



OFFICE OF RAIL REGULATION



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

**Appeal made by
Network Rail
Infrastructure Limited
pursuant to Part M of
the Network Code
against a Determination
of the Timetabling
Panel of the Access
Disputes Committee
dated 8 December 2014**

11 June 2015

Contents



Introduction	3
Summary	3
Network Code	3
Background	4
Disputes TTP570 and TTP571	4
The Determination	8
The appeal	9
ORR's consideration of the Appeal	13
Appeal on the grounds that the Determination is wrong	13
Appeal on the grounds that the Determination is unjust	14
ORR's Conclusions	17

Introduction

Summary

1. This Determination by the Office of Rail Regulation concerns an appeal made by Network Rail Infrastructure Limited (the “Appellant”) pursuant to Part M of the Network Code against a Determination of the Timetabling Panel of the Access Disputes Committee dated 8 December 2014 (the Determination).
2. The matters subject to appeal concern whether the Determination was either wrong or unjust in its finding that a Timetable Planning Rule (TPR) change related solely to a Network Change should not be put into effect before the associated Network Change has been implemented.

Network Code

3. The Network Code¹ is a set of rules which is incorporated into, and forms part of, each access contract between Network Rail and holders of rights of access to the track owned and operated by Network Rail.
4. Part M provides the process by which a party dissatisfied with either a decision of a Timetabling Panel in relation to a dispute arising under Part D, or a decision reached by Access Dispute Adjudication in relation to a dispute arising under Part J, can appeal the matter to the Office of Rail Regulation (“ORR”) for determination.
5. This Determination concerns a dispute on whether there is, or should be, a link between Parts D and G of the Network Code.
6. Part D sets out the process for revision of the timetable for the Network, while Part G is concerned with the procedures which Access Parties must go through when certain types of change to the Network occur or are proposed.

¹ <http://www.networkrail.co.uk/browseDirectory.aspx?root=&dir=%5Cnetwork%20code>

Background

7. Between 30 July 2010 and 22 February 2013 Freightliner Ltd and Freightliner Heavy Haul Ltd (together, “Freightliner”) notified the Access Disputes Committee of a series of disputes with Network Rail, against decisions made under Part D of the Network Code. These disputes were registered with the Secretary of the Access Disputes Committee as TTP371, TTP513, TTP514, TTP570 and TTP571. Following correspondence between Freightliner and Network Rail (together, the “parties”) and the Hearing Chair of the Timetabling Panel of the Access Disputes Committee (“the Hearing Chair”), the Hearing Chair ordered on 17 April 2013 that these disputes be heard together².
8. By 5 December 2014 the parties had resolved, on a bi-lateral basis (with prompting from the Hearing Chair), all of the issues that were contained within the five disputes. During that process, the Hearing Chair had set out his view that a TPR change related solely to a Network Change should not be put into effect before the associated Network Change has been implemented. On 8 December 2014 the Hearing Chair issued his Determination in respect of the disputes, noting that all of the original issues had been resolved, but making a determination in respect of two points, one of which is relevant to this appeal and which was stated as being with the agreement of the parties and for the benefit of the industry more generally.
9. The relevant part of the Determination related to items 17 and 21 of disputes TTP570 and TTP571. It set out that:

“5.1 a Timetable Planning Rule change related solely to a Network Change should not be put into effect before the associated Network Change is implemented.”³
10. It is this part of the Determination, paragraph 5.1, that has been appealed to ORR under the appeal mechanism contained in Part M of the Network Code.

Disputes TTP570 and TTP571

11. The Appeal asked for ORR to overturn paragraph 5.1 of the Determination, which related only to Disputes TTP570 and TTP571. ORR’s consideration is therefore limited to the relevant part of these two disputes.

