

Richard Price
Chief Executive
Telephone 020 7282 2006
Fax 020 7282 2043
E-mail richard.price@orr.gsi.gov.uk



19 December 2011

Sir David Higgins
Chief Executive
Network Rail Infrastructure Limited
Kings Place
90 York Way
London
N1 9AG

Dear David,

BREACH OF CONDITION 1 OF NETWORK RAIL'S NETWORK LICENCE WITH REGARD TO NETWORK RAIL'S OPERATIONAL PERFORMANCE

I wrote to you on 1 November to advise you that we were considering whether you were in breach of your network licence for failing to meet operational performance targets. You replied on 22 November and sent further information on 12 December, and Michael Lee met Robin Gisby with our respective colleagues on 28 November. We have taken all these representations into account.

I am now writing to give you notice that our board has found that you are likely to breach condition 1 of your licence in respect of failure to meet PPM targets for the long distance sector which were established under PR08 and that you are currently in breach of the same condition in respect of your failure to meet the target for 'Network Rail delay minutes' per 100 train km for freight. We are proposing to make an enforcement order in respect of each of these matters; I attach a copy of the proposed orders to this letter and set out their effects below. We have found that you are not in breach with regard to performance in Scotland.

In reaching these decisions, we have had regard to our duties under section 4 of the Railways Act 1993, in particular our duties to promote improvements in railway service performance and to protect the interests of users of railway services. We have also considered evidence in the form of letters and meetings between our organisations on national performance and individual train operating company performance (particularly that for East Coast) as well as the plans you have submitted over the course of this year. We have also reviewed letters sent by you and us to the freight companies this year.

Long distance

It is now clear that you will miss the PR08 PPM target for the long distance sector this year and you have confirmed that you are unlikely to be able to meet the targets for the



remainder of CP4. Missing these targets is not in itself a breach of your licence; we have to consider whether you are achieving the targets to the greatest extent reasonably practicable.

The current shortfall to target is mainly due to poor performance and high levels of 'Network Rail delays' for East Coast Trains, (Virgin) West Coast Trains and Great Western Trains (high speed services). The situation on the East Coast has been poor for the last two years and both you and East Coast are exceeding your JPIP delay minute targets. West Coast performance has deteriorated more recently. Great Western performance has been an intermittent problem for many years.

We appreciate the problems that cable theft is causing to utilities across the country, both in its immediate impact and in diverting resources from day to day maintenance, and that you have taken a number of measures to combat this. We accept that this is an issue that could not have been predicted at the start of CP4 when the targets were formulated. We also acknowledge that the delay caused by instances of trespass and suicide is higher than the average for the previous 6 years and we note the steps you are taking to reduce the number of incidents.

However, while we recognise that some factors outside Network Rail's control have contributed to the gap between performance and the committed trajectory, analysis of delay minute data shows that these by no means account for the whole of the gap.

Delay per incident has been increasing for over two years and you have said that you do not yet fully understand the reasons. You have told us that this decline in resilience of the network is a significant challenge and you point to timetabling and capacity issues. You note that the network is busier, with more trains and more passengers. Your analysis shows an increase in reactionary delay, which you attribute partly to the increase in passengers and partly to a change in industry policy for service recovery after an incident. You also point to the impact of operators' management of fleet and crew resources, suggesting that efficiency measures may have affected the ability to respond to disruption, and you suggest that this requires an industry wide solution. We agree that operators have a role to play in managing DPI and that you will need cross-industry cooperation if the problems are to be fully addressed. I am therefore writing to the operators (letter attached) asking them to work with you through the National Task Force in resolving this.

In considering whether you are taking all reasonably practicable steps to meet the PPM targets we are hindered by a lack of robustness in recent performance projections and improvement plans. We are concerned that some key elements of the performance planning and forecasting process are unsound, at least on parts of the network. This is based on our reviews of the national plan submitted in July, our detailed investigation of East Coast Trains performance and what we have seen of the mid-year review process.

We note and welcome your intention to improve your planning and forecasting processes as described in your letter of 12 December. In discussions with me, you have referred to your wish to establish 'what the infrastructure is capable of, route by route'. I agree that this is highly desirable, so that Network Rail can plan future performance robustly and identify any trade offs needed to achieve targets.

You will fail to meet the long distance sector target this year, you expect not to meet the corresponding targets for the remainder of CP4 and you have not, so far, produced robust evidence that you have plans which seek to meet these targets to the greatest extent reasonably practicable. We have therefore concluded that you are likely to be in breach of condition 1 of your licence.

