



So what is a Network Change now?

Some updates on the shifting ground of Network Changes and compensation available when one occurs

- A Network Change is a change or series of changes to a part of the Network; the way the Network is operated or to an established Network Change;
- The scope of such changes has recently been clarified by the ORR. They will include changes to the way maintenance is delivered by Network Rail provided such changes affect the running of the network in some practical sense and which departs from normal day-to-day variations;
- Changes to Part G, however, mean that compensation payable for Network Changes will now be more limited. Instead TOCs may need to block unappealing Network Changes where these will have a large financial impact upon them.

Network Changes and indeed disputes about Network Changes have a long history in the industry. Hundreds are issued by Network Rail every year. Generally the need for them is understood when they arise and they are implemented efficiently and smoothly.

However, every so often, a particularly contentious change arises and agreement cannot be reached on whether it qualifies as a change at all or, if it does, what compensation should be paid as a result. The nature of such changes and the overall interests of the industry also mean that the contractual obligations governing Network Changes are often in the spotlight resulting in policy changes to align the incentives correctly with the costs.

The Network Change regime has been in the spotlight again in the first part of this year with the ORR's determination of a Network Change on the WCML and a substantial change to Network Change compensation under CP4 coming into effect. This briefing gives some comments in light of those developments on what a Network Change is and what compensation should be paid for it.

Types of Network Change and NV33 ([2003] RR2)

There have historically been two main types of Network Change:

- Changes to the physical Network (both positive and negative changes); and
- Changes to the operation of the Network.

The scope of these categories was most famously considered in the then Regulator's decision in the appeal of NV33 ([2003] RR 2) issued on 21 June 2004. In overview the key clarifications were that:

- Deterioration of the Network; and

- Changes in NR maintenance practices and policies and its programme of renewal;

are capable of being Network Changes.

This remains the case. Consequently whenever changes occur which impact upon operators, it is worth keeping an open mind about whether the Network Change obligations in Part G should apply.

Changes to Operation and ADP 40

Changes to *maintenance and the operation* of the Network will tend to be more difficult to identify than changes to the Network itself. In this respect the ORR's latest determination on Network Change (appeal of ADP40) provides some useful clarification.

Following the WCML route modernisation, Network Rail decided to change the way in which it delivered routine maintenance. Instead of many single line blocks it decided to deliver the works in a smaller number of double line blocks overnight. This would mean that the line was frequently blocked entirely and ScotRail sleepers would need to be diverted from west coast to east coast completely missing the intermediate call points in England and requiring different route knowledge and locomotives. The ADP determined that this was obviously a change which had a material impact upon the operation of ScotRail's trains.

ORR considered whether a Network Change had occurred in three parts:

- Does such a change to standard procedure (in this case a standard maintenance procedure) amount to a change to the operation of the Network?

Yes, however the change must affect the running of the network in a practical sense and in some appreciable manner, which departs from the normal variations experienced on a regular, day-to-day basis;

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- What factors are relevant to whether the change is material?

A wide range of factors including the cost to the operator will be relevant.

- How is the time period calculated where there has been an operational change?

Where the change is one of policy or instruction, the change will begin when the policy comes into effect and will end when the policy ceases to have effect. The duration is not simply linked to the carrying out of any discrete activity.

Consequently changes in Network Rail's maintenance and operational policy are subject to Network Change from the moment they take effect provided they have a practical and material impact on the running of the Network beyond normal daily variations.

With this test in mind, operators may want to keep a close watch on whether disruption arising from Network Rail's adjustment of its operations should properly be considered through Part G before it is permitted. For instance:

- A policy decision on the priorities for Yellow plant?
- Changes to signalling procedures as a result of combined signalling centres?
- Changes to the use of weekends or weekdays for possessions on a commuter route?

Any change to policy or procedure could give rise to a Network Change which should be notified and accepted before Network Rail introduced it.

Network Changes and Compensation

The ORR's clarification arises at about the same time as the CP4 compensation arrangements for Network Change came into force.

The CP4 provisions have moved compensation for Restrictions of Use out of the Network Change regime into Schedule 4. This is likely to reduce significantly the compensation payable for many Network Changes and potentially the disputes over such compensation.

It should be remembered however that the Network Change process is not simply about compensation. Part G provides a mechanism of challenging the introduction of changes and an important right for operators and others to be heard before Network Rail proceeds with changes which might prejudice that operator's business. Part G still exists to prevent the introduction of Network Changes and in some cases still to provide compensation for them.

TOCs who think a Network Change may cause them significant loss may have little option but to challenge the introduction of the Network Change entirely on the basis that Part G compensation will not be adequate.

In order for this right to be respected Operators should continue to demand its exercise and require Network Rail to abide by its provisions ahead of making changes. These include changes to its maintenance and operational policy.

Contacts

Ian Tucker and Chris Jackson advise operators and others on disputes and challenges brought for Network Change and other breaches of contract. They were closely involved in the drafting and development of the new ADR rules which came into force on 1 August 2010 under which future challenges are likely to be brought.



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