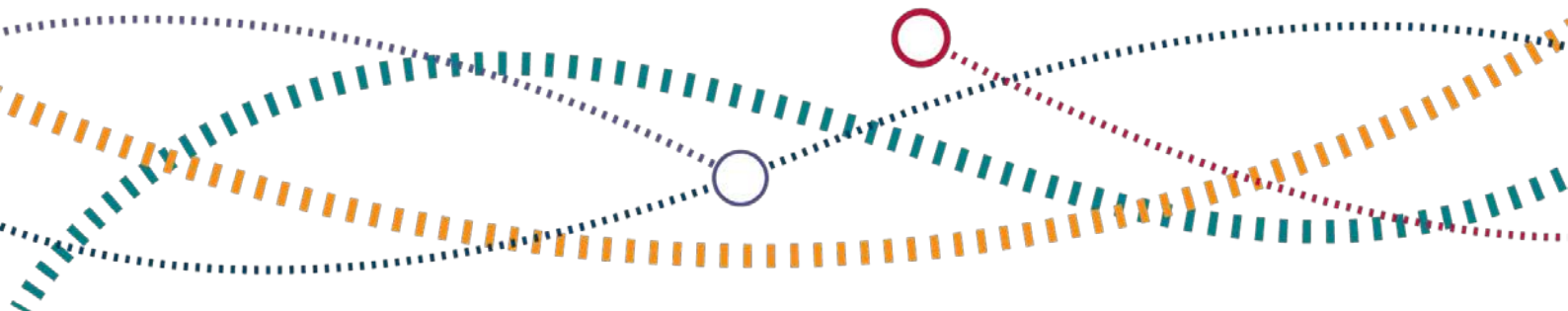




# Network Code appeals

28 July 2021



# Contents

<b>Introduction</b>	<b>3</b>
<b>ORR's role</b>	<b>4</b>
<b>Dispute resolution</b>	<b>5</b>
<b>Other appeal functions</b>	<b>9</b>
<b>ORR decisions</b>	<b>10</b>

# Introduction

- 1 This module concerns appeals submitted to 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. Although ORR approved the Code originally and our approval is required for any changes to it, we do not own the Code. It is an Industry Code which is managed and maintained by Network Rail. The Code and all related documentation can be found on Network Rail's [website](#).

# ORR's role

- 3 We are the final appeals body for Timetabling Panel (TTP) appeals and appeals resulting from disputes under Part J. Part M of the Code provides the process by which a dissatisfied party can appeal to ORR. Under Condition C6 we also have an appeal role in respect of proposed modifications to the Code itself.
- 4 Every appeal will be limited to a review of the decision of the lower tribunal unless we consider that it would be in the interests of justice to hold a re-hearing. We administer appeals under the Code neutrally and independently. We will base our decisions on the merits of each case, the evidence presented and the legal entitlements of the parties. 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.

# Dispute resolution

- 5 Each track access contract that Network Rail enters into incorporates the Code, which contains dispute-resolution mechanisms. Under the Code, the Access Dispute Resolution Rules (ADRR) which is annexed to the Code, establish the Access Disputes Committee (ADC). The ADC's role is to ensure the proper operation of the ADRR by providing a dispute resolution service to the parties
- 6 Under the ADRR, Access Beneficiaries 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.
- 7 Disputes are initiated in accordance with Chapter B of the ADRR. Once a dispute has been referred for resolution, the ADC secretary 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.
- 8 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)

- 9 All timetabling disputes are 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 Code or underlying contract, including, as applicable, to ORR pursuant to Part M of the Code.

## Disputes under Part J of the Network Code

- 10 With the exception of disputes concerning an ARC (an access right change related to 'better use') disputes under Part J of the Code should 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. 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.

For Part J matters other than those caught by the ARC provisions, 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.

### **The Part M process**

- 11 The process for appeals to ORR is set out in Part M of the Code. While this module contains a brief summary of the process, applicants, respondents and interested persons must familiarise themselves fully with Part M and comply with the process set out therein. We accept no responsibility for any divergence between this summary and Part M.
- 12 Any appeal must be served on ORR and the respondent within 5 working days (10 if the period includes Christmas). ORR may extend this timeframe if we consider it appropriate.
- 13 A notice of appeal must identify the determination being challenged; detail why it is wrong or unjust because of a serious procedural or other irregularity; and, insofar as reasonable practicable, attach any evidence on which the appellant wishes to rely in support of the appeal.
- 14 Within 10 working days of receipt of a notice of appeal ORR may decide that the appeal should not proceed. We may give the respondent an opportunity to make representations before reaching that decision. Grounds for not proceeding include that:
  - (a) the matter in question is not of sufficient importance to the industry;
  - (b) the reference is frivolous or vexatious;
  - (c) the conduct of the party making the reference ought properly to preclude its being proceeded with; or
  - (d) it is appropriate or convenient for the matter instead to be disposed of by the High Court (or in Scotland, by the Court of Session).
- 15 Within 10 working days of receipt of a notice of appeal a respondent may serve on the appellant, any other respondent and ORR, a notice opposing the appeal and, insofar as reasonably practicable, attaching any evidence on which the respondent wishes to rely in opposing the appeal. ORR may extend this timeframe if we consider it appropriate.

- 16 Either the appellant or respondent may ask ORR to deal with the appeal on an expedited basis. On receipt of such a request, ORR will give the other party an opportunity to respond before reaching a decision on expedition. If ORR considers it is in the interest of justice to do so, we may hear the appeal on whatever timeframe we consider appropriate.
- 17 In determining an appeal ORR has the power to give directions as to the procedure to be followed including setting the time limits in which anything must be done, the making of any written and oral submissions, and the extent to which any evidence or other submissions made by one party to the appeal shall be disclosed to any other. We will usually do this once we have decided to hear the appeal.

## Hearings

- 18 A hearing may enable us to probe and test issues of particular and wide-ranging regulatory concern together with relevant interested parties and may be quicker than successive written submissions. However, given the considerable time and resources required for hearings, we only hold them if we consider they will add particular value.
- 19 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.
- 20 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>1</sup>, before the record is published on our 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

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<sup>1</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.

further material or representations after the 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

21 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

- 22 ORR's decision on an appeal is final. We will place the notice of appeal and our determination on our public register and publish them on our [website](#). 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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