We are proposing to make a final order requiring you to work with the relevant operators to produce, by the end of February 2012, fully quantified and robust plans showing that you have understood why performance is lower than required in 2011-2012, that you are doing everything reasonably practicable to deliver the long distance performance commitment in 2012-2013 and, if necessary, demonstrating clearly why you believe that the 2012-2013 target cannot reasonably be met. We should emphasise that this order would require a substantial improvement in the quality of analysis supporting these plans.

If we accept the plan you submit and you then fail to deliver the projected performance, we will again consider whether this is indicative of a licence breach.

Scotland

PPM in Scotland has been declining against a regulatory target that increases throughout the control period. PPM (MAA) for First Scotrail reached 91.4% in period 7 of 2010-11 but has since fallen to 88.6%. This has been caused by high levels of both 'Network Rail' and 'TOC-on-self' delays. Up to period 8 this year Network Rail delays to First Scotrail were 19.2% worse than target. First Scotrail-on-self delays were 18.6% worse than target.

The principal causes of excess delay in Scotland in the year to date are Severe Weather, Autumn and Structures (much of this arising during gales early in the year), Management Control and External Factors (which largely reflects the network-wide problems with cable theft). Track and non-track asset delay variances to JPIP are in line with the rest of the network.

There is evidence, including a significant increase in delay per incident at the time of its introduction, that parts of the December 2010 timetable are less resilient than the one it replaced and that this has been a key factor contributing to excessive levels of delay. We are aware that this timetable was developed in partnership with Transport Scotland and the franchise operator and that you were seeking to meet their requirements. In practice performance has not matched the modelled outcome. In particular poor 'right time'

performance in the Glasgow area has apparently triggered widespread PPM failure in Edinburgh. Concurrent changes of rolling stock and driver training on new routes are thought to have had some impact on timekeeping which should resolve itself in due course. We remind you that you have primary responsibility for both timetabling and performance across the network; it is important that you satisfy yourselves that proposals from your customers will not have adverse effects before you accept them. If you are not satisfied, at the least you must make your concerns clear. We understand that you are now working closely with First ScotRail and Transport Scotland to develop a more resilient timetable.

You have provided us with your Further Improvement Plan, agreed with First ScotRail on 20 September, which we consider to be reasonably robust. It identifies initiatives in the original JPIP which have not delivered the expected benefits and has identified a series of additional initiatives to recover performance.

Although you will not meet your customer's reasonable requirements in relation to PPM for Scotland this year, we consider that you have a good and reasoned plan to improve performance. We are therefore satisfied that you are making all reasonably practicable efforts to meet your customers' reasonable requirements and that you are not in breach of condition 1 of your licence. We now expect you to deliver the plan you have agreed and will revisit this at the end of the year if necessary.

Freight

You missed your regulatory target in relation to freight by 25% last year and you are very likely to miss it again this year. You have argued that the target itself is not an appropriate measure and that your customers are not unhappy with performance.

However unless this target is formally changed with our agreement it remains a regulatory requirement that you accepted and which you are funded to deliver. You have been discussing possible changes to freight metrics with the operators this year, but so far they have agreed only to run a new metric in parallel with the existing one and to review the position in March 2012.

In our contacts with operators they have been clear that they are not content with your current performance.

We considered whether you were in breach of your licence in this matter last year but deferred a decision to give you the opportunity to agree a more appropriate solution with your freight customers. We have told you on a number of occasions, notably on 16 March 2011 and again by letter on 7 July 2011, that unless and until we agree such a change, we will continue to hold you to account against the original measure.



You have assured us that you are committed improving performance but you have not provided evidence that you are making every effort to meet the existing target. We therefore consider that you are in breach of condition 1 of your licence for failing to act to meet this target to the greatest extent reasonably practicable.

We have considered carefully what action is required to remedy the breach that will not have an adverse effect on your customers. We recognise that this target is just a part of the overall services to freight customers and requiring you to meet the target could have an adverse effect on them. We have concluded that, in this case, your customers are better placed to decide what steps are needed.

We are therefore proposing to make a final order, in line with our policy published on 4 June 2010¹, setting up a recovery board comprising the freight operators. This will have a remit to agree steps it wishes you to take to remedy the breach, within a specified timescale. If you consider that board's requirements to be unreasonable you may make representations to us, otherwise you will be expected to deliver them.

