

Condition 9 of Network Rail's network licence – Conclusions in respect of additional possession on 31 December 2007

1. We have investigated the events leading up to Network Rail taking an additional day's possession on 31 December 2007 outside industry timescales.
2. We have concluded that Network Rail was in breach of condition 9 of its network licence for its decision to take an extra day possession at Rugby on 31 December 2007 at late notice, despite the objections of affected operators.

Relevant condition

3. Condition 9.2 of Network Rail's network licence provides that:

“Subject to condition 9.7, the licence holder shall:

“9.2 (a) plan its renewal, maintenance and enhancement of the network in a timely and efficient manner to enable it to specify its requirements for temporary changes to the national timetable

(except in respect of changes arising from emergencies or severe weather conditions)

so that the procedures to revise the national timetable in respect of such changes can be completed not less than 12 weeks prior to the date of any such change: and

9.2 (b) provide access to information in accordance with condition 9.1 in relation to all such changes to the national timetable not less than 12 weeks prior to the date such changes are to have effect.”

Background

4. The extra day's possession was added to a pre-planned possession that was an essential part of the West Coast route modernisation (WCRM) programme to enable critical work lost in previous weekends to be done. Network Rail has provided evidence that it lost work in the weekends of 24/25 November 2007 due to points failure, 1/2 December 2007 due to high winds preventing the use of a crane, and 8/9 December 2007 due to a delayed maintenance vehicle. This lost work had to be rescheduled into the Christmas possession. Network Rail followed normal procedures to try to gain agreement to the extra day's possession, including discussions at a planning level on 28 November 2007¹, with more formal requests on 12 December 2007, and was actively looking for alternative arrangements to avoid the need for the extra day. However, due to the potential impact on the whole WCRM

¹ Network Rail letter dated 18 January 2008.

programme, it decided to take the possession despite not reaching agreement with affected train operators.

5. Network Rail has claimed² that it was not in breach of condition 9.2 because the exception in relation to changes arising from emergencies and/or severe weather in condition 9.2(a) applies.

6. We do not consider that the exemptions in condition 9.2(a) (“changes arising from emergencies or severe weather conditions”) apply in this case for the following reasons -

- (a) the words “arising from” have a natural meaning of “as a result of”. We consider that this means that for the exception in condition 9.2(a) to apply there has to be a causal connection between the emergency or severe weather and the temporary change to the timetable. In order to establish a causal connection we consider that the emergency or severe weather would have to be a substantial cause of the need for taking a possession at late notice, which it was not in this case.
- (b) the word “emergency” is not defined in the network licence. In the absence of this its natural meaning should be adopted. We consider that this, in the context of condition 9.2 (a), would refer to safety issues and unforeseen circumstances that impact on the network, such as landslips, cable thefts, etc. We do not think it is intended to cover situations where work is not completed within a project due to engineering problems, which is essentially a planning issue.

ORR’s consultation document³, published when we were proposing to put the T-12 obligation into the licence in 1999, is evidence of ORR’s interpretation of an “emergency” at the time this term was agreed and supports the approach taken now:

“the term “emergency” is regarded as going beyond (but, of course, including) work required for urgent safety reasons. An emergency might, for example, cover circumstances where urgent work was needed to maintain an appropriate level of service to customers, eg to repair a bank slip or to deal with the longer term effects of adverse weather such as flooded ballast. In cases where Railtrack might have anticipated a particular problem, repeated instances in similar circumstances of this type of failure to deliver T-12 might incur action under either the new proposed licence condition, or condition 7 (Stewardship of the Network). But the Regulator is clear that urgent works needed for the purpose of maintaining service standards for passengers are not ruled out, although Railtrack will need to ensure that emergency situations are not created through poor planning or ineffective

² page 5, Network Rail’s letter dated 19 December 2007.

³ “Achieving T-12: Consultation on Proposed Licence Modifications”, paragraph 6. ORR April 1999, at <http://www.rail-reg.gov.uk/upload/pdf/80.pdf>

stewardship to avoid being potentially in breach of its other licence obligations. The Regulator would expect Railtrack and train operators to have the necessary resources in place to deal with such normal fluctuations and to ensure that emergency changes to possessions do not have a "knock-on" effect disrupting the normal short-term planning process";

- (c) the licence is also silent on the precise meaning of "severe weather conditions". Taking its natural meaning, we think that "severe" weather is weather on or near the day of the breach which is so bad that it prevents the safe running of trains so TSRs might be imposed, or that causes blockages or breakages on the network such as flooding, heavy snowfall, landslips or high winds. However, these weather conditions could also be considered as emergencies or urgent safety reasons, so we consider that "severe weather" could also be weather that is so bad that it impedes Network Rail's ability to carry out engineering work on the network. In such circumstances, we would consider whether the severe weather itself was a substantial cause of the problem or whether other factors, such as lack of contingency in the possession plan for such an event were the main cause;
- (d) in light of the above, we consider that the failure of a set of points on the weekend of 24/25 November 2007 did not give rise to the exemption in condition 9.2(a) of Network Rail's network licence. However, the high winds experienced on 1/2 December 2007, which affected the operation of a crane, could amount to "severe weather" within the meaning of that exemption;
- (e) it is reasonable to consider the whole Christmas possession and the preceding weekends as a series of sequential work. The programme plan shows that these previous weekends involved necessary preliminary work essential for the successful delivery of the main possession. The additional day's possession was clearly a continuation of the main Christmas possession and we are informed that, without this day, Network Rail did not consider that it could complete the project on time, but did consider that only one day was required;
- (f) Network Rail has stated that it lost work over three weekends, which led to the additional day being required. Network Rail began informal discussions with train operators on 28 November 2007 regarding taking an additional day's access. This was before the weekend of high winds on 1/ 2 December, although it did not begin to negotiate more formally until afterwards, and did not confirm the need for it until after the next weekend. This means that Network Rail was considering additional access before the high winds struck and was still not certain after the high winds that extra time was required. In addition, we have also found in our report⁴ that it is likely that Network Rail was losing work

