

NOTICE IN ACCORDANCE WITH SECTION 56 OF THE RAILWAYS ACT 1993 (AS AMENDED) OF THE OFFICE OF RAIL AND ROAD'S PROPOSAL TO MAKE A FINAL ORDER IN RELATION TO NETWORK RAIL INFRASTRUCTURE LIMITED'S CONTRAVENTION OF CONDITION 1 OF ITS NETWORK LICENCE

29 May 2024

1. This document constitutes a notice issued by the Office of Rail and Road ("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 1 of its network licence, as more particularly set out in this notice;
 - 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;
 - 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 produced to ORR, by no later than 31 August 2024, a robust and evidenced plan identifying those further activities that it will undertake to secure the operation and maintenance of the network in accordance with best practice to meet the reasonable requirements of persons providing services relating to railways in respect of the facilitation of railway service performance to the greatest extent reasonably practicable. Network Rail will also be required to implement the plan consistent with any timing set out therein, or in the absence of a timing as soon as reasonably practicable and deliver to ORR within one month of ORR's request a report demonstrating why it is satisfied that the plan has been implemented. If by 31 October 2024 ORR is satisfied that Network Rail has failed to produce the plan as directed, Network Rail is required to pay to the Secretary of State within one month of ORR's demand, the sum of £3,000,000.
 - d) ORR proposes to make this order for the purposes of ensuring that Network Rail is complying with condition 1 of its network licence, in respect of the contravention which is the subject matter of this notice;

- e) The other facts which, in the opinion of ORR justify the making of the order are set out below; and
- f) Representations or objections with respect to the proposed order should be made by close of business on 20 June 2024 by:

email to: patrick.crowley@orr.gov.uk; or

post to: Patrick Crowley

Office of Rail and Road

25 Cabot Square,

London,

E14 4QZ.

Background

- 2. This notice follows a worsening trend in train performance in Network Rail's Wales & Western region since 2021. Wales & Western produced and iterated a performance recovery plan that included actions aimed at causes of delay from its analysis of attribution data. However, it did not reverse the decline in overall train performance.
- 3. ORR wrote to Network Rail on 29 November 2023 initiating an investigation into Network Rail's contribution to the delivery of train service performance in Wales & Western and whether Network Rail had contravened or is contravening its network licence.
- 4. The investigation considered whether Wales & Western has, to the greatest extent reasonably practicable having regard to all relevant circumstances:
 - a) applied best practice in train service performance management capability and system operation;
 - b) systematically reviewed the key factors that contributed to deteriorating train service performance (including those within and outside of its control);
 - c) developed and delivered a suitably evidenced and resourced improvement plan;

- d) engaged with relevant stakeholders in the development of the plan to ensure it meets their reasonable requirements;
 - e) reviewed the adequacy of the plan, its delivery and realisation, and
 - f) where the plan has not led to improvement, sought to understand why, including in respect of factors that are beyond its direct control.
5. ORR considered information provided by Network Rail as part of this investigation and as part of ORR discharging its regulatory functions, as well as information provided by relevant passenger and freight train operators, funders and passenger groups and representatives.

Relevant Legal Provisions

Condition 1

6. The relevant condition of Network Rail's network licence is condition 1, paragraphs 1.1 – 1.4 and 1.9, which provide as follows:

"1 Core Duties

Network Management Duty

1.1 The "Network Management Purpose" is to secure:

- (a) the operation and maintenance of the Network;
- (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 requirements set out in Condition 1.2.

1.2 For these purposes, the requirements are the reasonable requirements of persons providing services relating to railways and Funders, including Potential Providers or Potential Funders, in respect of:

(a) the quality and capability of the Network; and

(b) the facilitation of railway service performance in respect of services for the carriage of passengers and goods by railway operating on the Network.

1.3 The licence holder shall achieve the Network Management Purpose to the greatest extent reasonably practicable having regard to all relevant circumstances including the ability of the licence holder to finance its Licensed Activities (the “Network Management Duty”).

1.4 In complying with the Network Management Duty, the licence holder shall in particular ensure that it duly takes into account the interests of all classes of passenger operator and freight operator in satisfying the requirements set out in Condition 1.2.

...

Route Business and System Operator responsibilities

1.9 Each Route Business and the System Operator shall comply with the Core Duties in the performance of their functions.”

The Contravention

7. ORR is satisfied that Network Rail is contravening condition 1 of its network licence:
 - a) by failing to achieve to the greatest extent reasonably practicable having regard to all relevant circumstances its obligations to secure the operation and maintenance of the network in accordance with best practice to meet the reasonable requirements of persons providing services relating to railways in respect of the facilitation of railway service performance; and
 - b) for each Route Business (or Region) to comply with the obligations set out in 7(a)(i) above in the performance of their functions.
8. Several areas of concern and deficiencies were identified. These include the following:

- a) Network Rail failed to plan sufficiently for cumulative changes on the network, including as a result of the Great Western Electrification Project (GWEP) and Crossrail;
 - b) Network Rail does not fully understand the extent to which different operational factors are driving increased delay;
 - c) there are weaknesses in Network Rail's processes for learning lessons from incidents; and
 - d) Network Rail's leadership structure and governance is not currently set up to drive optimised train performance outcomes.
9. These areas of concern and deficiencies are set out in further detail in Annex B to this Notice.

