

NOTICE IN ACCORDANCE WITH SECTION 56 OF THE RAILWAYS ACT 1993, AS AMENDED, OF THE OFFICE OF RAIL REGULATION'S PROPOSAL TO MAKE A FINAL ORDER, IN RELATION TO NETWORK RAIL INFRASTRUCTURE LIMITED'S CONTRAVENTION OF CONDITION 7 OF ITS NETWORK LICENCE

28 FEBRUARY 2008

1. This document constitutes a notice issued by the Office of Rail Regulation ("ORR") published in accordance with section 56 of the Railways Act 1993, as amended ("the Act") stating that:

- (a) ORR is satisfied that Network Rail Infrastructure Limited ("Network Rail") is contravening Condition 7 of its network licence by not taking, including not having taken, such steps as are necessary or expedient, to achieve the purpose in paragraph 1 of Condition 7 to the greatest extent reasonably practicable, in that it:

is failing to plan and execute projects for the renewal, replacement, improvement, enhancement and/or development of the network which require possessions in an efficient and economical manner and in accordance with best practice so as to satisfy the reasonable requirements of persons providing services relating to railways and funders in respect of the quality and capability of the network; and

- (b) ORR proposes to make a final order under section 55 of the Act. The form of the order is attached at Annex A to this notice; and
- (c) The effect of the order will be to require Network Rail to take the steps outlined in the proposed order so that Network Rail has implemented measures, no later than 31 December 2008, to ensure that its planning and execution of projects for the renewal, replacement, improvement, enhancement and/or development of the network which require possessions are carried out in an efficient and economical manner in accordance with best practice to the greatest extent reasonably practicable so as to satisfy the reasonable requirements of persons providing services relating to railways and funders in respect of the quality and capability of the network . ORR proposes to make this order for the purposes of ensuring that Network Rail is complying with Condition 7 of its network licence, in respect of the contravention which is the subject matter of this notice; and
- (d) The other facts which, in the opinion of ORR, justify the making of the order are set out below; and

- (e) The final order which ORR proposes to make relates to the ongoing conduct of Network Rail and it is without prejudice to any other enforcement action and/or penalty which ORR is and/or might be satisfied is and/or would be appropriate in relation to Network Rail's planning and execution of projects for the renewal, replacement, improvement, enhancement and development of the network which require possessions.

2. Representations or objections with respect to the proposed order should be made by close of business on 31 March 2008 by post to:

Andy Burgess

Head of Network Regulation

Office of Rail Regulation

One Kemble Street

London WC2B 4AN

Or by e-mail to: andrew.burgess@orr.gsi.gov.uk

3. ORR will publish any representation or objections on its website and may quote from them. Persons making representations or objections should indicate clearly if they wish all, or any part, of their submission to remain confidential to ORR. If such persons make a representation or objection in confidence, they should also send a statement, excluding the confidential information, which they are content for ORR to publish. ORR may also publish the names of persons making representations or objections in future documents or on ORR's website, unless any such persons informs ORR that he, she or it wants his, her or its name to be withheld.

Background

4. On 6 December 2007 Network Rail announced that it wished to extend the blockade planned for Christmas at Rugby by an extra day, to finish on 31 December rather than 30 December 2007. On 17 December 2007, Virgin Trains asked ORR to issue a provisional order in effect preventing Network Rail from taking this additional day. ORR decided on 19 December 2007 against issuing a provisional order, on the grounds that it would not be in the best overall interests of rail users. However, ORR began an urgent investigation into the background, and into whether there had been a breach of Network Rail's network licence.

5. In the event the Rugby possession overran until 4 January 2008. At the same time there was a major overrun of the possession at Liverpool Street. Later, a possession at Shields Junction in Scotland overran from 7 January until 14 January 2008. The three overruns all had a significant impact on train operators, passengers and freight customers.

6. ORR announced on 8 January 2008¹ that it was extending its investigation and that one of the two strands of its investigation was to:

“A To investigate the circumstances surrounding the late notice planned extension of the Rugby possession, and the major possessions overruns at Rugby and Liverpool Street over Christmas/New Year 2007-08. To investigate any relationship between these events and delivery of planned works elsewhere on the network over this period (for example at Stevenage and Shields Junction). To establish the impact of these events on train operators and their customers (passenger and freight), and the extent to which Network Rail contributed to mitigating these impacts....”

7. By way of a report dated 28 February 2008 ORR has set out its findings in relation to its investigation (“the Findings Report”). In this notice ORR sets out the key reasons for finding there is the contravention, which is the subject matter of this notice. However, ORR is also relying on the facts and findings in the Findings Report to underpin this.

