



OFFICE OF RAIL REGULATION

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19 January 2012

Sir David Higgins
Chief Executive
Network Rail Infrastructure Limited
Kings Place
90 York Way
London
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Dear David

Breach of condition 1 of Network Rail's network licence with regard to operational performance

We consulted you and the industry on 16 December 2011 on our proposal to make two final orders to remedy the current breach and the potential future breach of your licence which we found with regard to your operational performance. Thank you for your responses on 21 December 2011 and 6 January 2012 accepting our decisions.

You have asked that we extend the deadline for the long distance sector recovery plan to 30 March 2012 to better align with the industry JPIP timescales and allow more time to consult with your customers. You also asked that Colas Rail be invited to join the freight performance recovery board for completeness. We agree these are sensible changes.

We can make a final order with modifications to our original proposal with the consent of the licence holder. You confirmed your consent to us making these changes on the 13 January. We are now making the two orders, modified in line with your representations.

Improving performance will require input from the train operators and both orders require you to work with them to find the best solutions.

The long distance order requires you to work with the relevant operators to produce, by the end of March 2012, fully quantified and robust plans showing that you have understood why performance is lower than required in 2011-12, that you are doing everything reasonably practicable to deliver the long distance performance commitment in 2012-13 and, if necessary, showing clearly why you believe the 2012-13 target cannot reasonably





be met. This order requires a substantial improvement in the quality of analysis supporting your plans.

The freight order requires you to set up and facilitate a recovery board comprising relevant freight operators. This has a remit to agree the steps it wishes you to take to remedy the breach, within a specified timescale. So long as the board's proposals are reasonably practicable and do not cause you to breach any contracts or regulatory or legislative commitments, we expect you to agree to its requirements. We received two responses to our consultation from your freight customers¹, broadly welcoming this process and identifying issues.

You suggested we should attend the recovery board. We are happy to do so as an observer, being mindful of our role as arbiter in the event of any disagreements. We also reserve our right to consider further enforcement action if needed.

In making these orders, 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 reviewed letters sent by you and us to the freight companies this year. Our findings and the reasons for our decisions are set out in detail in my 16 December letter.

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'.

Richard Price

¹ Available at: <http://www.rail-reg.gov.uk/server/show/nav.1362> under "Related documents".



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

RAILWAYS ACT 1993

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 2011-12 (the 2011-12 PPM) and a PPM of at least 91.5% for the 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 (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.

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 **30 March 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).
2. 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.
3. You should consult relevant customers when producing the Plan.
4. This document constitutes a final order made under section 55 of the Act.
5. This order shall have immediate effect.

A handwritten signature in blue ink that reads 'Richard Price'.

Richard Price

19 January 2012



OFFICE OF RAIL REGULATION

RAILWAYS ACT 1993

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 km of 3.41 for the year 2010-11 (the 2010-11 target) and 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 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 (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 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 the annex;
 - (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.

A handwritten signature in blue ink that reads 'Richard Price'.

Richard Price

19 January 2012

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 the Railways Act 1993, 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 Limited

GB Rail Freight Limited

Colas Rail 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.