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19 May 2008

To those listed in Annex B

Dear Sirs,

## **WEST COAST APPEALS – APPEAL AND INTERIM APPLICATION PROCESS**

We refer to the decision of the Timetabling Panel (“TP”) in respect of reference TTP210 brought by Network Rail and a number of train operators which has been issued today. The TP’s decision concerns Network Rail’s proposed possessions on the West Coast Main Line for the remainder of this year.

We are aware that there may be an appeal to ORR in relation to the TP’s decision and possibly an interim order application.

We understand that the first possession that will be the subject matter of the panel’s determination<sup>1</sup> is scheduled to take place on the weekend commencing 31 May 2008. Therefore, any decision on an interim order application concerning the weekends beginning with that commencing 31 May 2008 would have to be made by ORR by the beginning of next week. However, as Monday 26 May 2008 is a bank holiday, we consider that any interim order application would have to be dealt with by ORR by the end of Friday 23 May 2008.

Given these tight timescales, the purpose of this letter is to set out the process ORR proposes to adopt to consider any interim order application and appeal regarding the TP’s decision.

### **Interim order application**

We are aware that a party to the dispute before the TP could ask us to consider making an interim order pending determination of an appeal of the TP’s decision to ORR. Therefore, we require a process in place to enable us to consider urgently whether we should make such an order or not. In the event that a party did want to make an interim application regarding the TP’s decision announced today, the following process will apply:

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<sup>1</sup> other than the Week 9 Possessions which was dealt with last week and on which we issued an interim order on 15 May 2008 that the possessions should proceed.

- i) Submission of any appeals by 5pm on Tuesday 20 May 2008. We will accept appeals by e-mail and the e-mail and attachments should be copied to the responding parties. The appeal documentation must explain the grounds of appeal in sufficient detail to enable us to understand the basis of the appeal, and any other issues which the appealing party considers that we need to take into account including why we should hear the appeal. We will not require the appeal party to provide the full documentation which would normally be required on an appeal.

Parties should note that late submission of an appeal could prejudice the other parties' position in relation to the interim order application and in such circumstances ORR would be unlikely to be able to hear an interim order application ahead of the 31 May 2008 possession.

- ii) Responding parties should consider whether there is any reason why the appeal, for the purposes of determining the interim application only, should not be heard by ORR and, in particular, against the grounds listed in condition M4.1 of the Network Code. If responding parties wish to make any representations why we should not hear the appeal, then these should be submitted to us by 1pm on Wednesday 21 May 2008 by e-mail, copied to the other parties.
- iii) We also consider that submissions on the issues set out at Annex A may be of assistance to us in hearing any interim application. Submissions on such issues should be submitted to us by the interim order applicant(s), copied to the responding part(ies), by 1pm on Wednesday 21 May 2008. The applicant should note that late submission of these representations could prejudice the other parties' position in relation to the interim order application and in such circumstances ORR would be unlikely to be able to hear an interim order application ahead of the 31 May 2008 possession.
- iv) ORR would expect to make a decision whether or not to hear the appeal, for the purposes of the interim application only, by 5pm Wednesday 21 May 2008.
- v) The responding parties' submissions on the points listed in paragraph iii) above should be submitted to us, copied to the applicant(s), by 2pm on Thursday 22 May 2008.
- vi) If we decide to hear the interim order application, we would then hold an oral hearing regarding the interim order application on Friday 23 May 2008. The details of the hearing will follow. At the hearing all parties would be given the opportunity to make additional submissions on the above issues or any other issues relevant to whether we should make the interim order requested.

- vii) ORR would expect to announce its decision granting or refusing an interim order on Friday 23 May 2008. Full reasons for its decision would follow and would be published during the week commencing 2 June 2008.

### **Expedited Appeal Process**

Under the Network Code, the normal provisions relating to appeals against decisions of the TP are found in Part M of the Network Code and in summary are as follows:

- in the case of an appeal under Condition D5 of the Network Code, the appealing party has 5 working days from receipt of the TP's determination to make an appeal to ORR;
- within 15 working days of service of an appeal, ORR may decide that the appeal should not proceed;
- within 30 working days of service of an appeal, a Respondent may serve on the Appellant, any other Respondent and ORR a notice stating that he opposes the appeal and, as far as reasonably practicable, attaching any evidence on which the Respondent wishes to rely.

If this procedure were followed in relation to any appeal against the TP's decision referred to above, then, it would be likely that the appeal would not be determined until approximately August when many of the possessions in dispute would already have occurred.

Given the importance to the parties, and the wider industry, of these possessions we are prepared, in this instance, in principle, to adopt an expedited procedure for determining any appeal against the TP's decision.

