

**THE OFFICE OF RAIL REGULATION'S ("ORR") DETERMINATION OF THE APPEAL BY NETWORK RAIL INFRASTRUCTURE LIMITED ("NR") AGAINST DETERMINATION "ADP31" OF THE ACCESS DISPUTES PANEL IN RESPECT OF A JOINT REFERENCE BROUGHT BY NR AND FIRST GREATER WESTERN LIMITED ("FGW") REGARDING VEHICLE CHANGE IN THE EXETER AREA**

***DETERMINATION:*** ORR determines the appeal in the manner set out in paragraph 61 below.

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## **I Introduction**

1. This is the determination by ORR of the appeal brought by NR on 10 April 2008 (“the Appeal”). The Notice of Appeal challenges the Access Disputes Panel’s (“the Panel’s”) determination in reference ADP31 published on 27 February 2008 (“the Determination”).
2. The Determination arose out of a joint reference made by NR and FGW on 10 January 2008 (“the Joint Reference”). The subject-matter of the reference was whether NR was entitled to compensation for the consequences of implementing a Vehicle Change proposed by FGW under Part F of the Network Code (“the Code”). NR maintained that it was entitled to compensation and FGW argued that NR was already funded for these costs.

## **II Facts**

3. In the course of 2007, FGW came to appreciate that it would have insufficient rolling stock to discharge its franchise responsibilities unless it introduced a fleet of Class 142 2-car DMUs (“Class 142s”) on routes in the Exeter area. No change of frequency was proposed. The Class 142s were to replace the then-operating Class 150 and 153 DMUs. Class 142s differ from Class 150 and 153s since they have a two axle structure, are not fitted with conventional bogies and have a longer wheelbase. These characteristics have a significant effect on the curving behaviour of Class 142s. Class 142s are cleared for the relevant routes without restriction in the Sectional Appendix (see para 15 below).
4. In accordance with Condition F2.1(a), FGW submitted a notice of its proposed Vehicle Change on 5 September 2007 (“the Proposal”). It is accepted that FGW complied with the requirements of Conditions F2.1 and F2.2 in making the Proposal. In response to the Proposal, NR

issued a Vehicle Change Notice on 21 September 2007 in accordance with Conditions F2.3.1(b) and (c). On 22 October 2007, NR gave FGW its preliminary response to the Proposal in accordance with Condition F2.4. On 22 November 2007, the period for consultation expired. It is accepted that there were no objections to the Proposal from other Train Operators.

5. On 22 November 2007, NR provided its formal response to the Proposal in accordance with Condition F3.1. In its response, NR indicated that it would accept the Proposal subject to FGW paying compensation for:

- (i) additional lubricator units; and
- (ii) additional track inspections.

NR also required FGW to be responsible for processing any complaints arising from the operation of the Class 142s.

6. The Class 142s began running in full passenger service from 9 December 2007.
7. NR and FGW were unable to reach agreement and, as stated above, the Joint Reference was made to the Panel on 10 January 2008.

### **III Relevant Provisions of the Code, the Track Access Contract, the NR Network Licence (“the Licence”) and other defined terms**

8. The relevant version of the Code for the purposes of this appeal is that issued on 17 October 2007<sup>1</sup> and provides:

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<sup>1</sup> The 17 October 2007 Network Code is available on Network Rail’s website at <http://www.networkrail.co.uk/browseDirectory.aspx?dir=\\Network%20Code\\Network%20Code%20and%20Incorporated%20documents\\Network%20Code%20and%20Access%20Dispute%20Resolution%20Rules%20Archive\\Network%20Code%20Archive&pageid=2889&root=>

## **Part A – General Provisions**

### **Condition A.1.2 - DEFINITIONS**

*In this code, unless the context otherwise requires:*

...

*“Network” means the network in respect of which Network Rail is the facility owner and which is situated in England, Wales and Scotland;*

...

## **Part F – Vehicle Change**

### **DEFINITIONS**

*In this Part F, unless the context otherwise requires:*

...

*“Specified Equipment” means, in respect of an Access Agreement, any railway vehicle the use of which is permitted on the track pursuant to that agreement;*

...

