

# Form R32: Application to appeal

For use with appeals to ORR under regulation 32 of The Railways (Access, Management and Licensing of Railway Undertakings) Regulations 2016 (the 2016 Regulations). You may also adapt this form for appeals under section 17 of the Railways Act 1993 for access to yards and freight terminals etc.

## Using this form

This form sets out our standard information requirements for considering appeals under regulation 32 of the 2016 Regulations.

Please read our [guidance module](#) on the 2016 Regulations before making an application.

Please provide the following information:

### 1. Your contact details:

Company: Virgin Management Limited

Contact individual: Phil Whittingham

Job title: Project Lead

Address: 50A Charlotte Street, London. W1T 2NS

Telephone: [REDACTED]

E-mail: [REDACTED]

### 2. Your appeal

#### 2.1 Your status

In what capacity are you making this application (e.g. Railway Undertaking, Infrastructure Manager, Service Provider or other *Please specify*): Aspirant Railway Undertaking

#### 2.2 Grounds for applying to ORR

Which matter are you appealing about under regulation 32?

(Please tick at least one box )

- 32(2)(a) a network statement in its provisional or final version
- 32(2)(b) the information to be included in a network statement
- 32(2)(c) the allocation process for infrastructure capacity and its result
- 32(2)(d) the charging scheme, the charging system or the Channel Tunnel charging framework
- 32(2)(e) the level or structure of railway infrastructure charges
- 32(2)(f) the arrangements for access provided for under Part 2 and Schedule 2 of the 2016 Regulations
- 32(2)(g) access to and charging for services provided under Part 2 and Schedule 2 of the 2016 Regulations
- 32(2)(h) traffic management
- 32(2)(i) renewal planning and scheduled or unscheduled maintenance
- Compliance with the requirements, including those regarding conflicts of interest, set out in regulations 8A, 8B, 8C, 9A, 14(9) and 19(4)

- unfair treatment, discrimination or aggrieved

### 2.3 The matter or issue subject to appeal

Is the matter one in relation to which directions could be sought from ORR under sections 17 or 22A of the Railways Act 1993? (*Please tick Yes or No.*)

Yes  Please stop and complete Form F or P instead, as appropriate.

No  Please explain why: Virgin is appealing against the process followed by Network Rail rather than seeking to amend or direct an access agreement

### 2.4 Reasons for making this appeal

Set out here the reasons for making this appeal under the 2016 Regulations (e.g. are you appealing against a particular decision concerning any of the matters set out in regulation 32(2) or do you feel unfairly treated or discriminated against or in any other way aggrieved?) Please provide copies of correspondence between the parties relevant to your application.

This appeal relates to the decision by Network Rail ("**NR**") dated 5 August 2024 (the "**Notice**") to modify the Track Access Contract of First Trenitalia West Coast Rail Limited's ("**Avanti**") dated 1 December 2022 as set out in Appendix 1 of the Notice.

The Notice is set out at the following link:

[Part J Notification to the ORR - Temporary surrender of rights 2.pdf](#)

The applicant considers that, in respect of its decision, NR failed to correctly follow and incorrectly applied the required process for the surrender of access rights, as set out in Part J of the Network Code.

In particular, NR incorrectly accepted a "temporary" voluntary surrender of access rights from Avanti. Had the correct process been followed, NR would have served a Failure to Use notice under J4 or consulted other operators under J2.6.

The impact is that paths that should have been made available for other operators to bid for (from the December 2025 timetable change date) due to Avanti's non-use have instead been protected for Avanti.

For these reasons, Virgin requests that the ORR overturns NR's decision, as set out in the Notice, and instructs the correct application of Part J.

### 2.5 Summary

Please provide in the box below a summary of the proposed appeal.

#### **Mistaken decision to follow J2**

NR has confirmed that Avanti's rights for the second Liverpool paths (as referred to in Section 2.4 above) came into effect in December 2023.

Successive System Operator letters in April 2023 and February 2024 made it clear that unused rights should be discussed at periodic review meetings with a view to their voluntary surrender. It follows that these unused paths would have been part of those regular discussions.

By March 2024, following 13 consecutive weeks of the paths being unused, and with no voluntary surrender having been made, NR could, and to comply with its Better

Use obligations under the Network Code and System Operator guidance letters, *should* have served a Failure to Use notification under J4.1 and J4.4. This did not occur.

In any event, Virgin's Form P application on 17<sup>th</sup> May 2024, seeking reallocation of the unused second Liverpool paths, should have triggered a Failure to Use notice per J4, or if discussions were already taking place with Avanti about possible voluntary surrender under J2, a consultation process under J2.6.

What instead appears to have happened is that NR subsequently accepted a notification from Avanti on 22<sup>nd</sup> July 2024 for the purported '*temporary* surrender' of the paths under J2.1, without consultation, some two months after Virgin's Form P application was submitted.