The procedure we would be prepared to adopt is as follows:

- 1) In accordance with condition M6.1 of the Network Code, the appeal would be limited to a review of the decision of the TP unless ORR considered that in the circumstances it would be in the interests of justice to hold a re-hearing.
- 2) A party who had filed an appeal for the purposes of applying for an interim order would be given until 5pm on Tuesday 27 May 2008 to finalise its appeal. We will accept finalised appeal documentation by e-mail and the e-mail and attachments should be copied to the responding parties. The Appellant(s) should include in this documentation any representations it/they might wish to make as to whether there is any reason why, under condition M4.1 of the Network Code, ORR should not hear the appeal and, in

particular, whether it is appropriate for the matter to be disposed of instead by the High Court or for any other reason. The Appellant should also include any representations it/they may wish to make as to whether ORR's consideration of the appeal should be a re-hearing rather than a review.

3) Responding parties would serve, by 5pm on 9 June 2008, any notice on ORR, any other Respondent and the Appellant stating if it opposes the appeal and, as far as reasonably practicable, attaching any evidence on which the Respondent wishes to rely. The Respondent(s) should include in this documentation any representations it/they might wish to make as to whether there is any reason why, under condition M4.1 of the Network Code, ORR should not hear the appeal and, in particular, whether it is appropriate for the matter to be disposed of instead by the High Court or for any other reason.

The Respondent should also include any representations it/they may wish to make as to whether ORR's consideration of the appeal should be a re-hearing rather than a review.

4) ORR would expect to make its decision whether to hear the appeal or not and, if hearing it, whether to conduct a review or re-hearing by 5pm Wednesday 11 June 2008.

5) If an oral hearing was necessary, then this would take place week commencing 16 June 2008. Arrangements for the hearing would be confirmed in due course. All parties to the appeals, and any other parties likely to be affected by the appeals, will be entitled to make oral representations at the hearing.

6) ORR would then expect to announce our decision in respect of the appeals by no later than week commencing 23 June 2008. It is likely that detailed reasons explaining the decision would follow in due course.

The process outlined above is different from that set out under the Network Code, and is not the process which we would normally follow for an appeal. We can only follow this process with the consent of the parties to any relevant appeal. We are conscious that the process we are proposing means that the only element of the normal procedure which is significantly curtailed would be the period of time the Respondent has to file its Notice. Given that we are suggesting abridging the time the Respondent has to file its Notice we did not also want to require the Respondent to provide any representations it has on whether we should hear the appeal or not separately during this time.

Any party seeking to appeal against the TP's decision, and wishing to follow the procedure outlined above, must, when filing its finalised appeal documentation in accordance with paragraph 2) of the expedited appeal procedure set out above, provide evidence of the consent of any relevant party to this procedure being followed.



In order to ensure that this process is transparent, fair and robust, **please direct all future correspondence on this matter to me as the nominated point of contact at ORR.** The parties should not correspond with each other directly, other than to copy correspondence to nominated contacts. Unless I am advised to the contrary, for the purpose of this issue, the nominated contacts are those to whom this letter is addressed and copied to and I have sent copies of this letter to each of these contacts.

Yours faithfully

**Ian Williams**

## ANNEX A

- (a) whether the parties accept that ORR has the power to make an interim order in the terms requested by the Applicant pursuant to Condition M7(c) and/or Condition M10 or any other provision of the Network Code;
- (b) whether damages or compensation would be available and an adequate remedy for any party injured by the granting of the interim order or the failure to grant the interim order if the appeal was subsequently decided in its favour;
- (c) whether the status quo would be preserved by granting or refusing the interim order;
- (d) what disadvantages or detriment would be suffered by any of the parties if the interim order is granted or refused;
- (e) whether granting the interim order sought by the applicant is likely to dispose of the whole dispute between the parties;
- (f) whether the appeal is likely to succeed when the full appeal is heard;
- (g) whether the parties agree that the above matters are relevant considerations which the ORR should take into account;
- (h) whether there are other considerations which any party considers ORR should take into account in deciding whether or not to grant an interim order;
- (i) whether there are any measures which can be taken by any party to mitigate the harm to any other party if the interim order is granted or refused;
- (j) on the wording or scope of any interim order in the event that ORR decides that such an order should be made;
- (k) on the length of time any interim order should have effect. We are conscious of the fact that the longer the period of time any interim order might cover, the greater impact this would have on the the appeal being determined and on the parties. Any interim order application should therefore explain what period of time it is being requested to cover and why.

## **ANNEX B**

Ian Marlee, Network Rail Infrastructure Limited

Nick Gibbons, English Welsh and Scottish Railway Limited

Ian Kapur, GB Railfreight Ltd

Simon Barrett, Freightliner Ltd

Roberts Hodgkinson, West Coast Trains Ltd

Mark Haslam, London & Birmingham Railway Ltd

Phillip Hassall, First Keolis Transpennine Ltd

cc. Tony Skilton, Access Disputes Committee

Graham Ward, XC Trains Ltd