Section 4 of the Act

10. ORR must exercise its functions (including its enforcement function) in the manner which it considers best calculated to achieve a series of duties set out at section 4 of the Act.

Section 55 of the Act

11. Section 55(1) of the Act obliges ORR to make a final order if it is satisfied that a licence holder is contravening, or is likely to contravene, any condition of its licence.
12. Section 55(2) of the Act provides that ORR must instead make a provisional order where it appears it is requisite to do so. In determining if it requisite, ORR must have regard, in particular, to the extent to which any person is likely to sustain loss or damage in consequence of anything which is likely to be done, or omitted to be done, before a final order can be made.
13. Any enforcement order must contain such provisions as is requisite for the purpose of securing compliance with the relevant licence conditions.

14. The obligations to make an enforcement order contained in sections 55(1) and 55(2) of the Act are subject to a number of exceptions, as follows:

a) section 55(5) of the Act provides that ORR must not make an order if it is satisfied that the duties imposed upon it by section 4 of the Act preclude making an order;

b) section 55(5A) of the Act provides that ORR shall consider whether it would be more appropriate to proceed under the Competition Act 1998 and section 55(5AA) of the Act provides that ORR must not make an order if it considers that it would be more appropriate to proceed under the Competition Act 1998; and

c) section 55(5B) of the Act 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 for the time being, to be appropriate for it to take for the purpose of securing or facilitating compliance with the condition or requirement in question; or

ii. the contravention or apprehended contravention will not adversely affect the interests of users of railway services or lead to any increase in public expenditure;

it shall only make a final order if it considers it appropriate to do so.

15. ORR does not consider it is requisite to make a provisional order as it does not consider that any person is likely to sustain loss of damage in consequence of Network Rail's contravention before a final order can be made.

16. ORR does not consider that the exception in section 55(5) of the Act applies. ORR is satisfied that its section 4 duties do not preclude the making of an order.

17. ORR has considered whether it would be more appropriate to proceed under the Competition Act 1998 and does not consider that the exception in section 55(5AA) of the Act applies. In this case, ORR does not consider that Network Rail's failure to

deliver its performance obligations could amount to an infringement of the Competition Act 1998.

18. ORR does not consider that the exception in section 55(5B) applies because:

- a) Network Rail is not currently taking all such steps as it appears to ORR for the time being, it considers to be appropriate for the purpose of securing or facilitating compliance with condition 1. Although Network Rail has taken steps to produce a recovery plan and is taking steps to ensure further improvements through its Project Brunel plan, which is aimed at asset reliability and operational practices on the Western route out of Paddington, these require further development and therefore the delivery of future performance in Wales & Western is at risk without further actions to ensure sustainable improvements and processes are in place; and
- b) the contravention adversely affects the interests of users of railway services and could lead to an increase in public expenditure. This is because the contravention relates to a failure to deliver performance obligations, which may impact industry revenue and therefore, if it continues, it could require greater government financial support for the railway industry.

19. ORR therefore considers it appropriate to impose a final order, containing such provisions as it considers requisite for the purposes of securing compliance with condition 1.

20. The proposed order requires Network Rail to produce to ORR, by 31 August 2024, a robust and evidenced plan identifying those further activities that Network Rail will undertake to secure the operation and maintenance of the network in accordance with best practice to meet the reasonable requirements of persons providing services relating to railways in respect of the facilitation of railway service performance to the greatest extent reasonably practicable. Network Rail will also be required to implement the plan consistent with any timing set out therein, or in the absence of a timing as soon as reasonably practicable and deliver to ORR within one month of ORR's request a report demonstrating why it is satisfied that the plan has been implemented. The proposed order also provides that if, by 31 October 2024 ORR is satisfied that Network Rail has failed to produce the plan, Network Rail is to pay the sum of £3,000,000. Details as to how the reasonable sum has been calculated are included in Annex B.

21. Section 56 of the Act requires ORR to publish this notice specifying the period, being no less than 21 days, in which representations or objections with the proposed order may be made. The notice period ends on 20 June 2024. ORR will consider any representations or objections which are duly made and not withdrawn before the end of this notice period.

A handwritten signature in black ink, appearing to read 'John Larkinson', is positioned above the printed name.