² Network Rail’s Notice of Appeal under Part M of the Network Code, 16 January 2015, Paragraph 3.2

³ Determination of the Timetabling Panel of the Access Disputes Committee, 8 December 2014, Paragraph 5.1

12. On 22 February 2013 Freightliner notified disputes with Network Rail in relation to Network Rail's decisions regarding Version 2 of the TPRs applicable to the New Working Timetable publication for 2014. The disputes were brought under Condition D2.2.8 of the Network Code as applicable at that time. In its consideration of the Parties' submissions, the Panel stated that it was mindful that, as provided for in Access Dispute Resolution A5, it should "reach its decision on the basis of the legal entitlements of the Dispute Parties and upon no other basis"⁴.
13. Disputes TTP570 and TTP571 related to the Paisley Canal line in Scotland and the proposed TPRs to be put in place by Network Rail following the introduction of a non-standard electrification scheme.
14. The electrification constituted a Network Change under Part G of the Network Code, and included the use of reduced clearance electrification. The Appellant has advised ORR that reduced clearance electrification is cheaper than installing normal height electrification as it avoids the need to raise bridges or lower tracks under structures. In this case, there were four instances proposed where overhead line equipment would be replaced by an insulated wire under structures as the clearances were too limited to allow live equipment, which could short circuit when a train passed.
15. An effect of using a reduced height wire system in this case would be that diesel locomotive-hauled trains would be unable to operate through relevant sections of the route with the electrification live. This is because diesel locomotives are taller than electric trains, with the top of the locomotive close to the contact wire. This could allow the electric current to arc across the gap between the wire and the locomotive and cause a short circuit between the wire and the track. To resolve this, the electricity would have to be turned off for diesel trains to run through the reduced height wire sections.
16. Network Rail also proposed a change to the TPRs under Part D of the Network Code, on the basis that the electrification scheme would require adjustment to the working timetable, and to cater for the working of diesel locomotive-hauled trains.
17. Items 17 and 21 of TTP570 and TTP571 related to a point of principle which Freightliner regarded as arising solely because of a proposed amendment to the TPRs which would be the consequence of a Network Change which had not yet (at that time) been agreed (i.e. had not been established under the terms of Part G of the Network Code). Network Change had not been established because of a complaint that Network Rail had not addressed possible operation of trains other than

⁴ Determination of the Timetabling Panel of the Access Disputes Committee, 8 December 2014, Paragraph 1.8

the electric multiple units which were operated by the local franchised passenger operator.

18. Freightliner's position here was that Network Rail had proposed changes to the TPRs only because of the Network Change on the Paisley Canal Line and that they were not necessitated for any other reason. In its Sole Reference document, Freightliner asked the Panel to rule that:

*"changes pertaining to a Network Change should not be included in TPRs until that Network Change has been established (as defined by Part G10), or, are at least unenforceable until establishment and that fact should be referenced against the TPR entry."*⁵

19. Following discussions between the parties, Network Rail wrote to the Hearing Chair on 23 May 2013 and confirmed that items 17 and 21 from the Dispute "[...] arise solely from the Network Change process and that this Network Change is still under discussion."⁶ In the same letter, Network Rail asked the Hearing Chair to note that it had agreed to remove the disputed notes from the TPRs and that "This position has been agreed with Freightliner".

20. Network Rail referred to Items 17 and 21 in its Sole Reference document, submitted to the Panel on 7 June 2013. That document stated:

*"Network Rail has reached agreement with Freightliner to remove Items 17 and 21 from the dispute. We accept that changes arising from a Network Change should not be included in the TPRs until that Network Change has been established. Therefore we don't believe that this element of Freightliner's reference needs to be addressed by the panel."*⁷

21. Both of the parties noted in the covering letters to their Sole Reference documents that they were continuing to work with each other on the remaining items that were in dispute, with the aim of avoiding a need for a dispute hearing.