Condition 7

8. The relevant condition of Network Rail’s licence is Condition 7.

9. Condition 7 requires Network Rail, by virtue of paragraph 2, to:

“take such steps as are necessary or expedient so as to achieve the purpose to the greatest extent reasonably practicable having regard to all relevant circumstances including the ability of the licence holder [Network Rail] to finance its licensed activities.”

“The purpose” referred to in paragraph 2 of Condition 7 is defined in paragraph 1, and is:

“to secure:

- (a) the operation and maintenance of the network; and
- (b) the renewal and replacement of the network; and
- (c) the improvement, enhancement and development of the network,

in each case in accordance with best practice and in a timely, efficient and economical manner so as to satisfy the reasonable requirements of persons providing services relating to railways and funders in respect of:

- (i) the quality and capability of the network; and

¹ [Press notices - ORR announces scope of investigation into Network Rail’s New Year engineering over-run](#)

- (ii) the facilitation of railway service performance in respect of services for the carriage of passengers and goods by railway operating on the network.”

The Contravention

10. ORR is satisfied that Network Rail is contravening Condition 7 of its network licence by not taking, and not having taken, such steps as are necessary or expedient, to achieve the purpose in paragraph 1 of Condition 7 to the greatest extent reasonably practicable.

11. In particular, ORR is satisfied that Network Rail is failing to plan and execute projects for the renewal, replacement, improvement, enhancement and/or development of the network which require possessions in an efficient and economical manner and in accordance with best practice so as to satisfy the reasonable requirements of persons providing services relating to railways and funders in respect of the quality and capability of the network. Several areas of concern have led ORR to this view. These include weaknesses in Network Rail’s risk management, its management of suppliers, its site management and its communications with its customers and rail users in relation to such possessions. These weaknesses are explained in more detail at Annex A to this notice.

12. In concluding that the contravention is a present contravention, ORR has not (taking into account the nature of the breach) determined the precise date on which the contravention began but it considers that the contravention has been continuing for some time. ORR considers that it is appropriate and in line with its Economic Enforcement Policy for it to focus on the systemic weaknesses which it has identified in its investigation instead of focussing solely on specific past events which might in themselves have been capable of being contraventions.

Section 55 of the Act

13. Section 55(1) of the Act obliges ORR, if it is satisfied that a licence holder is contravening, or is likely to contravene, any condition of its licence, by final order to make such provision as is requisite for the purpose of securing compliance with that condition or requirement. Section 55(2) of the Act provides that ORR shall instead make a provisional order if it appears to ORR that it would be requisite to do so.

14. Section 55(3) provides that, in considering if it is requisite to make a provisional order, ORR shall have regard in particular to the extent to which any person is likely to sustain loss or damage in consequence of a contravention of the condition before a final order can be made. It does not appear to ORR that it would be requisite to make a provisional order in this case because this is an ongoing problem which, due to its nature, is not the type of contravention that would necessitate a provisional order.

15. There are exceptions to the obligation to make a final order under section 55(1), as follows:

- (a) section 55(5) provides that ORR must not make an order if it is satisfied that the duties imposed on it by section 4 of the Act preclude making an order;
- (b) section 55(5A) provides that ORR must not make an order if it is satisfied that the most appropriate way of proceedings is under the Competition Act 1998; and
- (c) section 55(5B) requires that if ORR is satisfied that:
 - (i) the relevant operator has agreed to take, and is taking, all such steps as it appears to ORR to be appropriate for it to take for the purposes of securing of facilitating compliance with the condition; or
 - (ii) the contravention will not adversely affect the interests of users of railway services or lead to any increase in public expenditure;

it must make an order only if it considers it appropriate to do so.

16. ORR does not consider that the exception in section 55(5) applies. ORR is satisfied that its section 4 duties do not preclude it making an order. The only duty that might preclude ORR from taking such action is ORR's duty to impose on the operators of railway services the minimum restrictions which are consistent with the performance of its functions. However, in this case ORR considers that the action it is proposing is proportionate to the contravention in question. Moreover ORR considers that a number of its section 4 duties including its duties to:

- a. promote improvements in railway service performance;
- b. otherwise to protect the interests of users of railway services;
- c. 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 it considers economically practicable;
- d. promote efficiency and economy on the part of persons providing railway services;
- e. enable persons providing railway services to plan the future of their businesses with a reasonable degree of assurance;
- f. have regard to the funds available to the Secretary of State for the purposes of his functions in relation to railways and railway services;

actually support it making the order. This is because in light of the programme of work anticipated in control period 4 to implement the Government's specification regarding growth on the network, Network Rail's

planning and execution of projects for the renewal, replacement, improvement, enhancement and development of the network which require possessions will have to be and should be carried out to the greatest extent reasonably practicable in an efficient and economical manner so as to satisfy the reasonable requirements of persons providing services relating to railways and its funders.

