



DARREN FODEY is a Partner in the rail team, and **Paul Thwaite** is a Partner in the commercial litigation team, at law firm Stephenson Harwood LLP

On c-ORR-ecting Regulatory Mistakes

Darren Fodey and **Paul Thwaite** of law firm Stephenson Harwood LLP, look at what you should consider when challenging a regulatory decision

Who watches the watchers? In a regulated industry, the regulator has significant legal powers. Decisions can be made which have the potential to dramatically change how a rail business is operated, or the finances of that business. Inevitably, decisions may be made that a rail business disagrees with, for whatever reason. Who can hold the ORR to account if a wrong decision is made?

How can a decision be challenged?

Regulators are public bodies and their decisions are subject to judicial review by the courts. This is the case in the rail industry as well. An adverse ORR decision will usually only be challengeable by asking a court to review the decision-making process. This is an important point: a court recognises that a regulator will have specific expertise in their sector and will have a degree of deference to that specialist expertise. A judicial review is not about asking the court to assess the merits of the decision made or substitute its own view. It is about assessing whether the decision was properly made in accordance with the law. There are three main grounds for challenging a decision of the ORR as a public body:

1. **Illegality** – The ORR has acted outside the scope of its statutory powers or has misinterpreted or misapplied the law in reaching its decision. Effectively, the ORR has got the law wrong and the court steps in to correct the error.
2. **Irrationality** – The ORR has reached a decision that no reasonable regulator could have reached based on the evidence

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that was before it. This is a high threshold and is not simply that the court may disagree with the original decision that has been reached by the ORR. The court has to be persuaded that no reasonable person in the shoes of the ORR could have come to the same decision.

3. **Procedural impropriety** – The ORR has not followed a proper process to reach its decision or has breached a legitimately held expectation which it has created. For example, if the ORR has said it will follow a particular process or policy but does not actually do so, this could be a ground for challenge.

What to consider

There are a number of factors to consider, both when putting forward your position to the ORR in the first place and when considering the potential for a challenge:

- What is the legal framework? – What

NEWS IN BRIEF

CAIRNGORM MOUNTAIN RAILWAY OPENS FOR SNOWSPORTS SEASON

Cairngorm Mountain (Scotland) Ltd (CMSL) has welcomed the return of Scotland's mountain railway to full operation. Following significant engineering works and testing, the UK Department of Transport has issued safety certificates, enabling CMSL to bring Scotland's only funicular railway back into service during the 2023 snowsports season.

Weather conditions permitting, the two kilometre funicular railway will now run a regular service taking snowsports enthusiasts to the top of the slopes in around five minutes. The Cairngorm Mountain Railway is Scotland's only funicular railway and is the highest in the UK reaching the Ptarmigan building at over 1,065 metres. The reinstatement works have involved a complex engineering project to strengthen the viaduct and install a new control system, all within the strict environmental requirements of a unique mountain environment.

ZONEGREEN IMPROVES POINTS SAFETY AT SOUTHSEA

Technology created by Sheffield-based rail safety specialist, Zonegreen, is protecting workers at an historic Portsmouth depot from the potential risks posed by manual points. South Western Railway's Southsea facility is the latest to benefit from Zonegreen's Points Converter system, which automates the levers traditionally used to alter the direction of tracks.

Working with contractors, Balfour Beatty, Zonegreen has installed a converter on Southsea's HP01 point, to control vehicle movements in and out of its siding roads. It is now operated remotely from a post-mounted key switch panel located on a walkway around 100m away, removing the need for staff to traverse uneven terrain, alongside the third rail, to operate the point.

NEWS IN BRIEF

PIONEERING FEMALE TRAIN DRIVER TO BE CELEBRATED

An 8 x 5 metre mural celebrating the woman who led the charge for female train drivers has been created as part of new campaign by Avanti West Coast to encourage more women to follow in her footsteps.

The artwork to be displayed at Euston Station features trailblazer Karen Harrison, who in 1979 overcame prejudice to be one of the first female train drivers in the UK. Not only did she pave the way for other women by fighting against sustained harassment, she also campaigned for minorities in the rail industry.

EXPERIENCE THE TUBE'S 160 YEARS OF HISTORY

Experience the 160 years of London Underground's history by exploring the secret and 'forgotten' locations where it all took place with London Transport Museum's award-winning Hidden London tours.

Tickets are now available for the February and March 2023 dates, giving ticketholders an exclusive chance to step behind-the-scenes of history. Hidden London guided tours are the only ones in the city that grant guests access to these locations on the Underground network, which are usually off limits to the public.