*“Vehicle Change” means, in respect of a Train Operator, any change to the Specified Equipment including by way of:*

- (a) alteration to the physical characteristics of the Specified Equipment;*
- (b) any increase in the length of any trains beyond that specified in the Access Agreement to which it is a party; or*
- (c) the inclusion in Specified Equipment of any railway vehicle which is not so included*

*which, in any case, is likely materially to affect the maintenance or operation of the Network or operation of trains on the Network, but excluding any authorized variation.*

...

## **CONDITION F3 – RESPONSE BY NETWORK RAIL TO VEHICLE CHANGE PROPOSAL**

### **3.1 *Obligation to give notice of response***

*Network Rail shall give notice to the Sponsor if:*

...

- (c) it considers that it should be entitled to compensation from the Sponsor for the consequences of the implementation of the change either*
  - (i) in accordance with the compensation terms proposed under Condition F2;*

...

### **3.2 *Amount of compensation***

*Subject to Condition F3.3, the amount of the compensation referred to in Condition F3.1 shall be an amount equal to the amount of the costs, direct losses and expenses (including loss of revenue) which can reasonably be expected to be incurred by Network Rail or the operator in question as a consequence of the implementation of the proposed change other than any such costs, losses or expenses which are attributable to the Sponsor improving its ability to compete with other operators of railway assets.*

### **3.3 *Benefits to be taken into account***

*There shall be taken into account in determining the amount of compensation referred to in Condition F3.1:*

- (a) *the benefit (if any) to be obtained or likely in the future to be obtained by Network Rail or any other operator of trains as a result of the proposed Vehicle Change; and*
- (b) *the ability or likely future ability of Network Rail or any other operator of trains to recoup any costs, losses and expenses from third parties including passengers and customers.*

9. The track access agreement relevant to this appeal is the Track Access Contract (Passenger Services) dated 8 December 2006 (as amended) between NR and FGW ("the TAC") and provides as follows:

**5.1 *Permission to use the Routes***

*Network Rail grants the Train Operator permission to use the Routes.*

**5.2 *Meaning***

*References in this contract to permission to use the Routes shall, except where the context otherwise requires, be construed to mean permission:*

- (a) *to use the track comprised in the Routes for the provision of the Services using the Specified Equipment;*

*...*

*And such permission is subject, in each case and in all respects to:*

- (i) *the Network Code;*
- (ii) *the Applicable Rules of the Route; and*
- (iii) *the Applicable Rules of the Plan.*

*...*

**5.6 *The Services and the Specified Equipment***

*Schedule 5 shall have effect.*

10. It is accepted that Table 5.1 in Schedule 5 to the TAC, which sets out Specified Equipment, did not include Class 142s in the relevant service group.
11. The TAC defines the relevant Control Period (that is, the time between periodic reviews) ("CP3") in Schedule 7 as:

*the period of five Relevant Years commencing on 1 April 2004 and ending on 31 March 2009*

12. Schedule 7 to the TAC also provides that the Variable Track Usage Charge ("VTU"):

*means a variable charge, calculated in accordance with paragraph 3 of Part 2.*

Paragraph 5.15 of ORR's Criteria and Procedures<sup>2</sup> sets out an explanation of the VTU. This states:

*The variable track usage charge is designed to enable Network Rail to recover the additional maintenance and renewal costs associated with additional traffic. It is calculated by multiplying the number of vehicle miles for each vehicle type by the usage charge rates for each type of rolling stock as set out in the track usage price list published by ORR. This charge is adjusted each year to take account of changes in the retail prices index (RPI). There is, however, no real price adjustment to usage charges during control period 3.*

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<sup>2</sup> The "Criteria and procedures for the approval of passenger track access contracts: fourth edition" dated May 2006 can be found on the ORR website at [http://www.rail-reg.gov.uk/upload/pdf/288-pass\\_candp4ed.pdf](http://www.rail-reg.gov.uk/upload/pdf/288-pass_candp4ed.pdf)