22. Against that background, of the remaining issues being resolved bi-laterally, the Hearing Chair wrote to the parties on 10 June 2013⁸. In that communication, the Hearing Chair raised two points for consideration before the disputes could be regarded as finalised. One point was relevant to this Appeal:

⁵ Freightliner's Sole Reference document, 10 May 2013, Page 2, paragraph 6

⁶ Letter from David Jackson of Network Rail to the Hearing Chair, dated 23 May 2013

⁷ Network Rail's Sole Reference document, 7 June 2013, page 2, paragraph 2.1

⁸ Document titled "Text of a message to be sent to the Parties and Panel Members in disputes TTP371, 513, 514, 570, and 570", provided to ORR as supporting evidence to the Appeal

“3. In Network Rail’s Sole Reference Document, NR accepts the proposition made by FL that changes in Timetable Planning Rules (‘TPRs’) resulting from Network Change should not be introduced until the Network Change itself is implemented. The Hearing Chair concurs with this view, while recognising that there may be merit in suitable cases in advising operators of such changes in TPRs in advance, so that they can become effective immediately following the implementation of the related Network Change.

4. As far as the Hearing Chair is aware, there is no determination of a Panel on this point to provide a precedent for the industry”⁹

23. In his communication, the Hearing Chair identified that he concurred with what he thought was the parties’ agreed position “that changes in Timetable Planning Rules resulting from Network Change should not be introduced until the Network Change itself is implemented” (ORR’s emphasis), and expressly asked the parties whether they thought a precedent determination on this point would assist the industry.

24. On the procedural points, the Hearing Chair acknowledged that such a question would normally be discussed at an oral hearing (which would be required to decide other issues still in dispute) and that including it in such an oral hearing would then allow the Hearing Chair to include it within his determination. However, if no oral hearing was needed on any other points (i.e. if the points of dispute were resolved between the parties, no hearing would therefore need to be held), he considered it would still be within his powers to record this agreed position and make a determination on the same without holding such an oral hearing (and he expressly noted that such decision on whether to hold a hearing or not would still not be taken without first consulting industry advisors).

25. That text was provided to the parties on 10 June 2013 prior to the directions being published on 24 June 2013, and it is apparent from subsequent correspondence (though ORR has not been provided with the actual responses) that both parties wrote to the Hearing Chair accepting that the suggested determination point would assist industry.

26. In the directions letter dated 24 June 2013, the Hearing Chair noted that the parties had agreed that it would assist the industry if this agreed point (as above) were to be recorded in a Determination, to provide an authority for the industry. In the same letter, the Hearing Chair directed:

“That any Resolution Service Party which is not an Involved Party which wishes to make any representations on the proposal that a Determination may be reached without an oral hearing recording a decision by the Panel that TPR changes which arise from a proposed

⁹ Document titled “Text of a message to be sent to the Parties and Panel Members in disputes TP371, 513, 514, 570 and 571”, submitted as part of the Appeal.

Network Change should not be implemented before the associated Network Change, shall advise the Committee Secretary and the Dispute Parties of its representations by 12 July 2013. If such representations are made, further Directions may be required to indicate how these representations will be considered by the Timetabling Panel.”

27. The Directions letter of 24 June 2013 was published on the Access Disputes committee website and circulated by email to Resolution Service Parties. ORR understands that three Resolution Service Parties responded “with no dissent expressed”¹⁰. ORR has not seen these responses and relies on the information provided within the Appeal.

The Determination

28. The dispute process then continued until 8 December 2014, when the Determination was made. In his Determination the Hearing Chair noted that Freightliner had reported to him (on 5 December 2014) that all of the other issues from the Dispute had been resolved.

29. Notwithstanding the agreements that had been reached, the Hearing Chair determined that:

“5 Determination

*Having considered carefully the submission and notwithstanding agreement reached between the Dispute Parties, and based on my own analysis of the legal and contractual issues, I **DETERMINE** that:*

*5.1 a Timetable Planning Rule change related solely to Network Change should not be put into effect before the associated Network Change is implemented; [...]*¹¹

¹⁰ Network Rail’s Notice of Appeal under Part M of the Network Code, 16 January 2015, Paragraph 3.13

¹¹ Determination of the Timetabling Panel of the Access Disputes Committee, 8 December 2014, Paragraph 5.1