CRAWLEY STATION'S £6 MILLION FACELIFT

Crawley's 1960s station has been given a £6 million makeover, with a brighter look to the concourse, a new plaza, and more wide ticket gates to give passengers a much better experience as they travel to the town.

Over the past year, Network Rail has been working with Southern, Crawley Borough Council and Arora Group to improve the station facilities and revamp the 1960s design to bring it up to modern standards.

Part of the work included extending the concourse, re-glazing the ticket hall, improving signage to make it easier for passengers making their way around the station and installing additional ticket gates that have been widened to improve accessibility.

powers and rights does the ORR have? For example, there are various statutory duties and considerations under the Railways Act which it must take into account when exercising its functions. In the context of the particular decision being made, there may be other relevant law: Acts, regulations and case law. For example, this might apply in the context of charging for access to the railway, stations and depots.

- Is there relevant guidance published by the regulator? – Whilst each situation will have its own facts, the regulator may have published guidance about how it will approach making a particular decision and what it will take into account. It is important to align submissions to the regulator with this guidance to make sure points are expressed in a way that is relevant to the decision to be made.
- Are there any relevant previous decisions of the ORR? – Transparency usually means that regulatory decisions are publicly available on the ORR's website. Consistent regulation is also considered to be desirable. Considering how the ORR has approached previous decisions in the same area may be helpful. They can offer insight into the most important factors relevant to the decision, approach to the legal framework and guidance and can be used to focus representations on what are likely to be the most material points.

What are the consequences of a successful challenge?

A successful day in court may not mean the rail company ultimately wins. The typical remedy awarded by the court is that the original decision is quashed and the decision-maker is required to take the decision again – it is as if the decision was never taken in the first place. Taking the decision again might be with the guidance of the court on how the law should be applied if the original decision was made illegally, or being required to follow a proper process if this wasn't done the first time around. Since mid-2022, the court now has the power to declare that the original decision is only quashed from the date of the court order and allows the court to suspend the quashing of a decision, giving the decision-maker time to implement an alternative. It remains to be seen how these new powers will be used in practice.

Effectively, the ORR has to have another go at making the decision – and it's entirely possible that the same decision may be reached. This will of course depend on the decision in question, the basis on which the original decision was challenged and the information and evidence available.

The best outcome for rail businesses is to do everything they can to get the ORR to make the preferred decision in the first place and avoid the need for a challenge. This may involve some investment upfront to make sure the best arguments and evidence are before the ORR as the decision is made.

Top tips

Here are our top tips:

- Put forward the best case upfront. It is always easier if the ORR makes the 'right' decision in the first place, rather than having to challenge a 'wrong' decision as the grounds for doing so are limited. It may be helpful to seek legal assistance to help make sure you are presenting your arguments in the most persuasive way and to anticipate and avoid any potential pitfalls.
- Make sure you provide all relevant information helpful to your position. Put simply, if the information isn't in front of the ORR when it makes its decision, you can't complain later on. Trying to get new arguments or information in front of the ORR by way of a challenge to its decision is not likely to get you far.
- Make sure you provide supporting evidence to back up the points you are making. Assertions are rarely given any weight unless there is evidence to back them up.
- Depending on the subject matter, it may be helpful to engage internal or external support, such as economists, to provide supporting evidence and analysis. However, expert opinion that isn't presented to the ORR at the time of the decision is unlikely to be admitted by the court at a later date.
- Do not rely on assertions from the other side that 'it will be ok' or 'we will sort it out later'. If you don't agree, put it in writing and explain why as this is material that the ORR – and ultimately a court – would take into account. There may not be an opportunity down the line to 'sort it out' – for example, if the ORR cannot be persuaded that a different approach is needed.
- Make sure a written record is kept of key discussions – including detailed meeting notes where appropriate.
- Witness statements will be needed to support any challenge. So make sure to keep contemporaneous notes of what is happening, thinking and decision-making processes. This will help jog your memory when preparing a witness statement.
- Timescales are tight for challenging a regulatory decision. If an adverse decision is expected or is made, speak with your legal team immediately as the clock will tick down quickly. A judicial review application can take time to prepare and must be made within three months of the decision.

Whilst wrong regulatory decisions are relatively rare, they can have significant financial and operational impacts on railway businesses. It is important to be prepared, make the best case to start with and respond quickly if the decision does not go your way. **RP**