



Major Projects - Challenging decisions not to designate: confirmation of cost compensation for major projects

August 2007

The ORR's recent ruling on ADP21 has provided useful guidance on **what is a Major Project** under Part D of the Network Code and **when TOCs should challenge** a failure by Network Rail to designate works as a Major Project.

Key points from the ADP21 Ruling

- In order to constitute a Major Project, works must:
 - Be a 'project' (see below);
 - Involve engineering, maintenance or renewal activities;
 - Require a possession or series of possessions over one or more sections of track; and
 - Last for a period which contains two or more timetable change dates.
- To be a 'project' the works must be a discrete set of coordinated activities and must be of an unusual nature and scope or be coordinated and implemented in an unusual way.
- Failure by Network Rail to designate works as a Major Project must be challenged by the operator. Operators must act early in bringing such a challenge or risk being prejudiced in relation to recovering the costs of long-running track, OHLE, signalling or other works.

Issue of PSN (Major Project)

Despite the change under Part D from Major Project Notices to Possession Strategy Notices (PSNs), Network Rail is still obliged to issue a PSN identifying a Major Project whenever a Major Project is planned. The PSN (Major Project) is significant as it can trigger the potential application of Schedule 4 Significant Restriction of Use (SRoU) treatment, entitling the TOC to compensation for direct costs in addition to the usual Schedule 4 compensation.

However, Network Rail has shown a reluctance to issue a PSN (Major Project) for renewals works, refusing to see the renewals as 'projects' even where they spanned two timetable change dates. This failure to issue was the subject of ADP21.

What is a Project?

In ADP21 ORR has clarified what constitutes a 'project' within the railway industry:

- (a) A 'project' involves a set of coordinated activities i.e. a package of inter-dependent activities, planned and managed as a discrete piece of work

with unified objectives;

- (b) The activities are programmed so they are completed on a sequential or continuous basis within a proposed time frame;
- (c) The works are of an unusual nature and scope and/or must be coordinated and implemented in an unusual way; and
- (d) The works require the commitment of identified resources and costs.

So in ADP21 a programme for the renewal of overhead wires on the approaches to Kings Cross was confirmed as a Major Project. The task of renewal might not be unusual for the network as a whole, but the programmed and coordinated nature of the activities which had not been carried out before at the location and would not be repeated for many years helped to confirm Major Project status. Similar conclusions might be reached for example in relation to resignalling projects. Renewal works of an ongoing and routine nature, like some track renewals, are unlikely to qualify.

TOCs should be vigilant in respect of programmes of renewal works raised for example in the Rules of the Route process or in Network Change notices. If they may meet the Major Project criteria and compensation for direct costs may be relevant to the TOC, then requiring a PSN (Major Project) should be considered.

TOC Actions Necessary in Relation to Major Projects

If Network Rail refuses to designate works as a Major Project, then the TOC should take proactive steps without delay to challenge Network Rail under Part D. Although the Network Code is silent on this point, the ORR have indicated that the TOC should raise a challenge under Part D requiring the issue of a PSN (Major Project) before the works commence, even where Network Rail has merely failed to issue the right notice. Raising the issue of a failure to designate at a later stage may still be possible, but is likely to be more complex.

It may be advisable to press for the issue of a PSN (Major Project) even where Network Change may be thought to

apply. If Network Change is not agreed as capturing all the effects of the project (for example where it is part renewal and part change), then failure to establish the PSN (Major Project) could prejudice full costs recovery.

Finally, where the status of a project is in dispute, it is advisable to ensure this is clearly noted on the TOC responses to its Schedule 4 Day 42 notices from the outset of the first period affected by the dispute.

If you are interested in further details on this or the firm's wider rail practice please see our website at:

http://www.burges-salmon.com/our_work/content/Rail/Index.htm

or contact **Simon Coppen** (0117 939 2291), **Chris Jackson** (0117 939 2238) or **Ian Tucker** (0117 902 6332) who will be happy to discuss these issues with you.

Burges Salmon LLP
August 2007

Contacts



Simon Coppen
Partner

+ 44 (0) 117 939 2291

Mobile: +44 (0) 7976 574742
simon.coppen@burges-salmon.com



Chris Jackson
Partner

+ 44 (0) 117 939 2238

Mobile: +44 (0) 7973 284896
chris.jackson@burges-salmon.com



Ian Tucker
Associate

+ 44 (0) 117 902 6332

Mobile: +44 (0) 7971 200189
ian.tucker@burges-salmon.com

Disclaimer: This briefing gives general information only and is not intended to be an exhaustive statement of the law. Although we have taken care over the information, you should not rely on it as legal advice. We do not accept any liability to anyone who does rely on its content.

© Burges Salmon LLP 2007. All rights reserved. Extracts may be reproduced with our prior consent, provided that the source is acknowledged.

Data Protection: Your details are processed and kept securely in accordance with the Data Protection Act 1998. We may use your personal information to send information to you about our products and services, newsletters and legal updates; to invite you to our training seminars and other events; and for analysis including generation of marketing reports. To help us keep our database up to date, please let us know if your contact details change or if you do not want to receive any further marketing material by contacting marketing@burges-salmon.com.