13. A periodic review ("Periodic Review") is not defined in the TAC or the Code but it is when ORR periodically reviews and amends track access charges that help fund NR to operate, maintain and renew the Network. The charges are reviewed at five yearly intervals in order to set them at levels enabling NR to efficiently and economically meet the reasonable requirements of its train operator customers under the terms of its network licence. The Periodic Review which began in November 2002 and resulted in any necessary revisions to charges having effect from April 2004 is called the Access Charges Review 2003 ("ACR03").
14. The Licence is the Network Licence granted to Network Rail Infrastructure Limited (formerly Railtrack PLC) by the Department of Transport on 31 March 1994.<sup>3</sup> The Licence provides (as relevant):

***Condition 7: Stewardship of the Licence Holder's Network***

***7.1 Purpose***

*The purpose is to secure—*

- (a) the operation and maintenance of the network;*
- (b) the renewal and replacement of the network; and*
- (c) the improvement, enhancement and development of the network,*

*in each case in accordance with best practice and in a timely, efficient and economical manner so as to satisfy the reasonable requirements of persons providing services relating to railways and funders in respect of:*

- (i) the quality and capability of the network; and*
- (ii) the facilitation of railway service performance in respect of services for the carriage of passengers and goods by railway operating on the network.*

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<sup>3</sup> The licence can be found on the web at [http://www.rail-reg.gov.uk/upload/pdf/netwrk\\_licence.pdf](http://www.rail-reg.gov.uk/upload/pdf/netwrk_licence.pdf).



## *7.2 General duty*

*The licence holder shall take such steps as are necessary or expedient so as to achieve the purpose to the greatest extent reasonably practicable having regard to all relevant circumstances including the ability of the licence holder to finance its licensed activities.*

...

### **Condition 24: Asset Register**

#### **Primary obligation**

*24.1 The licence holder shall establish and maintain a register of relevant assets in accordance with the provisions of this Condition 24.*

#### *Purpose of the asset register*

*24.2 The purpose of the asset register is to ensure that the licence holder holds, and has appropriate access to and records of, knowledge of the relevant assets, including knowledge of their condition, capability and capacity, in the manner and to the extent which best achieves:*

- (a) the maintenance of the network;*
- (b) the renewal and replacement of the network;*
- (c) the improvement, enhancement and development of the network; and*
- (d) the operation (including timetabling) of the network.*

15. The Sectional Appendix is described in NR's 2008 Network Statement (dated October 2006) in the following terms:

*A listing, according to line of route, of various physical and operational attributes of the main rail network, including information as to permanent speed restrictions, position of signal boxes and stations, together with other information relevant to the operation of trains. (para 1.10.2 of the Network Statement)*

The 2008 Network Statement further provides:

*The physical attributes of the railway infrastructure controlled by Network Rail are described in the Sectional Appendix. (para 2.5.5.1 of the Network Statement)*

#### **IV The Panel's Determination**

16. The Panel issued its Determination on 27 February 2008. In outline, the Panel determined (at para 36 of the Determination) that:

(i) the introduction of Class 142s constituted a Vehicle Change under Part F;

(ii) as such, FGW was potentially liable to compensate NR under Condition F3.2;

(iii) however, NR was obliged to discharge its general duties in accordance with identified best practice;

(iv) in the present circumstances, such best practice included NR's Business Process Document NR/SP/TRK/8006 ("BPD: 8006") which includes reference to installing rail-mounted lubricators to counter excessive rail sidewear;

(v) as such, the costs resulting from the installation of track lubricators are not recoverable from FGW; and

(vi) it did not see that any costs payable in consequence of its determination would be eligible for any level of abatement on the grounds of off-setting benefits and it did not accept the un-quantified arguments that were advanced in support of such off-sets.

## **V The Conduct of the Appeal before ORR**

17. NR issued its Notice of Appeal on 10 April 2008 under Part M (Appeals) of the Code. ORR decided to hear the appeal and communicated its decision to do so to NR and FGW by way of letter dated 24 April 2008. FGW submitted its Respondent's Notice on 27 May 2008 ("the Respondent's Notice"). ORR invited NR to comment on the Respondent's Notice on 30 May 2008 and NR did so on 13 June 2008 ("NR's First Response"). ORR invited FGW to respond to NR's First Response on the question of whether there was a Vehicle Change on 24 June 2008 and FGW did so on 8 July 2008 ("FGW's Response"). NR made further written submissions on 7 July 2008 ("NR's Second Response").
18. ORR indicated in its 24 June letter to NR and FGW that it proposed to determine the Appeal by way of review of the Panel's Determination , reserving the right to hold a re-hearing if the question of the quantum of any compensation owed to NR became live (under Condition M6.1). Both NR and FGW agreed to this course of action.

