condition should apply to one type of appeal and not the other when there is no difference between the two situations.

FSR's submissions

22. FSR argues that Condition D2.1.9 refers to (amongst others) Condition D2.1.7 which refers to references to the ADRR Panel. However, appeals to

ORR are governed by clause D5.2, which is not referred to in D2.1.9. On that basis, Condition D2.1.9 does not apply to appeals to ORR.

23. FSR also argues that such an interpretation is sensible. It makes sense for the clause to apply while the decision is referred to the ADRR Panel as during this period, NR's decision takes effect, subject to a challenge to overturn it. However, once the TTP judgment is given, this should take effect and NR should implement the decision if the TTP finds against it. Not to do so would be to assume that the relevant TTP is wrong. Further, it cannot be certain that any appeal will be brought to ORR.

24. Both parties accepted in final submissions that Condition D2.1.9 could only apply to appeals brought pursuant to Part D.