



OFFICE OF RAIL REGULATION

ORR'S REASONS FOR ITS DIRECTIONS DATED 15 JULY 2010 GIVING EFFECT TO ITS DETERMINATION OF THE APPEALS AGAINST ADP40 AND TTP317

1. ORR has considered the correspondence from FSR's legal representatives, Burges Salmon, dated 19th, 20th and 26th May and from NR's legal representatives, Kennedys, dated 26th May, concerning the appropriate directions to be issued by ORR in order to give effect to its Determination dated 12 May 2010. On 24th June, ORR sent the parties a copy of the directions it was minded to issue ("the minded to directions"), accompanied by its reasons. It sought the parties' comments on the minded to directions and received comments from Kennedys in letters dated 6th and 9th July and from Burges Salmon in a letter dated 7th July 2010.
2. ORR has considered all the further comments from the parties before making the final version of the directions, which accompany this reasons document. The parties made no representations on the majority of the minded to directions or ORR's reasons. Therefore, much of the final directions and the explanation below replicates what was contained in the earlier documents. However, ORR has addressed the various minor issues raised in the latest comments from the parties. In particular, in response to the parties' comments, paragraph 6 of the directions now provides that the parties may refer any issue or dispute arising out of the interpretation or implementation of these directions back to ORR.
3. The parties agreed in their correspondence concerning the appropriate directions to be made that no changes to the current Rules of the Route were to be made in the current timetable period. They also agreed, in the

course of the appeal proceedings, that the outcome of any Part G process in relation to this Network Change would need to be incorporated into relevant Rules of the Route for future years and reflected appropriately in the relevant timetable. The parties' agreement on these issues is reflected in paragraphs 3 and 4 of the accompanying directions.

4. While the parties were in agreement that a Part G Notice needed to be issued, they could not agree between themselves as to the form of wording to reflect this or as to the version of Part G which should govern the process, with consequences for the measure of compensation, if any, to be awarded and the period for which it should be awarded.
5. FSR considered that the Part G process was to be conducted, and its effects backdated as necessary, as if it had been conducted prior to the Network Change being established. Accordingly, the Part G rules in place at the date of Network Change would apply.
6. NR stated that FSR'S claim was in respect of the possessions included in the Rules of the Route for 2010. It did not consider that FSR was entitled to make any claim for compensation in respect of possessions included in the Rules of the Route for 2009, since it had not done so in these proceedings and it stated that FSR had already been compensated in full by virtue of Schedule 4 compensation, for the period governed by the Rules of the Route for 2010.
7. In its letter dated 7 July 2010, FSR set out its understanding of the process to which the directions are intended to give rise, which included comments referring to the definition of the Network Change in question. ORR emphasises that the Network Change to which the Part G process is to relate is the Network Change as defined in the Determination.
8. ORR also determined, at paragraph 67 of its Determination, that this Network Change had '*started when the plan to continue to take the possessions (after the completion of the WCML project) came into effect.*'

As is noted in the same paragraph of the Determination, the argument before ORR, based as it was (and had also been before the ADP) only on the possessions which were to take place from May 2010, *'focused on whether or not any change was 'likely to last' more than six months.'* ORR found that *'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'*. It also added that it *'notes that, on its analysis of the application of the limb of the definition, the period of change has already lasted for six months.'*

9. The WCML project was not completed until December 2008. After December 2008 maintenance on the WCML was planned in accordance with the Efficient Engineering Access (EEA) strategy which encompassed not just the change which was the subject of these appeals, namely the change from single to double line block closures, but a wide range of changes. At the oral hearing of these appeals, the parties indicated that they did not consider the adoption of EEA itself constituted the relevant Network Change for the purposes of this appeal, focusing instead on the narrower change from single to double line blocks.¹ The Network Rail CP4 Delivery Plan, Network Availability - Implementation Plan version 2 published by NR on 31 March 2010 states "The December 2008 timetable saw the introduction of *7 Day Railway* principles (in the form of EEA) to the south end of the West Coast Main Line. The December 2009 timetable saw the introduction of *7 Day Railway* principles to the northern end of the West Coast Mainline". Therefore, the move from single to double line blocks between Preston and Carlisle in accordance with EEA took effect from the end of 2009 and the first year in which the relevant possessions occurred was, therefore, 2010.² While double line blocks were taken in 2009, no evidence was put to ORR to suggest that this was part of the implementation of EEA and this is consistent with the factual summary at paragraph 10 of the Determination of the Access Disputes Panel in ADP40.

¹ Transcript of oral hearing, p.15 line 32 to p.16, line 28; p.36, lines 17-28.

² <http://www.networkrail.co.uk/browse%20documents/strategicbusinessplan/delivery%20plan/2010/network%20availability%20implementation%20plan%20march%202010.pdf> p.27.