## **VI The Grounds of Appeal and the Scope of the Appeal**

- (i) In the Notice of Appeal, NR challenged the Panel's Determination that no compensation was payable to it under Part F on the grounds that the Panel erred in concluding that NR was already funded for the Vehicle Change by reason of: (i) the CP3 settlement; the VTU charge; or compliance with BPD: 8006.
19. In the Respondent's Notice, FGW contested the Appeal on the ground that the Panel correctly determined that no compensation was payable to NR. FGW also made representations challenging the Panel's

decision that the Proposal did constitute a Vehicle Change under Part F.

20. In NR's First Response, NR disputed that FGW could raise the question of whether the proposal was a Vehicle Change at this stage, on the grounds that FGW had not submitted an appeal within the time-limits laid down in Condition M2. NR argued that FGW did not have appropriate *locus standi* to make such an application to ORR. Network Rail said further that its Notice of Appeal had been prepared on the basis that the Vehicle Change position had been determined and had therefore focused on the funding aspect of the dispute.
21. ORR responded to this in its 24 June 2008 letter stating that it regarded a review of a Panel's decision on the question of whether a Vehicle Change occurred as an inevitable part of the Appeal since a review of the Panel's Determination regarding compensation would only arise if the Proposal properly constituted a Vehicle Change.
22. In its Second Response, NR disputed ORR's view and stated that it regarded the questions of Vehicle Change and compensation as entirely distinct.
23. As a preliminary matter, ORR has determined that it should consider the question of whether the Proposal constituted a Vehicle Change for the reason given in its 24 June 2008 letter. This conclusion is reinforced by the definition of "Grounds" in Condition M6.2 which refers to matters contained in the Appeal Notice *or* the Respondent's Notice. FGW made representations on the question of Vehicle Change in the Respondent's Notice.

24. In any event, ORR is not satisfied that the grounds of objection raised by NR are sound. Although the usual time limit for bringing appeals is 30 Working Days from receipt of the determination to be challenged, ORR has the power to vary this to “such longer period” as it shall allow (Condition M2). Further, Condition M7 provides that ORR may “give directions as to the procedure to be followed in the appeal” and this includes directions “in relation to the time limits within which anything must be done”. In the present Appeal, FGW had no reason to appeal against the Determination since the overall outcome was favourable to it. Had FGW made such an appeal ORR could have considered whether to exercise its discretion under the Code to extend time to permit FGW to bring an appeal against the Panel’s Determination on the question of Vehicle Change.
25. ORR does not understand NR to be taking a distinct point about *locus standi*. FGW plainly has *locus standi* as one of the parties to the Joint Reference to the Panel.
26. Overall, ORR concludes that it is in the interests of proportionality for it to consider the question of whether there was a Vehicle Change as part of this Appeal.

## **VII ORR’s consideration of the Appeal**

27. ORR considers that the Appeal raises the following three questions (which are addressed in turn below):
- (A) Did the Proposal constitute a Vehicle Change within the meaning of Part F of the Code? (paras 27-40 below)
- (B) If so, was NR entitled to compensation under Condition F3.2? (paras 41-58 below)

(C) If so, are there any benefits to be taken into account under Condition F3.3 in assessing the amount of such compensation? (para 59 below)

(A) Vehicle Change

28. The Panel's decision that the Proposal did constitute a Vehicle Change was based on the following considerations (para 26 of the Determination):

- (i) before FGW could operate the Class 142s, an amendment was needed to the TAC to insert Class 142s in the Specified Equipment (para 26.1.1 of the Determination);
- (ii) the inclusion of Class 142s in the Sectional Appendix did not confer on FGW the right to include such stock in the Specified Equipment since the Sectional Appendix only defines the physical compatibility of the stock with the Network (paras 26.1.2-26.1.4 of the Determination);
- (iii) on the basis of past practice since before privatisation, NR was entitled to assume that Class 142s would not be re-introduced (para 26.3 of the Determination);
- (iv) the re-introduction of Class 142s does require NR to reassess (and probably change) its maintenance regime (para 26.5 of the Determination); and
- (v) as such, the re-introduction of Class 142s would be a change which materially affects the maintenance of the Network and is therefore a Vehicle Change (para 26.6 of the Determination).

