



# Network Code appeals

March 2015

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## Introduction

1. This module concerns appeals submitted to the Office of Rail Regulation (ORR) under the Network Code (the Code).
2. The Code is a common set of rules and industry procedures that apply to all parties (freight and train operating companies) that have a contractual right of access to the track owned and operated by Network Rail. Network Rail manages and maintains the Code, and all related documentation, placing it on its website<sup>1</sup>.

## ORR's role

3. Our responsibility is to ensure that the Code provides appropriate contractual certainty for all affected parties and does not benefit one contractual party to a greater extent than another.
4. We will administer appeals to us under the Code neutrally and independently. We will base our decisions on the merits of each case and the evidence presented. If we are required as part of an appeal to reach a judgment on the legal interpretation of the Code or of a contractual term, we will do so under normal legal principles and without reference to our statutory duties under section 4 of the Railways Act 1993, unless the Code or relevant contract directs us otherwise.
5. We are the final appeals body for Timetabling Panel (TTP) appeals and appeals resulting from disputes under Part J, referred to us under Part M of the Code. Under Condition C6 we also have an appeal role in respect of proposed modifications.

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

## Changes to access rights and Timetabling Panel appeals

6. Each track access contract that Network Rail enters into incorporates the Code, which contains dispute-resolving mechanisms. Under the Code, the Access Dispute Resolution Rules (ADRR)<sup>2</sup> establish the Access Disputes Committee (ADC), whose role is to ensure the proper operation of the ADRR by providing a dispute resolution service to the parties. Part M of the Code provides the process by which a dissatisfied party can appeal to ORR in relation to a decision of a TTP or the outcome of an appeal made in accordance with Part J.

7. Under the ADRR, Access Beneficiaries<sup>3</sup> can either refer a dispute through mediation or through a determinative processes such as the TTP, Access Disputes Adjudication (ADA), expert determination or arbitration, in lieu of court action.

8. Disputes are initiated in accordance with Chapter B of the ADRR. Once a dispute has been referred for resolution, the ADC secretary (who must act impartially) helps the parties reach a 'procedure agreement'. An Allocation Chair (appointed by the ADC) will oversee the case and will preside over any hearing. If the parties do not agree a procedure to be followed, that matter may be determined by arbitration, subject to the provisions of Chapter B13(j) of the ADRR. In some cases, the parties are told which procedure must be followed and are not permitted to choose<sup>4</sup>.

9. Regulatory matters or issues of wider industry concern can be referred to us for a view at any stage of this process under certain provisions of the Code. We can determine such specific issues in a dispute, which can then be considered within the wider dispute process. The mechanisms are described in Chapter C of the ADRR.

### *Timetabling disputes (Part D of the Network Code)*

10. All timetabling disputes shall be referred to a TTP for determination in accordance with Chapter H of the ADRR. Any dispute party is entitled to appeal in accordance with the relevant part of the access conditions or underlying contract, including, as applicable, to ORR pursuant to Part M of the Code.

### *Disputes under Part J of the Network Code*

11. With the exception of disputes concerning an ARC (an access right change related to 'better use') disputes under Part J of the Code shall be referred in accordance with Chapter G of the ADRR. Depending on the type of procedure used, the ADRR might provide for a right to appeal.

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<sup>2</sup> These are an annex to the Network Code.

<sup>3</sup> In respect of an Access Agreement, the Train Operator or Access Option Holder who is party to that Access Agreement.

<sup>4</sup> See CJ10.14.2, in respect of which the parties are restricted to expert determination.

The ARC procedure incorporates different appeal mechanisms, whereby disputes about costs and compensation are referred to ADRR, but disputes about ‘better use’ are determined by ORR<sup>5</sup>.

12. For Part J matters other than those caught by the ARC provisions, there remains a right of appeal to ORR where one of the parties is dissatisfied with the decision made under ADRR; the matter may be referred to ORR for determination in accordance with Part M of the Code.

### *Hearings*

13. A hearing, for appeals to ORR, enables us to probe and test issues of particular and wide-ranging regulatory concern together with relevant interested parties. In addition, a case may be sufficiently complex that more progress is likely to be made at a hearing rather than through successive written submissions. However, given the time and resources required for hearings, we only hold them where we consider that they will add value to our decision making process.

14. If we decide to hold a hearing, we will invite all parties we consider likely to be directly and materially affected by, or to have a substantial interest in, the appeal. We will generally expect to put questions to the Appellant and the Respondent(s) and we may also invite others to present their concerns and may also allow cross-questioning (through the chair). Where a party intends to have legal representation (in-house or external) then it must make this clear to the other parties in advance.

15. We will usually give attendees advance notice of the agenda we expect to follow and its timing. A hearing may run for more than one day, and it may be appropriate to hold separate hearings to consider separate issues. An appropriate record, which could include a full transcript, will be taken of the hearing. A draft will be made available to those who have spoken to give them the opportunity to propose corrections to their own words, using Hansard Rules<sup>6</sup>, before the record is published on the ORR website (with any necessary confidentiality redactions). For matters that we consider should be confidential, in accordance with the test in section 71 of *The Railways Act 1993*, we may arrange for a hearing to be closed (“in camera”), in whole or part, and attended only by the relevant parties. We will not expect to receive further material or representations after the

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<sup>5</sup> The ARC process is due to come into effect from 1 April 2015.

<sup>6</sup> The transcript will be substantially verbatim, but with repetitions and redundancies omitted and with obvious mistakes (including grammatical mistakes) corrected. The transcript will leave out nothing that adds to the meaning of the speech or illustrates the discussion.

hearing has concluded, other than in response to any further questions we may pose, or as we may have requested or permitted before or during the hearing.

## **Other appeal functions**

16. ORR also has a role under Condition C6.5 of Part C where there has been a veto exercised in response to a proposal for change under Condition C5. Where such an appeal is made, we will follow the procedures detailed in Condition 6.5. As Condition C6.5 is specific and the potential issues very wide, we do not give any more detail on our procedures here. However we will normally expect the appeal to be made in good faith and for the issues to have been explored fully under Condition C5 before being referred to us. We will consider the evidence presented to us carefully and balance the issues raised. We will consider each case on its own merits.

## **ORR decisions**

17. We will place the notice of appeal and our determination on our public register<sup>7</sup> and we normally also publish them on our website<sup>8</sup>. We will consider any requests for the redaction of commercially sensitive information and will do so where we consider it is appropriate.

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<sup>7</sup> <http://orr.gov.uk/publications/public-register>

<sup>8</sup> <http://orr.gov.uk/what-and-how-we-regulate/track-access/the-network-code/determined-appeals>