### **Incorrect application of J2**

Despite NR's mistaken decision to follow J2 (as outlined above), it could nevertheless have delivered the correct outcome if J2 had been properly applied. Unfortunately, this was not the case.

#### Failure to consult under J2.6

Part 2 envisages that an Access Beneficiary may make (and NR is obliged to answer) Relevant Enquiries to inform any decision to surrender its access rights. J2.6 is clear that in preparing its Relevant Responses, NR must carry out a consultation including with "*persons whom it has reason to believe intend to become operators of trains*".

Relevant Enquiries are very broadly described in Part 2, covering the matters that would inevitably be covered in any J2.1 surrender, and J2.4 sets out the Relevant Information that NR must provide in response (again the information that an Access Beneficiary would want if considering surrendering rights under J2.1) with J2.6 going on to require NR to carry out a consultation with various operators and those who NR has reason to believe intend to become operators.

Virgin considers that the only way that a surrender could have been made under J2 without triggering the need for consultation under J2.6 is if no Relevant Enquiry was made at all. This would seemingly require the Access Beneficiary to have made an unsolicited approach to NR and to have unilaterally surrendered its access rights, without asking for or receiving any of the information that NR would otherwise be obliged to provide under J2.4. This would imply that Avanti surrendered access without having discussed with NR how the access amounts payable by Avanti might be affected by such surrender, the length of the purported "temporary surrender" nor the extent to which the released capacity might be used by other operators.

In short, it is inconceivable that there was no engagement between Avanti and NR constituting a Relevant Enquiry prior to Avanti's 22<sup>nd</sup> July 2024 notice. Indeed, with NR's 19<sup>th</sup> February 2024 system operator letter specifying the need for regular dialogue regarding unused access rights, and NR's letter of 5<sup>th</sup> August 2024 specifying Avanti had "agreed" to the surrender, it suggests that: (i) discussions around the surrender of the paths must have taken place between Avanti and NR in advance of the 22<sup>nd</sup> July 2024 surrender; and (ii) the surrender of those paths was not unilaterally volunteered by Avanti. Any such discussions must have formed a Relevant Enquiry as envisaged in J2.3. As part of that process, a consultation under J2.6 should have occurred, and this should have included Virgin.

#### Inappropriate use of voluntary surrender provisions

Further, if NR's position is that J2.1 is separate from the J2.2 process then it is clear that a *temporary* voluntary surrender is not available under J2.1. J2.1.1 specifies that these rights must have been assessed as being of "no current or foreseeable reasonable on-going commercial need". No mention is made in J2.1.1 of a "*temporary* voluntary surrender": a surrender under J2.1 must be permanent.

If Avanti considered in July 2024 that there would be a commercial need for the rights from December 2024 and May 2025 (and hence sought to make its surrender temporary) the mechanism in J2.1 should not have been applied as a separate mechanism without the process in J2.2 being followed (including a consultation).

It is clear that reference to "part or parts of such Access Rights" in J2.1.1 refers to the length of the paths (i.e. adjusted to stop short of planned destination) rather than to the duration in time of the period of the surrender of any Access Rights. Indeed, the only reference to a "temporary" surrender in J2 is under J2.3 regarding Relevant Enquiries, which NR maintain does not apply.

### **Conclusion**

Why NR chose to continue with its agreement to a J2.1 surrender is unclear. NR clearly knew of Virgin's interest in these paths and that Avanti claimed to have a current or foreseeable on-going commercial need to use the paths (by virtue of wanting only a temporary surrender), thus making J2 the wrong process to follow and adding weight to the argument that any surrender under J2.1 should be permanent.

That NR failed to implement the Part J4 Failure to Use process once Virgin's Form P application was submitted on 17<sup>th</sup> May 2024 and also failed to use the Relevant Enquiry process under J2 forms the basis of Virgin's appeal under the infrastructure capacity allocation process. J4 would have freed up the rights Virgin had identified as being available to bid for and the J2.3 Relevant Enquiry process would have given Virgin the ability to respond via a consultation.

NR's approach of allowing temporary surrenders of paths under J2.1 without any consultation with those who could put those paths to good use is completely at odds with the requirements to make best use of the network. In addition, its interpretation of the J2.1 process could enable multiple "temporary" surrenders (one after the other), resulting in the reservation of paths for an operator without them (ever) being used, and no consultation with operators who could use them.

## **2.6 Events leading up to the appeal**

What were the events leading up to the appeal and what were you told by the infrastructure manager/service provider/ allocation body/charging body/railway undertaking? Were any codes of practices cited or used.

Virgin's 17<sup>th</sup> May 2024 Form P application included plans to operate services between London Euston and Liverpool Lime Street utilising an existing path allocated to Avanti. This application was made on the basis that Avanti had not used, nor was likely to use, those paths to operate a second hourly Liverpool service for the foreseeable future, and therefore that those paths should be made available for other operators to bid for.