29. FGW appeals against this part of the Determination on the grounds (principally, paras 3.2, 6.9 and 9.1 of the Respondent's Notice and para 1 of FGW's Response) that the introduction of Class 142s has no material effect on the operation of the Network because:
- (i) Class 142s are already "route cleared" as confirmed by the Sectional Appendix;
  - (ii) there were no objections from other operators to the change; and
  - (iii) the maintenance and operation costs of implementing the Proposal are already covered by the variable charges paid under the TAC and/or broader arrangements for funding NR.
30. NR supports the Panel's Determination on Vehicle Change (NR's Second Response). NR's jurisdictional challenge on the issue of Vehicle Change is set out above (see para 20).

*ORR's analysis*

31. For the reasons given below, ORR has concluded that there was a Vehicle Change in the present case.
32. ORR's analysis begins with the definition of Vehicle Change contained in Part F. FGW accepts that Class 142s are not included in the Specified Equipment (Table 5.1 of the TAC). This is the reason why FGW initiated the Vehicle Change procedure. As such, the Proposal falls within sub-para (c) of the definition of Vehicle Change in the Code, as set out at para 8 above.

33. FGW does not suggest that the Proposal is excluded from the definition of Vehicle Change on the ground that it is an “authorized variation”. Given the definition of Authorized variation in Part F, ORR accepts that the Proposal did not constitute an Authorized variation.
34. As such, the determinative question under the definition in Part F is whether the introduction of Class 142s “is likely materially to affect the maintenance or operation of the Network”. ORR approaches the interpretation of this provision on the basis that it should adopt the ordinary usage of terms in the Code except where it is clear that they have a particular meaning in the context of the railway industry or other parts of the Code. As regards the specific elements of this provision, ORR interprets the terms “is likely . . . to” as requiring a prospective assessment based on objective evidence that a particular outcome is more than merely possible, but less than certain to occur. ORR concludes that the adverb “materially” is intended to exclude effects which are minimal, but does not require that any effect should be substantial. In assessing whether there has been a material effect, ORR has regard to effects other than purely financial costs and has regard to the state of the Network at the time of the Proposal.
35. The Panel found as a matter of fact (para 9 of the Determination) that:
- Class 142 trains had previously (for a brief period in the late 1980s) been used on the routes in question. Problems deriving from the long fixed wheelbase of the two axle vehicles resulted in BR redeploying the vehicles to other parts of the network deemed more suitable to the vehicles’ characteristics.*
36. FGW has not sought to challenge this finding in its Respondent’s Notice. Nor has FGW sought to dispute that NR will have to install



lubricators on the track (Part 6 of the Joint Reference). In para 5.8 of the Joint Reference submission, it is accepted that “there is a cost implication of making the changes required as a consequence of the change in the prevailing rolling stock”. FGW did not seek to advance separate submissions in relation to the track inspection element of NR’s costs in the Joint Reference. For these reasons, ORR agrees with the Panel that such effects are material for the purposes of Part F.

37. ORR therefore turns to consider FGW’s specific arguments that the Proposal does not constitute a Vehicle Change as set out at para 29 above.
38. (i) Route clearance under the Sectional Appendix. ORR is not persuaded by this argument. The inclusion of rolling stock in the Sectional Appendix demonstrates that the Network is physically capable of accommodating the rolling stock on the route in question. The Sectional Appendix is not incorporated in the TAC and it is the TAC which defines the stock which the passenger Train Operator is entitled to use on the relevant part of the Network as a matter of contract. ORR accepts that there is a distinction between the treatment of freight and passenger TACs in this respect (as noted by the Panel in para 7.3 of the Determination), but the present case concerns a passenger track access contract. ORR attaches importance to the fact that the draftsman of Part F has defined Vehicle Change by reference to the Specified Equipment and not the Sectional Appendix.
39. (ii) The absence of objections to the Proposal. ORR is not persuaded by this argument which it regards as, to some extent, circular. The presence or absence of objections from other Train Operators cannot affect the meaning of Part F which is a matter of construction. Further, it is only where the Vehicle Change procedure is instituted that there is

a mechanism for other Train Operators to object. As such, the absence of such objections cannot be relevant to whether a proposal constitutes a Vehicle Change.