If, during consultation on this order, it becomes clear that the freight operators are unwilling to take on this role, we will revisit this and may propose another order with an alternative solution. We are also reserving our position on whether a penalty is appropriate in this case depending on the outcome of this consultation.

If you would like to make any representations on either of the final orders, can you please do so by 16 January 2012 to:

Abigail Grenfell

Office of Rail Regulation

One Kemble Street

London WC2B 4AN

abigail.grenfell@orr.gsi.gov.uk

¹ Empowering stakeholders through enforcement 4 June 2010 can be found at:
<http://www.rail-reg.gov.uk/server/show/nav.2051>



I am copying this letter to Norman Baker and officials at the DfT, Keith Brown and officials at Transport Scotland, Robin Gisby and Paul Plummer at Network Rail and to the other parties on the attached list. A copy will also be placed on our website.

Yours sincerely

A handwritten signature in blue ink that reads 'Richard Price'. The signature is written in a cursive, slightly slanted style.

Richard Price

cc:

Train Operating Company MDs

Freight Operating Company MDs

Owner Group MDs

Welsh Assembly

Transport for London

ATOC

Rail Freight Group

Passenger Focus

London TravelWatch

Secretary to the National Task Force

DRAFT

RAILWAYS ACT 1993 (as amended)

SECTION 55

FINAL ORDER

- A. In the 2008 periodic review Network Rail Infrastructure Limited ("Network Rail") agreed to deliver a trajectory for freight delay minutes (normalised per 100 train km) attributed to Network Rail and delay minutes trajectories for each freight operator. Network Rail is obliged to deliver maximum delay minutes per 100 train kms of 3.41 for the year 2010/2011 ("the 2010/11 target") and maximum delay minutes per 100 train kms of 3.18 for the year 2011/12 ("the 2011/12 target"). Delivery of the 2010/11 target and the 2011/12 target ("the Outputs") is a reasonable requirement under Condition 1 of Network Rail's network licence which means that Network Rail must achieve it to the greatest extent reasonably practicable having regard to all relevant circumstances.
- B. The Office of Rail Regulation ("ORR") is satisfied that Network Rail Infrastructure Limited ("Network Rail") is contravening Condition 1 of its network licence in that it is not achieving the purpose set out in condition 1 to the greatest extent reasonably practicable having regard to all the circumstances, specifically by having no adequate plan to meet the Outputs on an ongoing basis and having failed to meet the 2010/11 target and being likely to fail to meet the 2011/12 target.
- C. Having had regard to section 55(1) of the Railways Act 1993 as amended (the "Act"), ORR considers it is requisite for it to make a final order for the purpose of securing Network Rail's compliance with Condition 1.
- D. ORR is satisfied that:
- a. the duties imposed on it by section 4 of the Act do not preclude the making of this order; and
 - b. the most appropriate way of proceeding is not under the Competition Act 1998.
- E. Having regard to all the circumstances and, in particular, the factors set out in section 55(3) of the Act, it does not appear to ORR that it is requisite that a provisional order be made.
- F. ORR need not consider, under section 55(5B) of the Act, the appropriateness of making this order because:
- a. ORR is not satisfied that Network Rail has agreed to take, and is taking, all such steps as appear to ORR for the time being to be appropriate for Network Rail to take for the purpose of securing or facilitating compliance with Condition 1; and
 - b. ORR is not satisfied that the contravention will not adversely affect the interests of users of railway services or lead to an increase in public expenditure.

- G. ORR gave notice under section 56 of the Act of its proposal to make the order' and has taken into consideration all representations made in relation to the proposed order.

Therefore:

1. In respect of the contravention, pursuant to section 55 of the Act ORR requires Network Rail to:
 - (a) Within two weeks of the making of this order, invite relevant holders of freight operator licences issued by ORR under the Railway (Licensing of Railway Undertakings) Regulations 2005 to participate, either directly or through representatives, in a 'recovery board'. The scope and remit of the recovery board is set out in the annex to this order;
 - (b) Within two weeks of sending out the invitations, make arrangements for the formation and running of a recovery board in accordance with the scope and remit in annex 1;
 - (c) Within six weeks of the formation of the recovery board, agree with it such steps and timescales as are reasonable to bring itself back into compliance with condition 1 of its licence.
 - (d) These steps should be designed to ensure that compliance is achieved within not more than six months of the date of this order.
2. A step or timescale proposed by the recovery board shall be agreed by Network Rail unless:
 - (a) it would place Network Rail in breach of contract; or
 - (b) it would place Network Rail in breach of another regulatory or legislative commitment; or
 - (c) the step or timescale is shown by Network Rail, to the satisfaction of ORR, not to be a reasonably practicable step or timescale having regard to all the circumstances.
3. This document constitutes a final order made under section 55 of the Act.
4. This order shall have immediate effect.