⁴ see Report of ORR's investigation into Network Rail's management of Engineering Projects, published on our website.

slightly earlier than the three weekends it has referred us to which may also have added to the need to take extra time over Christmas;

- (g) we therefore consider that the severe weather on 1 and 2 December may have played a part in Network Rail requiring an extra day's possession but it was not the substantial cause and that lost work in other preceding weekends did not constitute an "emergency" under the network licence. In light of this, we consider that the additional day's possession was not "arising from" the severe weather or an emergency and neither of the exceptions in condition 9.2(a) apply.

7. It is clear that Network Rail did not complete its procedures to revise the national timetable for temporary changes 12 weeks before 31 December 2007. In fact, it did not formally advise operators of the need for the extra day until 4 weeks before the possession. Because we do not consider that either of the exceptions set out in condition 9.2(a) apply, we therefore conclude that it is necessary to find that Network Rail has breached condition 9.

Assessment of whether it is appropriate to impose a penalty

8. As paragraph 5 of our penalties statement sets out in deciding whether to impose a penalty, we take into account the particular facts and circumstances of the contravention, including any representations and objections made to us, and we shall act in a manner best calculated to fulfil the duties placed upon us by section 4 of the Railways Act 1993. We take account of the five principles of good regulation: proportionality, targeting, consistency, transparency, and accountability.

9. Paragraph 6 of our penalties statement states that any penalty should be proportionate to the nature and severity of the breach. This may lead to no penalty being required.

10. In this case, although Network Rail has breached condition 9 in relation to its late notice possession on 31 December 2007 at Rugby, and has caused disruption to train operators and passengers, we consider that, given the circumstances at the time, it acted in accordance with the longer term interests of rail users in seeking to complete the work needed for the December 2008 timetable.

11. We consider that our section 4 duties justify not imposing a penalty in these circumstances. In particular, we are mindful of our duty under section 4(1)(f) to impose on the operators of railway services (which includes Network Rail) the minimum restrictions which are consistent with the performance of our functions, and of our duty under section 4(1)(b) to promote the use of the railway network in Great Britain for the carriage of passengers and goods, and the development of that railway network, to the greatest extent that we consider economically practicable.

12. Our penalties statement then goes on to explain that, in particular, we will consider a number of factors in deciding whether to impose a penalty:

- (a) *the seriousness of the breach* – We consider that it is important for all licence holders to follow the standard industry processes to meet the T-12 obligation (for Network Rail, its duty under condition 9.2 of its network licence to plan its works so that temporary changes to the

national timetable can be completed at least 12 weeks in advance), so that passengers and train operators are able to plan their journeys and their business in good time. In the context of condition 9, we would normally consider a serious breach of condition 9 to be where there was a consistent failure to meet the T-12 obligation over a prolonged period, or where there were significant problems across the network, particularly where this was caused by poor planning or lack of adequate processes. In this case, the breach related to one day at one particular point on the network. While we acknowledge that its action had an adverse impact on passengers trying to travel on the West Coast main line during a busy holiday period and on the train operators, we consider that Network Rail took reasonable steps to try to find alternative solutions. We also consider that, given the circumstances, it was better to take the extra day possession than to jeopardise the whole of the pre-planned possession and the rest of the West Coast programme in 2008, which would have been far more disruptive in the longer term;

- (b) *whether the breach or possibility of the breach would have been apparent to a diligent licence holder* – Network Rail would have been aware that it may be found in breach of condition 9 of its licence. However, Network Rail has told us that it took the view that it would be less disruptive in the long term to take the additional day's possession. We also consider, as explained in our report, that Network Rail had planned the Christmas possession adequately and it could not reasonably have known before T-12 that the extra day's possession on 31 December 2007 would be required, without being overly risk-averse;
- (c) *culpability* – We consider that Network Rail is technically culpable but, given the potential impact on the rest of the Christmas possession, and on the whole of the WCRM programme and the December 2008 timetable, we consider that it was acting in the best interests of rail users in the longer term and therefore its actions were justified;
- (d) *the extent to which a penalty would provide additional incentives on the licence holder to remedy the breach* – While we consider that it is important for Network Rail to meet the T-12 obligation, we do not consider in this case that a penalty for the breach of condition 9 would create an incentive on Network Rail not to repeat this breach; rather that it could instead result in an approach which made it over-cautious to the detriment of rail users;
- (e) *whether the licence holder has profited from the breach* – We do not consider that Network Rail has profited from the breach as it will have to pay compensation to affected operators;
- (f) *the impact the breach has had on third parties* – As discussed above, the breach had a significant impact on rail users over a busy holiday period; and
- (g) *the licence holder's record of compliance or non-compliance with this and other obligations, and the need to provide an incentive for it to comply with its licence obligations generally* – In 2002 and 2003, we

required Network Rail to produce a recovery plan to rectify a widespread failure to meet its T-12 obligations the situation. In 2004 and 2005, we obtained additional commitments from Network Rail in relation to breaches of T-12 obligations. But we consider that the circumstances of this case are very different.

13. Furthermore, in applying the principles of good regulation, given that we consider that the action Network Rail took was justified in the particular circumstances, it would not be proportionate to impose a penalty in these particular circumstances.

14. Having taken into account all the factors listed above, and for the reasons set out above, we do not consider that a penalty is appropriate in this case.

Office of Rail Regulation

28 February 2008