17. ORR is satisfied that the exception in section 55(5A) does not apply. In this case ORR received complaints about specific breaches of the licence condition and it is not satisfied that it is appropriate to proceed under the Competition Act 1998, when there is a specific provision in Network Rail's network licence which is being contravened.

18. In addition, ORR does not consider that the exceptions in section 55(5B) apply:

- a. In relation to section 55(5B)(a), this is because, although Network Rail has said that it will take action to remedy any failings it identifies in its processes as a result of the overruns at New Year 2008 at Rugby, Liverpool Street and Shields Junction, ORR is mindful that it has had previous assurances from Network Rail that it would learn lessons from the finding of the planning contravention which arose in case of Portsmouth². In light of the present contravention, ORR considers that such assurances have not been met. Network Rail has not provided a plan addressing how it will deal with the weaknesses it identifies in its processes. In light of this and, given the significant amount of work to be carried out in the next control period and the potential impact of the contravention on train operators, their customers and on funders, it is appropriate to take enforcement action.
- b. In relation to section 55(5B)(b), in view of the adverse effect which the contravention can have, as observed at Rugby, Liverpool Street and Shields Junction, ORR is satisfied that the contravention will adversely affect the interests of users of railway services. In addition, ORR is not satisfied that the contravention will not lead to any increase in public expenditure. This is because the contravention relates to a failure to plan and execute projects in an efficient and economical manner and in accordance with best practice and thus if it continues the requirement for government financial support for the railway industry could well be larger than it would be otherwise.

² [ORR confirms penalty of £2.4m on Network Rail for poor planning and risk assessment](#)

Proposed Order

19. For the reasons set out above ORR considers that the proposed order is requisite and that the effect of Network Rail complying with the proposed order, as set out at Annex A, is that Network Rail would be complying with Condition 7, in relation to the contravention highlighted in this notice.

20. The proposed order requires Network Rail to produce to ORR, by 31 May 2008, a plan setting how it intends to implement measures to ensure that its planning and execution of projects for the renewal, replacement, improvement, enhancement and/or development of the network which require possessions will be undertaken in an efficient and economical manner and in accordance with best practice to the greatest extent reasonably practicable so as to satisfy the reasonable requirements of persons providing services relating to railways and funders in respect of the quality and capability of the network. The proposed order requires Network Rail to set out clear milestones in its plan showing how the measures will be implemented and requires the measures to address, in particular, the weaknesses in Network Rail's risk management, supplier management, site management and communications with train operators and rail users. The proposed order requires Network Rail, by 31 December 2008, to have implemented its plan and have delivered a report to ORR demonstrating why it is satisfied that the plan has been implemented.

Conclusion

21. For the reasons set out in this notice ORR proposes to make the final order in the form attached at Annex B.

A handwritten signature in blue ink, appearing to read "Bill Emery".

Bill Emery

Chief Executive of the Office of Rail Regulation

ANNEX A

1. This annex contains supporting information in relation to the Contravention. It is underpinned by the full facts and findings in the findings report³.

2. Our report reveals significant weaknesses within Network Rail's application of risk assessment and mitigation measures. These fail to reflect adequately the complexity and significance of the work and the potential impact of possession overruns on train operators, passengers, and freight customers.

3. Our assessment of these weaknesses has also taken account of the particular failings at Portsmouth, where one of the areas of concern which led us to conclude that Network Rail was in breach of its network licence was Network Rail's failure to:

“identify risks effectively and to develop adequate mitigation measures, including contingency plans, to address the possibility of extended disruption to services and the potential effect of this on third parties.”

4. We have concluded in our report that these weaknesses are unlikely to be confined solely to the three cases covered by our investigation, and that, based on the evidence we have seen, they are weaknesses which are present to some degree across the organisation and which, unless Network Rail takes action, will manifest themselves from time to time in similar disruptive overruns to those which took place over Christmas/New Year and at Portsmouth.

5. We understand that Network Rail has procedures and processes in place which require that schedule quantitative risk assessments (“SQRA”) and readiness reviews are undertaken in certain circumstances. As we have said in our report, in the case of Rugby, we have found that there was a high level of review and risk assessment in the months preceding the blockade.