10. Consequently, it is the possessions which are taking place in the 2010 Timetable Period (and any future possessions) which would have been the subject of a Part G Notice, had it been issued at the appropriate time. Further, FSR's own evidence to the Timetabling Panel at the hearing of TTP317 on 17 December 2009 indicated that it was the possessions to take place in 2010 with which its appeal was concerned³.
11. It is necessarily artificial to attempt now precisely to identify the date when the implementation of the change in pattern of possessions for 2010 took place in accordance with paragraph 67 of the Determination. ORR considers the best and most appropriate approximation to be the date of the Preliminary Proposal of the Rules of the Route for 2010 ie. 14 November 2008. ORR, therefore, considers that, for present purposes, this should be treated as the date upon which the Part G process would have started. Had NR recognised the change from single to double line blocks to be a Network Change at the time, it should have instigated the process sooner, so as to have completed it before it proposed the Rules of the Route. However, since it did not, it is not sensible now to speculate as to when this earlier date might have been.
12. ORR considered simply directing the parties to implement the Part G process on the basis set out above and to agree themselves the basis upon which any compensation should be paid. However, given the inherent difficulty in running a process in retrospect and in the light of the parties' failure to agree the terms of their proposed directions relating to compensation, ORR has decided to direct the parties as to the basis upon which any compensation should be paid by NR.
13. Any compensation which is due to FSR as a result of the implementation of the Network Change will flow from the Part G process, which is to be treated as having commenced on 14 November 2008. However, it is also

³ Record of Hearing of TTP317, 17 December 2009, p.5, q6 from Panel.

necessary to bear in mind the terms of the Track Access Agreement by which the parties were bound at that time. At the time the Part G process should have taken place, FSR was in negotiations with NR concerning an extension to its Track Access Agreement, which was due to expire on 13 December 2009. The agreement was extended on 30 January 2009 to run until 13 December 2010. It was not until 28 August 2009 that it was extended to run until December 2015.

14. ORR recognises that, as at 14 November 2008, FSR's Track Access Agreement was due to expire on 13 December 2009. However, given the advanced state of the parties' negotiations concerning an extension to the agreement, which were concluded shortly afterwards, ORR directs that compensation for the year 2010 be paid by NR, as it would have been as part of the Part G process commencing on 14 November 2008. Further, compensation for possessions taken under the Rules of the Route for 2010 should be payable in accordance with the provisions of Part G of the Network Code which were in force at the time the process should have taken place (ie. as at 14 November 2008).

15. However, ORR does not accept, given the uncertainty as to the ultimate terms and duration of any extended agreement at that stage, and the fact that the agreement was initially only extended until 13 December 2010, that compensation for future years should be paid on the basis of the provisions of Part G of the Code then in force.

16. Therefore, ORR directs that the Part G Notice be issued under the current provisions of Part G of the Network Code. This will allow the full consultation process to take effect for future years and any applicable compensation for future years will also be governed by the current provisions. However, for the purposes only of calculating compensation for the possessions governed by the Rules of the Route for 2010, the Part G Notice shall be treated as having been issued on 14 November 2008 under the version of the Code then in force.

17. It should be clear from the explanation above that ORR does not consider it accurate to treat the Network Change, which is the subject of the consultation process, as due to take place on 13 December 2010, as FSR appears to suggest in its letter dated 7 July. As explained at paragraphs 8 to 11 above, the approximate date of the Network Change as defined in the Determination is 14 November 2008. However, it should be made clear in the Notice that the consultation process applies only to the implementation of the Network Change in future Timetable Periods and that any compensation for implementation during those periods will be governed by the current Part G provisions.
18. NR raised concerns as to whether it will be possible to complete the Part G process before the timetable for the Timetable Period commencing at 02.00 on Sunday 12 December 2010 is finalised. ORR has issued its final directions on the basis that it will be completed within that time frame. However, if it is not, the parties may refer the matter back to ORR for further directions, as suggested by NR in its letter dated 9 July 2010.
19. FSR also sought directions that NR update all relevant internal guidance and processes and provide such documents to ORR and FSR to confirm the changes made.
20. ORR has not made such directions because it is not a necessary part of determining this appeal. It is NR's responsibility to ensure that the effects of this Determination are fully implemented and reflected in its documents and procedures. If it does not do so, it risks facing further appeals by train operators on such issues. Further, there are other regulatory routes an operator can use if it is concerned that NR's procedures do not reflect the Determination.
21. Finally, FSR sought a direction that NR should pay its costs incurred in these consolidated appeals. NR resisted the making of such a direction.

22. ORR has a discretion, pursuant to Condition M7(d) of the Network Code, to *'make such order as it shall think fit in relation to the proportions of the costs of the proceedings in question...which shall be borne by each party'*. ORR's discretion to order that one party should pay any or all of the other party's costs is not one which is exercised in the same way as the courts' discretion. Costs in appeals to ORR are not routinely awarded against the losing party because the basis of ORR's appeal jurisdiction is to enable matters of general regulatory interest to be determined, rather than simply to determine disputes between private parties. ORR has decided not to award costs in this case.

23. The very fact that ORR decided to hear the appeals indicates that none of the grounds referred to in Condition M4.1 were applicable and that the appeals concerned matters of sufficient relevance to the industry and were of sufficient merit not to be considered frivolous or vexatious. The issues raised in these consolidated appeals were, in fact, finely balanced and required careful consideration. ORR does not consider it appropriate for NR to pay FSR's costs of these appeals, simply because the issue of 'Network Change' was ultimately decided in FSR's favour and ORR's construction of Condition D2.1.9 accorded with FSR's general understanding of the clause. Furthermore, it does not consider NR's conduct in these appeals to have been in any way improper such as to have materially increased the costs incurred by FSR or to warrant censure in the form of an adverse costs order. Therefore, each party shall bear their own costs of these appeals.