

020 7655 5646

WRITER'S EMAIL ADDRESS:
john.ellard@shearman.com

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David Robertson Esq
Track Access Policy Manager
Office of Rail Regulation
1 Waterhouse Square
138-142 Holborn
London
EC1N 2TQ

Dear Mr Robertson,

ORR consultation document on Network Code reform phase 2

The following are our comments on ORR's consultation document on Network Code reform Phase 2. We have focussed on the emerging conclusions on reform of Parts F and G.

1. ORR's document contemplates a future which is very like the past, in that the Network Code continues to be a purely contractual relationship between TOCs and FOCs on the one hand and Network Rail on the other hand. We question whether this is wholly consistent with the emerging architecture of the rail industry following the White Paper and the Railways Act 2005. Specifically, in future development of the industry will be driven by the Department's High Level Output Specification. Should it continue to be open to a private operator, even if it is funded to pay for the change, to propose changes which are inconsistent with the HLOS?

In practice, this is an issue about the permissible grounds on which Network Rail can object to Vehicle or Network Change proposal made by an operator. The principal possible grounds for refusal (see conditions F3 and G4) are that the proposal would necessarily breach a third party's access contract, or that the proposed change would result in a material adverse affect to the operation of the Network or the operation of any train on the Network which, in either case cannot be compensated. If none of the specified grounds for refusal in conditions F3/G4 apply then Network Rail must implement the operator's change proposal. Should the

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provisions of conditions F3/G4 be amended to include inconsistency with the HLOS as a permissible ground of refusal of an operators' proposal?

Equally, we would question whether breach of the access rights, at least of a franchised third party operator should invariably be grounds for rejection of a Network/Vehicle change proposal. If the objective is optimisation of whole industry outputs and costs, then implementation of a major project may involve significant interruptions of access (for example, the Thameslink blockade); revisions of access rights post implementation; or the withdrawal of certain services altogether. Should it only be these breaches of access rights which cannot be satisfactorily compensated which should serve as grounds for rejection of a Network Change proposal? It may be that this issue should be handled elsewhere in the contractual matrix.

2. It is difficult to see how ERTMS – which will require either the installation of ERTMS equipment on board trains or, in some cases, the withdrawal of rolling stock not equipped for ERTMS where it is not economic to fit ERTMS equipment – can be earned through without a right for Network Rail to propose Vehicle Change. One can imagine other circumstances in which such a power would be helpful – for example, overall capacity utilisation might be optimised if higher performance rolling stock were substituted for existing rolling stock. We do not, however, believe that Network Rail should have an unconstrained right to propose Vehicle Change – the criteria again should be an optimum whole industry solution and preservation of the operator's ability to plan its business with a reasonable degree of assurance.

3. Against this background, we support the suggestion that project specific contracts may be useful in the case of major upgrades. There is an open issue as to whether significant upgrades should be specified in future as reasonable requirements under Network Rail's Licence, or through contracts. Assuming that future upgrades are specified as reasonable requirements, the boundary between the specification (which may not be as precise as a contract would be) and the contract dealing with implementation of the project, no doubt dealing primarily with compensation, will need careful thought.

We hope that these comments will prove helpful and stimulating. We do not wish any part of these comments to be treated as confidential and we are content for ORR to publish the entire response. These comments are made by the firm and do not necessarily reflect the view of any client.

Yours sincerely

John Ellard