6. At Liverpool Street, however, the SQRA process was not satisfactory⁴. Despite the engineering works involving a major possession which involved closing a major London terminus for a significant period of time, the last SQRA which was undertaken in relation to the overhead line engineering work was in August 2007, four months before the work began. Even when there were then later issues regarding the late ordering of materials and late addition of extra work to the blockade around T-4, no further SQRA was undertaken. We do not consider that this is consistent with good practice in the planning of engineering projects which require possessions.

³ Published on our website

⁴ See paragraph 2.58 of our report in particular

7. At Shields Junction (Glasgow), Network Rail dispensed with the application of the SQRA process altogether on the grounds that this methodology had not previously been found to be robust. Network Rail proceeded with the possession without having formally assessed and mitigated significant schedule risks, particularly those associated with signal integration problems that were clearly foreseeable but that which would only be crystallised at the end of the blockade. We do not consider that this is consistent with good practice.

8. We also note that Network Rail has chosen to carry out regular readiness reviews on certain types of signalling blockade which include scrutinising project plans in order to improve the robustness of the blockade plan. While Network Rail has recognised the value in carrying these out for certain types of signalling blockade, it does not apply them more widely to complex and/or significant work in other fields. We consider this a failure to apply good practice.

9. We also consider that the provision of inadequate information by Network Rail to train operators reflects failings in site management identified in our report, including lack of effective reporting lines and knowledge of physical completion of work on site.

10. In particular, our investigation into the three overruns over the Christmas period⁵ has led us to conclude that there is a lack of clear site management reporting milestones during possessions which would provide better visibility for all parties about the volume of physical work remaining and the time required to complete it.

11. In our view, an infrastructure manager applying best practice and adopting an economic and efficient approach would ensure it knows what work has been completed and whether the work is progressing according to its latest plan. It would ensure that it has the right level of understanding through effective site management of the amount of work to be done and the likelihood of an overrun and that it had an adequate chain of communication so that its customers receive timely and accurate information⁶. This is a significant weakness in Network Rail's current approach.

12. Connected with risk assessment and effective site management are issues shown in our report on the management of contractors. We have identified some over reliance on information from contractors, particularly on site, which has affected communication of accurate information.

13. We highlighted in the breach at Portsmouth the need for Network Rail to assess the plans and scrutinise the work of its contractor. We note that at Liverpool Street Network Rail was late to identify before the possession that its contractor had not ordered some essential material. We also note that

⁵ see paragraph 2.109 of our report

⁶ see paragraphs 2.35, 2.69 and 2.94-2.96 of the report.

Network Rail did not appear to challenge the low level of supervision from its contractor at Liverpool Street. All of these factors lead us to conclude that there are current weaknesses in Network Rail's risk assessment and management of its suppliers.

14. In conclusion, better risk assessment and mitigation as part of the planning of the work would address many of the weaknesses highlighted above. Significant improvements could also be made in arrangements with contractors, in site management - so that unexpected events can be dealt with and managed adequately as they arise -, and in communication both within Network Rail and to train operators. We consider that reasonably practicable steps were and are available to Network Rail to address the weaknesses highlighted above.

ANNEX B

RAILWAYS ACT 1993 (as amended)

SECTION 55

FINAL ORDER

- A. The Office of Rail Regulation (“ORR”) is satisfied that Network Rail Infrastructure Limited (“Network Rail”) is contravening Condition 7 of its network licence.
- B. 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 7.
- C. 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;
- D. 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 7; 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.

- E. ORR gave notice under section 56 of the Act of its proposal to make the order⁷ 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) produce and deliver a plan to ORR by 31 May 2008, on which it has consulted its customers, relevant funders, Passenger Focus and London TravelWatch, which:
 - (i) demonstrates how Network Rail will implement measures to the greatest extent reasonably practicable, including procedures and training, to ensure that its planning and execution of projects for the renewal, replacement, improvement, enhancement and development of the network which require possessions will be undertaken in an efficient and economic manner and in accordance with best practice (“the Measures”); and
 - (ii) sets out clear milestones showing how Network Rail will implement the Measures; and
 - (iii) demonstrates that particular attention has been paid in the Measures to addressing weaknesses in Network Rail’s risk management, supplier management, site management and communications with train operators and rail users;
 - (b) by 31 December 2008, have implemented the plan and have delivered a report to ORR which demonstrates why it is satisfied that the plan has been implemented.

⁷ [LINK TO BE INSERTED]

2. This document constitutes a final order made under section 55 of the Act.
3. This order shall have immediate effect.

Bill Emery

Chief Executive of the Office of Rail Regulation

[Date]