40. (iii) Maintenance and operation cost. ORR accepts the Panel's Determination that the issues of Vehicle Change and compensation are distinct under Part F. This is clear from a reading of Part F as a whole and the independence of the provisions on compensation in Conditions F3.2 and F3.3 from the definition of Vehicle Change in Part F. As such, ORR is not persuaded by this argument.
41. For the above reasons, ORR considers that the Panel was correct to determine that the Proposal constituted a Vehicle Change.

(B) Compensation

42. The Panel's reasoning appears to include the following elements:
  - (i) given that Class 142s are now again in use, BPD: 8006 "does direct NR's employees and contractors to install such additional flange lubricators as may currently be observed to be necessary" (para 30.4.2); and that
  - (ii) *it is a reasonable presumption that each CP settlement, however first constructed, aims, in its own terms,*  
  
*to enable Network Rail to recover all costs that have been acknowledged to vary with the type of rolling stock, through the VTU; and otherwise*  
  
*to provide scope for Network Rail to determine how best, in terms of maintenance practices etc, to discharge its*

*responsibilities economically throughout the Network.* (paras 32.1, 32.1.1 and 32.1.2)

43. NR challenges this determination on three grounds:
- (i) the inclusion of the Class 142s in the Sectional Appendix does not mean that NR is therefore responsible for funding increased maintenance as a result of the Proposal (para 8 of the Notice of Appeal);
  - (ii) the CP3 funding settlement was made on forecasts of traffic which did not include Class 142s and the VTU charge is intended to deal only with marginal increases in the amount of traffic (rather than material step changes) (para 9 of the Notice of Appeal); and
  - (iii) the Panel has confused NR's contractual commitments with best practice as represented by BPD: 8006 (para 10 of the Notice of Appeal).
44. FGW seeks to defend the Panel's finding on this issue (paras 6.5 and 6.7-6.8 of FGW's Response) on the ground that any changes to NR's costs as a result of the introduction of stock contained in the Sectional Appendix are covered by variable charges or may otherwise be compensated in the next charges review.

*ORR's analysis*

45. For the reasons given below, ORR has concluded that NR is not entitled to compensation under Condition F3.2 in relation to the Vehicle Change.

*(i) CP3/Sectional Appendix*

46. ORR's analysis begins with the terms of Condition F3.2. It is not suggested by either NR or FGW that any costs incurred as a result of the Proposal are "attributable to the Sponsor improving its ability to compete with other operators of railway assets". As such, the question turns on whether or not the costs identified by NR are such as "can reasonably be expected to be incurred by Network Rail . . . as a consequence of the implementation of the proposed change".
47. This in turn requires ORR to consider NR's obligations with respect to the Network. NR's obligations are set out in the provisions of the Licence quoted at para 14 above and in the ACR03 Conclusions<sup>4</sup>.
48. The ACR03 Conclusions set output targets for CP3, the five-year period from 2004/5 to 2008/09. These outputs include, at Table 9.2 of the ACR03 Conclusions, "no reduction in the capability of any route for broadly existing use from April 2001 levels". The ACR03 Conclusions further provide:

*9.50 In his October 2000 access charges review final conclusions, the Regulator concluded that the network as a whole should not in future offer any less functionality (subject only to network changes authorised under the network code) than from its starting position in April 2001...*

*9.51 The Regulator does not consider that there is any basis for changing his requirements as part of this review. Train operators and industry funders need to plan their businesses with a reasonable degree of assurance that the overall functionality of the network should not change for the worse over time. The Regulator also considers that the interests of future passengers and freight users are best protected by*

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<sup>4</sup> <http://www.rail-reg.gov.uk/upload/pdf/184.pdf>