The appeal

30. On 12 December 2014 Network Rail gave notice that it wished to challenge the decision of the Timetabling Panel of the Access Disputes Committee, dated 8 December 2014, under Part M of the Network Code. At that time, Network Rail requested an extension to the timescales (as set out in 2.1.1 (b) (i) of Part M of the Network code) for submission of its complete appeal. This was in view of the Christmas period and in order to formulate and serve further more detailed grounds of appeal.
31. ORR considered that it would be appropriate to allow an extension and agreed that the Notice of Appeal should be served on ORR by 16 January 2015.
32. On 16 January 2015 Network Rail served a valid Notice of Appeal under Part M of the Network Code in relation to Paragraph 5.1 of a determination of the Timetabling Panel of the Access Disputes Committee dated 8 December 2014 (“the Determination”) in respect of TTP 371, TTP513, TTP514, TTP 570 and TTP571.
33. Freightliner was provided with a copy of the Appeal by Network Rail, and was separately notified of the Appeal in a letter from ORR on 21 January 2015. ORR’s letter set out that, in accordance with paragraph 5 of Part M, Freightliner had 10 working days in which to serve a notice on the Appellant and ORR stating that it opposed the Appeal and, insofar as reasonably practicable, attaching any evidence on which it wished to rely. No response was received to either communication.
34. ORR continued to seek assurance that Freightliner had received and considered ORR’s letter of 21 January, and found that due to an administrative error, the email had been sent to an incorrect email address and had not been delivered. On 16 February 2015 Freightliner confirmed that it had now received all relevant documentation and did not wish to oppose the Appeal, nor make any representations.
35. The Appellant has asked that paragraph 5.1 of the Determination is overturned on one or more of the following grounds:
 - “paragraph 5.1 is wrong as it establishes an express link between the TPR changes under Part D of the Code and Network Changes under Part G of the Network Code [...].”
 - “paragraph 5.1 is based on an agreement between the dispute parties which did not reflect the actual agreement of the dispute parties, the Dispute Parties agreeing to adopt the term “established” rather than “implemented”
 - “paragraph 5.1 is unjust because of serious procedural irregularity [...].”

36. The extracts from Network Rail’s appeal document set out below provide the detail of these grounds:

■ **Parts D and G of the Network Code are distinct and operate separately and should not be linked**

“4.2. Parts D and G of the Network Code operate as contractually separate parts of the Network Code. For instance, they provide for different processes; Part D sets out the process for revision of the timetable for the Network whereas Part G outlines the consultation and compensation process for “Network Changes” which, although broadly defined, generally relate to either physical or operational changes which may have a material effect on the operation of the Network or trains operated on the Network.”¹²

[...]

“4.10. Given the clear distinctions between Part D and Part G of the Network Code, the link which the Determination provides is wrong to the extent that it has created an inappropriate contractual link between two parts of the Network Code. The two parts operate and apply to two separate and distinct processes. Indeed, there is only one instance in Part D where reference is made to Part G, in Condition D6.6.1, and that in itself preserves the separation of the two parts.”¹³

■ **The Term “implementation” was not used by the parties and was adopted in error by the Hearing Chair**

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

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

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

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

And “establish” and “establishment” of a Network Change shall be construed accordingly.”

¹² Network Rail’s Notice of Appeal under Part M of the Network Code, 16 January 2015, paragraph 4.2

¹³ Network Rail’s Notice of Appeal under Part M of the Network Code, 16 January 2015, Paragraph 4.10

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

4.18. *Part G does not provide a specific definition of “implement”, although the term is used throughout Part G. The Oxford English Dictionary defines “implement” as “To complete, perform, carry into effect (a contract, agreement, etc); to fulfil (an engagement or promise)...*

[...]