Richard Price

Chief Executive of the Office of Rail Regulation

[date]

Annex : Scope and remit of the freight recovery board

Scope

The recovery board should be made up of the following holders of freight operator licences issued by ORR under the Railway (Licensing of Railway Undertakings) Regulations 2005, or as many as choose to participate:

DB Schenker Rail (UK) Limited

Direct Rail Services Limited

English Welsh & Scottish Railway International Limited

Freightliner Heavy Haul

Freightliner Ltd

GB Rail Freight Limited

The scope of the recovery board is to agree, unanimously, reasonably practicable steps Network Rail should take to remedy the breach.

Remit

The recovery board's remit is to agree reasonably practicable steps Network Rail should take to remedy the breach within the timescales set out in the order.

The recovery board should also review Network Rail's delivery of those steps within the timescales set out in the order. If the recovery board is not satisfied with Network Rail's delivery during this period, it should refer the matter to ORR.

DRAFT

RAILWAYS ACT 1993 (as amended)

SECTION 55

FINAL ORDER

- A. In the 2008 periodic review Network Rail Infrastructure Limited (“Network Rail”) agreed to deliver annual public performance measures (“PPM”) in relation to passenger train services classified as the Long Distance sector. For this sector Network Rail is obliged to deliver a PPM of at least [90.9%] for the year 2011/2012 (“the 2011/12 PPM”) and a PPM of at least [91.5%] for year 2012/13 (“the 2012/13 PPM”). Delivery of the 2011/12 PPM and the 2012/13 PPM (“the Outputs”) is a reasonable requirement under Condition 1 of Network Rail’s network licence which means that Network Rail must achieve it to the greatest extent reasonably practicable having regard to all relevant circumstances.
- B. The Office of Rail Regulation (“ORR”) is satisfied that Network Rail is likely to contravene Condition 1 of its network licence in that it is not likely to deliver the Outputs and has not yet produced robust evidence that it has plans to meet the Outputs (“the likely Contravention”).
- C. Having had regard to the matters set out in section 55(1) of the Railways Act 1993, as amended (“the Act”), ORR considers it is requisite for it to make a final order for the purpose of securing Network Rail’s compliance with Condition 1.
- D. ORR is satisfied that:
- (a) the duties imposed on it by section 4 of the Act do not preclude the making of this order, and
 - (b) the most appropriate way of proceeding is not under the Competition Act 1998.
- E. Having regard to all the circumstances and, in particular, the factors set out in section 55(3) of the Act, it does not appear to ORR that it is requisite that a provisional order be made.
- F. ORR need not consider, under section 55(5B) of the Act, the appropriateness of making this order because:-
- (a) ORR is not satisfied that Network Rail has agreed to take, and is taking, all such steps as appear to ORR for the time being to be appropriate for Network Rail to take for the purpose of securing or facilitating compliance with Condition 1; and
 - (b) ORR is not satisfied that the contravention will not adversely affect the interest of users of railway services or lead to an increase in public expenditure.
- G. ORR gave notice under section 56 of the Act of its proposal to make the order and has taken into consideration all representations made in relation to the proposed order.

DRAFT

Therefore:

1. In respect of the likely Contravention, pursuant to section 55 of the Act, ORR requires Network Rail to produce and deliver to ORR by **28 February** 2012 a plan setting out the steps it will take in the remainder of 2011/12 and for 2012/13 to deliver the Outputs to the greatest extent reasonably practicable, through operating and maintaining the network in a timely, efficient and economical manner and in accordance with best practice (“the Plan”). The Plan should include:
 - a. a clear explanation of the factors causing the current under performance;
 - b. a clear assessment of external factors expected to influence future performance including risks and opportunities;
 - c. details of actions proposed to improve performance; and
 - d. fully quantified and substantiated forecasts including the impact of the above factors
2. You should consult relevant customers when producing the Plan.
3. This document constitutes a final order made under section 55 of the Act.
4. This order shall have immediate effect.

Richard Price

Chief Executive of the Office of Rail Regulation

[date]