Since Virgin became aware of NR's agreement to amend Avanti's rights under Part J 2.1 on 5<sup>th</sup> August 2024 under the Notice, to reflect a temporary surrender of rights, Virgin has engaged with NR (and ORR in copy) to understand the process followed and the rationale, given Virgin's views on how Part J should have been applied.

Despite several in person meeting requests, only written correspondence has been forthcoming.

Without the ability to discuss in person or virtually, in summary Virgin believe NR's argument is that:

1. Virgin is not a Part J Access Beneficiary and therefore the process set out in J5 does not apply
2. J2.1 is a totally separate process to the remainder of the process set out in J2

Given NR knew of Virgin's interest in these paths following its 17<sup>th</sup> May 2024 application, it was clear that Virgin was seeking to become an Access Beneficiary, thus making the J4 Failure to Use provisions the most appropriate action to take. This would have enabled NR to make best use of the Network, make use of paths that were not being used and comply with the spirit of the network use guidance.

Even if J4 was not followed, Virgin has made it clear why it believes J2.1 cannot be followed on its own and in isolation from the rest of J2. There is nothing in the intro or any other part of Part J that would show there being two processes. Therefore, the J2.3 Relevant Enquiry process, involving a consultation, should have been applied. Notably the Relevant Enquiry and Relevant Response provisions are defined by reference to the whole of J2, and do not exclude J2.1.

Should NR's stated position on J2.1 be correct, it would follow that any surrender notified by an Access Beneficiary can only be indefinite (or until the end of their access contract at least). If that is not the case, and an Access Beneficiary can unilaterally surrender access temporarily, that would leave NR without any contractual ability to free up those paths for other potential operators. That is clearly not the intention of Part J, nor is it consistent with NR's Better Use obligations.

### **3. Supporting information**

#### **3.1 Other material**

If there is any further justification or relevant information that will support your application, please provide it below. Please itemise and describe any other material being submitted with this form.

No additional supporting information is contained. ORR has been party to much of the correspondence with NR, but the information is summarised in this appeal in any case.

#### **3.2 Side letters and collateral agreements**

Please confirm that the whole of the proposed agreement, where applicable, between the parties has been submitted with this application. If there are any side letters or other documents which qualify or otherwise affect the proposed application, please list these below and provide copies.

This is the entire appeal

#### **3.3 Associated applications to ORR**

Please provide details of any other related applications that are also being made to ORR (e.g. under sections 17, 18, 22 or 22A of the Act).

None

#### 4. Access appeals

Only complete section 4 for appeals relating to access under Part 2 and Schedule 2 of the 2016 Regulations. Otherwise go straight to [section 5](#).

##### 4.1 Details of the facility to which access is requested

Name of facility:

Name of owner/provider:

Contact individual:

Job title:

Address:

Telephone:

E-mail:

##### 4.2 Details of which services you want

Details of services you need:

(eg stabling, tyre turning, loading, unloading, shunting, refuelling,....)

##### 4.3 Suitability of preferred facility (if applicable)

- Explain the purpose for requiring the access/service and why you consider that this particular facility is competent to supply the access/service.

##### 4.4 Summary

- Please provide in the box below a summary of the type and level of rail access required (including number of train slots and timings if relevant) or services required from the infrastructure manager/service provider
- the commercial terms proposed; and
- your reasons for seeking the contract in the terms proposed.

This section should also include an explanation of the extent to which you have evaluated available capacity at the named facility to satisfy yourself that the level and type of services being sought can be provided. Please also include a draft agreement showing the contractual terms between the applicant and infrastructure manager/service provider.

## 5 Confidentiality and market sensitivity

### 5.1 Confidentiality

Indicate clearly any elements in the application and the proposed agreement (if relevant) that you believe should be excluded from any wider consultation on the grounds of confidentiality. Please provide a summary that can be cited instead, if we agree to make redactions.

The email and telephone details are asked to remain confidential. The remainder can be shared publicly

### 5.2 Market sensitivity

Indicate clearly whether you consider that a final decision in relation to the application would be market sensitive.

If NR is determined to have applied the wrong process, this may become market sensitive

*Note: Under regulation 42 of the Regulations if any person, in giving any information or making any application under or for the purposes of any provision of the Regulations, makes any statement which s/he knows to be false in a material particular, or recklessly makes any statement which is false in a material particular, s/he is guilty of an offence and liable to prosecution.*

## 6. Signature

Signed:  


Date: 26<sup>th</sup> February 2025  
Name (in caps): PHIL WHITTINGHAM  
Job title: Project Lead  
For (company): Virgin Management Limited

## 7. Submission

Please check you are sending electronic copies of:

- this application form;
- the proposed draft agreement (where appropriate);
- any documents incorporated by reference (other than established standard industry codes or other instruments); and
- any other attachments, supporting documents or information.

Send by e-mail to: [track.access@orr.gov.uk](mailto:track.access@orr.gov.uk)

### Privacy Notice

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