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

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

4.22 *The Hearing Chair’s use of “implement” rather than “establish” thus did not correctly reflect the terms of use by the parties. The Determination is therefore wrong for that reason. This also leads to further practical operational difficulties.”¹⁴*

- **There are significant practical implications for using “implement” and “implementation” rather than establish, which was not intended by the appellant**

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

4.25. *There is practical uncertainty. Where, for example the Network Change is established and planned for implementation for the start date of 15 December , even*

¹⁴ Network Rail’s Notice of Appeal under Part M of the Network Code, 16 January 2015, Paragraphs 4.16 – 4.22

though the Network Change has not been implemented due to the lag time in the development of the timetable, is the Appellant able to use the new TPRs? While a Network Change is being implemented, is the Appellant able to change and plan on new TPR values to match the planned implementation date for the Network Change?

4.26. Moreover, what happens if a Network Change is not implemented as established? It is foreseeable that projects may change and as such its plan is re-dated. How might this impact of the timetable written? How also might this affect rapid timetable changes?”¹⁵

■ **The determination is unjust due to procedural irregularities: jurisdiction and failure to give reasons**

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

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

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

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

[4.30 – 4.34]

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

4.36. In the circumstances, there has been a serious procedural irregularity in relation to paragraph 5.1 of the Determination and, as such, it would be unjust to uphold it.”¹⁶

¹⁵ Network Rail’s Notice of Appeal under Part M of the Network Code, 16 January 2015, Paragraphs 4.24 – 4.26

¹⁶ Network Rail’s Notice of Appeal under Part M of the Network Code, 16 January 2015, Paragraphs 4.27 – 4.36

ORR's consideration of the Appeal

37. ORR has considered the issues involved in this Appeal and whether the case has been proven that the Determination is either wrong or unjust because of a serious procedural or other irregularity. ORR's consideration on the main points of the Appeal is set out below.

Appeal on the grounds that the Determination is wrong

38. The evidence provided in the Appeal demonstrates that, during the disputes process, the parties did agree that a Determination would be useful to the industry. ORR notes that, when providing their support for such a Determination, the parties referred to it being on the basis of the word "establish" rather than "implement".

39. However, ORR also notes that a draft of the Determination, using "implemented" was provided to the parties for comment on two occasions (see above), and there was an opportunity for them to correct the error on 10 and 24 June 2013. ORR has been told that no dissenting representations were made to the Hearing Chair at either of these opportunities.

40. ORR has considered the effects of the Determination as drafted, and ORR is concerned that the resultant interaction between Parts D and G would be inflexible. ORR considers some examples of these effects are (and these are in line with the examples provided by Network Rail in its Appeal):

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

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

42. ORR has considered whether it should amend paragraph 5.1 to reflect the agreement that was reached between the parties on this point (i.e. to use "establish" rather than "implement"). The following factors have been relevant to that consideration:

- To amend the Determination in this way (so that it reads "establish" rather than "implement") would, as is stated in the Appeal, maintain a link between Parts D

and G of the Network Code that was not previously expressly stated in the Network Code. ORR would need to give a full and detailed consideration to the impact of such a link and ensure that it was desirable in all of its potential consequences. This would be a significant piece of work for ORR and the industry.

- Paragraph 5.1, or a revised version of it, would impact on all operators. As such, ORR would need to conduct an industry consultation in order to enable the consideration referred to, above.
- The Network Code contains a change mechanism that is designed to consider this type of issue and would allow all relevant parties an opportunity to influence the outcome. It remains open to the industry to utilise the change process set out in the Network Code to put in place a link between Parts D and G if it considers it appropriate for specific circumstances and after due industry process.
- Although the parties can be demonstrated to have reached an agreement on the desirability of such a Determination during the dispute process, the Appellant's appeal was to "overturn" paragraph 5.1, rather than amend it.

43. ORR considers that in light of the above factors it would not be appropriate for ORR to amend paragraph 5.1. ORR determines that the express link as set out in paragraph 5.1 of the Determination should be overturned.