*ensuring that the railway that exists today remains available to them to use in the future.*

49. The ACR03 Conclusions also set out measures for baseline outputs (see Table 9.4). These measures include network size, permissible speeds, loading gauge, permitted axle loads, coverage of electrification systems and number of stations and facilities provided. These attributes, with the exception of electrification, are reflected in the Sectional Appendix. For passenger vehicles the information about permitted axle loads and loading gauge is contained in the route availability tables which set out the route clearance by individual class of train.
50. To evaluate NR's obligations regarding capacity on 1 April 2001 we have looked to the Sectional Appendix in place at that time. To determine whether class 142s could be operated on the relevant parts of the network on 01 April 2001 we have reviewed the Sectional Appendices dated October 1999 and August 2001 (this confirmed no relevant changes took place to the information set out in the October 1999 Sectional Appendix prior to 01 April 2001).
51. Table D in the October 1999 Sectional Appendix sets out the route availability of multiple unit trains. Under the heading to Table D it states:

*Trains formed of these units are permitted (Y) or prohibited (N) over routes shown in the following table:*

The footnote to Table D provides:

*Where authority is shown above, it includes all adjoining Railtrack controlled running lines and sidings, subject to any restrictions affecting passenger rolling stock. Movements within Depots and other non-Network Rail lines are the responsibility of the infrastructure controller concerned. R - Restriction.*

Hence, three letters are used in Table D to indicate route availability: (Y) for permitted, (R) for restricted and (N) for prohibited.

52. As the Sectional Appendix reflects NR's obligations as set out in the ACR03 Conclusions, NR is required to maintain the Network in a condition that enables it to be used by vehicles consistent with the route availability set out in Table D. Class 142s on the relevant routes of the October 1999 Sectional Appendix have the letter (Y) by them, showing that Railtrack had not sought to impose any restrictions on the operation of Class 142s in the Sectional Appendix as of 01 April 2001. Hence NR is required to maintain the Network in a condition that enables it to be used by 142s on the relevant routes.
53. This view is consistent with and supported by the view ORR has expressed in the past in relation to Network capability, for instance in the notice ORR issued to NR under section 55(6) Railways Act 1993 on 2 March 2006<sup>5</sup> ("the Railways Act Notice") and in ORR's letter to NR dated 8 July 2005 on Network capability<sup>6</sup> ("the 2005 letter"). Relevant parts of these documents are set out below:

54. The Railways Act Notice provides:

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<sup>5</sup> The 2 March 2006 notice is available at: <http://www.rail-reg.gov.uk/upload/pdf/55-6-010306.pdf>.

<sup>6</sup> The 8 July 2005 letter is available at <http://www.rfg.org.uk/library/?pid=3158&lsid=3290&edname=18602.htm&ped=18602>.

*2. Capability is an important issue. The importance of accurate information on capability is explained in paragraphs 4 to 9 below. In summary, Network Rail needs to understand the capability of its infrastructure to run its business and to plan the future operation, maintenance, renewal, and enhancement of the network and inform decisions on future funding and outputs. In planning their businesses, train operators need to understand whether it is possible to use, or increase use of, a particular part of the network. The capability of the infrastructure is described in the sectional appendix for a particular part of the network (including such matters as gauge, line speed, and route availability).*

55. The circumstances which gave rise to the 2005 letter were specifically concerned with freight rather than passenger services, but this does not affect its relevance to the general references to Network capability (as acknowledged in para 3 below of the 2005 letter). The 2005 letter provides (as relevant):

*2. We consider it is essential that Network Rail understands the nature of its network, including the capability of its assets, both for its own needs and to comply with the obligations placed on the company under Conditions 7 and 24 of its network licence. It is also important that Network Rail makes available to its customers and funders accurate information about those assets, and that there is an effective process for dealing with changes in capability.*

*3. Although discussions and correspondence between Network Rail and ORR have to date focussed on freight only routes, and the need to address some of the issues is most acute for freight, capability is also important for passenger services.*

