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By email only

3 December 2021

Heathrow Airport Limited
Heathrow Express Operating Company Limited
MTR Corporation (Crossrail) Limited

Dear Sirs,

Appeals under Part M of the HAL Network Code by Heathrow Airport Limited (HAL) and Heathrow Express Operating Company Limited (HEOC) in respect of Timetabling Panel Determination HAL/TTP003

Thank you for your responses to ORR's letter dated 19 November 2021. ORR has considered the parties' representations on ORR's legal powers to act as an appeal body in this case and which party/parties have a right of appeal to ORR.

This letter is to advise you of ORR's decision to hear the appeal in the above referenced matter, pursuant to its powers under Regulation 32 of The Railways (Access, Management and Licensing of Railway Undertakings) Regulations 2016 (the "Regulations"), and in accordance with the procedure set out in Part M of the HAL Network Code.

Summary

Having considered the representations of the parties, ORR considers that its appeal role under Regulation 32 provides a basis for it to hear this appeal, without further determination of the wider *vires* issues at this stage.

ORR considers that HEOC has a prima facie right of appeal to ORR under Regulation 32 of the Regulations. Although HAL does not have a similar right of appeal as an "applicant" under Regulation 32, HAL is directly involved in this dispute and ORR considers that HAL is a "relevant party" which has a right to be "consulted" in any appeal under Regulation 32(5)(a).

Rather than requiring HEOC to submit a fresh appeal under Regulation 32, ORR intends, in the particular circumstances of this case, to conduct its determination of this appeal in accordance with the procedure the parties have agreed between themselves, as set out under Part M of the HAL Network Code. ORR considers this

to be an expedient approach to determining the appeal, not least because the parties have already submitted the relevant documents to ORR.

ORR does not consider that any of the grounds for refusal to hear an appeal under Condition M4.1.1 of the HAL Network Code apply in this case.

ORR's *vires* to hear this appeal

As a statutory body, ORR only has those powers which have been conferred upon it through legislation. ORR has thus considered whether it has a statutory power to act as an appeal body in this case. Since the Heathrow Rail Infrastructure¹ is exempt from the access and licensing regimes of the Railways Act 1993², ORR has also considered its various powers and duties under the Regulations, including Regulation 32.

Regulation 32 provides a broad right of appeal for an applicant where it believes it has been unfairly treated, discriminated against or is in any other way aggrieved.³ The Regulation goes on to set out a list of matters to which an appeal may relate. ORR considers that the fact that the Regulation introduces this list with the language of "*and in particular*" indicates that it is a non-exhaustive list. In any event, ORR considers that the subject matter of this appeal would fall under Regulation 32(2)(f), read together with Regulation 6(1) and Schedule 2(1)(b).

ORR has received two Notices of Appeal, one from HAL and one from HEOC.

HEOC is a train operating company and ORR therefore consider it meets the definition of an "applicant" under Regulation 32 as it is a "railway undertaking", as defined in the Regulations. Therefore, ORR considers HEOC has a prima facie right of appeal to ORR under Regulation 32.

HAL, on the other hand, is the infrastructure manager for the Heathrow Rail Infrastructure. ORR does not consider that HAL meets the definition of an "applicant" under Regulation 32 as it is not a "railway undertaking" as defined in the Regulations. Therefore, ORR does not consider that HAL has a prima facie right to appeal to ORR under Regulation 32. However, HAL is directly involved in this dispute and even without a right of appeal as an "applicant", ORR considers that HAL should be treated as a "relevant party" under Regulation 32(5)(a), in the same way that (for example) MTR is.

¹ This relates to the 8.6km of railway infrastructure which HAL owns and operates and which links Heathrow Airport to the Great Western Main Line (the Heathrow Spur).

² Railways (Heathrow Express) (Exemptions) Order 1994

³ See paragraph 5.3 of ORR's guidance on The Railways (Access, Management and Licensing of Railway Undertakings) Regulations 2016



HAL Network Code Provisions

The contractual dispute resolution mechanism for the parties is incorporated in HEOC's track access contract via the HAL Network Code, which sets out a process for appealing a decision of the Timetabling Panel of the ADC.

ORR intends to use its discretion under Regulation 32 to conduct its determination of this appeal in accordance with the provisions the parties have agreed between themselves, as set out under Parts D and M of the HAL Network Code. This is in line with what the parties themselves have contractually agreed as being acceptable and ensures consistency in our process when hearing timetabling disputes involving other infrastructure managers and networks. Furthermore, in light of the time sensitive nature of the matters under dispute, ORR considers this to be an expedient approach to determining the appeal.

Right to Appeal under the HAL Network Code

The parties have made representations to ORR regarding HEOC's right of appeal under the HAL Network Code. HEOC was an interested party to the HAL/TTP003 dispute. It has submitted that it now has the right to appeal the Determination to the ORR as a "Dispute Party", as defined in the ADRR which forms part of the HAL Network Code and is referred to in Part M of the HAL Network Code. MTR has submitted that since HEOC was not a party to the dispute before the ADC, it is not a "Dispute Party" and does not have a right to appeal to ORR under the HAL Network Code.

ORR has considered this issue and notes there appears to be some inconsistency between Parts D and M of the HAL Network Code in relation to rights of appeal. Condition D5.2.1 provides that a "Timetable Participant" that is dissatisfied with the decision of a Timetabling Panel under Condition D5.1 may refer the matter to ORR for determination under Part M of the HAL Network Code. ORR considers that HEOC satisfies the definition of a "Timetable Participant". Part M of the HAL Network Code sets out the procedural rules that govern an appeal to ORR. Some of these rules refer to actions taken on the part of an "Appellant". An "Appellant" is defined as a "Dispute Party" seeking to challenge a determination made in accordance with the ADRR by appeal to the ORR. HEOC and MTR dispute whether HEOC meets the definition of a "Dispute Party".

To the extent that there is any inconsistency between the right of appeal provisions under Parts D and M of the HAL Network Code, ORR considers that the provisions should be interpreted in a non-restrictive, rather than restrictive, manner. On this basis, ORR considers that HEOC has a right to appeal to ORR under Parts D and M of the HAL Network Code. ORR considers that HEOC qualifies as a "Dispute Party" under Part M of the HAL Network Code for the following reasons: HEOC is directly involved in this dispute, it is likely to be materially affected by the outcome of the dispute and it put its position to the ADC (even if only in summary form).



Next Steps

ORR notes the requests in the Notices of Appeal received from HAL and HEOC for the appeal to be heard under an expedited process and the representations from MTR on this matter. ORR understands the time sensitive nature of this dispute and will endeavour to reach a final determination of this matter as soon as reasonably practicable. We will keep the parties updated regarding our intended timescales for reaching a determination.

This letter will be copied to all interested parties.

Yours faithfully

A handwritten signature in black ink that reads 'Martin Jones'.

Martin Jones