Appeal on the grounds that the Determination is unjust

44. In addition to the grounds which ORR has discussed and determined above (which are based on whether it is appropriate, in fact, to create a link between Parts D and G), Network Rail further contends that paragraph 5.1 of the Determination should be removed for the three reasons set out in paragraphs 2.2.7 and 2.2.8 of its submission:

- that the agreement between the parties on which paragraph 5.1 is based, used the word "established" rather than "implemented" so that the Determination does not record the agreed position; and,
- that there were procedural irregularities on the part of the Hearing Chair which renders the determination unjust, namely:
 - that the Hearing Chair acted *ultra vires* in making a link to Part G, so that the dispute goes beyond Part D issues; and,

- that the Hearing Chair failed to follow rule H51 in that he failed to record his decisions and conclusions in relation to paragraph 5.1, and did not distinguish between those decisions upon legal entitlement, remedy or guidance.
- 45. Given the decision ORR has already reached, ORR does not consider it is necessary or an appropriate use of resources to consider these procedural and *vires* complaints in detail. However, ORR briefly sets out below particular points it wishes to identify, given that these procedural complaints which Network Rail makes do not appear to reflect the significant role played by the parties themselves in the wording of the Hearing Chair's determination. In particular, ORR notes the parties' express agreement to the suggestion by the Hearing Chair that a determination on this point might be of assistance to the industry, and the fact that he set out the exact wording he proposed to use, and described the procedure he intended to follow, for the whole purpose of ensuring that both parties consented to what he was proposing to do. Given these circumstances, it does not appear to ORR to be an appropriate argument for Network Rail now to criticise the Hearing Chair on these procedural grounds.
- 46. The Hearing Chair did not include this part of his determination without considerable engagement with the parties – he identified that the possibility existed of addressing a concern the parties themselves identified (i.e. no precedent on Parts D and G interaction), and asked for the parties' submissions on the same, and then consulted on the wording he proposed to adopt. Just as at no point did either party raise an objection that the result would be at odds with how Parts D and G should interact (i.e. that as a matter of fact there should be no express link), neither did either party raise objections on procedural grounds, despite there being several opportunities to do so.
- 47. In his 24 June 2013 directions, the Hearing Chair set out directions and identified his thinking¹⁷ that it was not worthwhile holding an oral hearing on an agreed point; he identified that the standard rules require an oral hearing before making a determination on a point, so proposed to use his powers under rule H.20 to amend the procedure, to allow Resolution Service Parties to make representations on the proposal to record the link (i.e. incorporate that decision) without an oral hearing. ORR is told by Network Rail that there were three responses, and no dissensions.
- 48. Network Rail complains¹⁸ that the Hearing Chair concentrated on explaining the procedure allowing him to include the decision, rather than consideration of the substance of paragraph 5.1. But that criticism ignores the substance of paragraph

¹⁷ Directions letter from Access Disputes Committee to the Parties, Dated 24 June 2013

¹⁸ Network Rail's Notice of Appeal under Part M of the Network Code, 16 January 2015, Paragraph 4.35

5.1 itself – namely, it records an agreement reached by the parties, which they further agreed should be recorded in the determination (by way of consent to the Hearing Chair’s direct question) in order to provide future assistance to the industry. Network Rail states¹⁹ that this procedural irregularity is so serious as to make it unjust to uphold 5.1, but the two parties themselves played a substantial role in agreeing the concept, the process and the final wording.

49. As stated above, ORR allows the appeal and strikes out the relevant paragraph for the reasons given, above. ORR wishes to make the point, however, that it expects the parties to be fully engaged in and give careful consideration to what they agree in such ADRR processes. This particular appeal could have been avoided if the parties had done so. ORR would not wish to encourage appeals challenging the substance or process of determinations where the parties have themselves agreed the matters in front of the ADRR which they subsequently wish to overturn on appeal.

¹⁹ Network Rail’s Notice of Appeal under Part M of the Network Code, 16 January 2015, Paragraph 4.36

ORR's Conclusions

50. ORR determines that that Paragraph 5.1 of Determination of the Timetabling Panel of the Access Disputes Committee dated 8 December 2014 shall be struck out.

A handwritten signature in black ink that reads "Juliet Lazarus". The signature is written in a cursive style with a clear, legible font.

Juliet Lazarus

Director of Legal Services

Duly authorised by the Office of Rail Regulation

11 June 2015