*. . .*

### **ORR's view on funding**

8. ORR concluded in the access charges review 2003 that Network Rail should maintain the capability of the network for broadly existing use at April 2001 levels, subject only to network change procedures contained in Part G of the Network Code, and that the requirement to do so represented the reasonable requirements of customers and funders under Condition 7 of Network Rail's network licence. ORR also considers that Network Rail is funded to maintain the capability of the network to the level required to meet its current contractual obligations. All of its current freight access contracts oblige Network Rail to provide the level and quality of access that is described in the freight operating constraints. Unless the network change procedures in Part G of the Network Code have been completed, freight train operators' permission to use (enabling spot bids to be made on particular routes) extends to the current published network capability, with no additional funding requirement (except in the event that any enhancement in network capability would exceed the published capability as at 1 April 2001).

9. Where a route is not being used, it is for Network Rail to decide on the level of maintenance and renewals that it carries out, so long as when a train operator seeks access to the route, Network Rail can carry out whatever work is needed to bring the capability back to the published level at no additional cost to the operator and without assuming additional funding via a future increase in the RAB. Failure to carry out such work in a timely manner to fulfil a train operator's request for access, may result in Network Rail breaching its access contract and potential liability for compensation under that contract. If Network Rail considers that there is a whole industry business case to support a permanent reduction to the published capability, it should follow the network change procedures.



56. From all the information above, ORR derives the following conclusions.

- (i) NR is required to maintain the Network in a condition that enables it to be used by those vehicles that are listed without restrictions in the Sectional Appendix.
- (ii) If a proposal is made to introduce vehicles listed without restrictions in the Sectional Appendix onto that part of the Network, it is for NR to ensure that the Network is capable of accommodating such vehicles.
- (iii) Therefore, any costs attributable to NR placing the Network in such condition that it can accommodate vehicles listed without restriction in the Sectional Appendix are not costs “which can reasonably be expected to be incurred by [NR] . . . as a consequence of the implementation of the proposed change”.
- (iv) Since Class 142s are listed without restrictions for the relevant routes, NR is not entitled to compensation under Condition F3.2 for the Vehicle Change.
- (v) ORR accepts that the situation may be different where it is proposed to introduce vehicles which are not listed without restriction and where their introduction may require, for example, line speed enhancements or platform alterations. In such circumstances, the costs of the changes might have to be borne by the operator.

*(ii) VTU*

57. Notwithstanding ORR's findings at paragraph 56 above, ORR would like to comment on Network Rail's ground of appeal at paragraph 9 of

the Notice of Appeal. NR states that the VTU charge is about wear and tear costs of marginal changes in the volume of traffic. NR further states that the VTU does not compensate NR for material step changes such as occurred in this instance. ORR considers that the issue in this instance is a change in rolling stock from class 150/153 to class 142 rather than any change in the volume of traffic. Network Rail has not demonstrated that any change in traffic volumes has led to an increase in costs over and above that recovered through the VTU. As stated in paragraph 56 the relevant routes should be capable of accommodating the change in rolling stock and so we consider that any changes in marginal costs should be reflected in differences in the relevant VTU charges.

*(iii) Remaining arguments*

58. As concluded above in para 56 ORR is of the view that NR is not entitled to compensation in this instance. As a result ORR does not need to express a view on the grounds of appeal in paras 10 of the Appeal Notice or any other arguments which may have found favour with the Panel (paras 28-35 of the Determination).
59. ORR also notes that NR and FGW have not advanced distinct submissions on the installation of lubricators and the track inspection costs. ORR is satisfied that the same considerations apply to both of them on the facts of the present case.

(C) Benefits to be taken into account

60. Since this question only arises if NR succeeds in its appeal under (B) above and since ORR has rejected that aspect of the Appeal, it is unnecessary for ORR to consider this question.

**VIII Conclusion**

61. For the above reasons, ORR determines the appeal by:

(A) upholding the Panel's Determination on the question of Vehicle Change; and

(B) upholding the Panel's Determination on the question of compensation, albeit for the reasons given at paras 45-59 above, rather than those relied on by the Panel.

62. In the absence of any request from either of the parties, the parties' costs should lie where they fall.



**Brian Kogan**  
**Deputy Director, Access, Planning and Performance**  
**Duly Authorised by the Office of Rail Regulation**

29 September 2008