John Larkinson
Chief Executive

Annex A
Draft Final Order

SECTION 55

DRAFT FINAL ORDER

- A. The Office of Rail and Road (“ORR”) is satisfied that Network Rail is contravening condition 1 of its network licence (“the contravention”):
- a. by failing to achieve to the greatest extent reasonably practicable having regard to all relevant circumstances its obligations to secure the operation and maintenance of the network in accordance with best practice to meet the reasonable requirements of persons providing services relating to railways in respect of the facilitation of railway service performance; and
 - b. for each Route Business (or Region) to comply with the obligations set out in A(a) above in the performance of their functions.
- B. Having regard to the matters set out in section 55(1) of the Railways Act 1993, as amended (“the Act”), ORR considers it appropriate to make a final order for the purpose of securing Network Rail’s compliance with condition 1.
- 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. it is not more appropriate to proceed under the Competition Act 1998.
- D. 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.
- E. ORR need not consider, under section 55(5B) of the Act, the appropriateness of the making of this order because:

- a. ORR is not satisfied Network Rail has taken, 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.

F. [ORR gave notice under section 56 of the Act of its proposal to make a final order and has taken into consideration all representations made and not withdrawn 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 to ORR by 31 August 2024 a robust and evidenced plan identifying those further activities that Network Rail will undertake to secure the operation and maintenance of the network in accordance with best practice to meet the reasonable requirements of persons providing services relating to railways in respect of the facilitation of railway service performance to the greatest extent reasonably practicable. In particular, the plan should:
 - i. develop further its improvement plan for the Thames Valley section of the Western route (known as 'Project Brunel') including ensuring sufficient definition of and focus on operational culture and process improvements. It must provide a clear, timebound plan for renewing the headspans of overhead line equipment from Paddington to Airport Junction, together with a mitigation plan until that work is complete;
 - ii. set out timebound and measurable actions to deliver sustainable operational and performance improvements in the long-term across the wider Western route and Wales & Western region – which could include expansion of the approaches being adopted under the current 'Project Brunel';

- iii. set out timebound and measurable actions that adequately address the relevant findings of the ‘Wales & Western Region – Network Rail, Investigation Report dated 28 May 2024’ relating to the contravention, including, but not limited to:
 - improved governance around learning reviews to ensure they are fully and effectively implemented including for complex, multi-lateral incidents;
 - improved governance of train performance delivery, including how performance risks are identified and escalated; and
 - prioritised improvement plans, demonstrably based on sufficiently robust data describing key operational factors that are driving increased delay associated with each incident.
 - iv. set out how i to iii above will be governed and managed, including through any update to existing performance recovery plans; and
 - b) Implement the plan consistent with any timing set out therein, or in the absence of a timing as soon as reasonably practicable and deliver to ORR within one month of ORR’s request a report demonstrating why it is satisfied that the plan has been implemented.
2. If, by 31 October 2024, ORR is satisfied that Network Rail has failed to produce the plan set out at 1(a) above, Network Rail shall pay to the Secretary of State, by bank transfer to such account as notified by ORR, within one month of ORR’s demand the sum of £3,000,000.

3. Nothing in this order shall be taken to permit Network Rail to breach any licence, contract or other legal obligation.

This order shall have immediate effect.

John Larkinson

Chief Executive

[Insert Date]

Annex B

1. This annex contains supporting information in relation to the Contravention. It is underpinned by the 'Wales & Western Region – Network Rail, Investigation Report dated 28 May 2024' and which is published on our website. This annex also contains details as to how the reasonable sum has been calculated.
2. Wales & Western ended Control Period 6 (March 2024) below the regulatory floor for both CRM-P (Consistent Region Measure – Performance) and FDM-R (Freight Delivery Metric by Region). For the start of control period 7 (CP7) (April 2024) whilst the first railway period was a better period for punctuality, the moving annual average for the regulatory success measures (On Time and Cancellations) remained significantly below the targeted performance for the end of year 1 of CP7.
3. Our investigation has identified a range of factors impacting performance in the region. We have assessed Network Rail's actions to date to address these including leadership structure and governance on train performance, preparing for and delivering major network changes, managing assets to deliver train performance, operational management of the network, and resourcing to support train performance.
4. We are not satisfied that Network Rail is doing everything to achieve the Network Management Purpose to the greatest extent reasonably practicable, and we are satisfied that Network Rail is contravening condition 1 of its network licence as:

a. Sufficient planning for cumulative change

Network Rail has failed to plan sufficiently for cumulative changes on the network. Network Rail does not yet have comprehensive asset and operations improvement plans that will recover from its previous failure to sufficiently plan for the cumulative changes on the network, including as a result of the Great Western Electrification Project and Crossrail. It appears that it did not fully understand and articulate the impact of increased services and tonnage on effective management of network assets and therefore did not develop appropriate asset management plans and engineering access plans. Whilst the emergent Project Brunel (aimed at addressing longer-term asset sustainability, asset reliability and operational practices on the Western route out of Paddington) is intended to partially address this, it is not

sufficiently developed and is limited geographically to the London end of the Great Western Mainline (GWML). It has not delivered substantial outputs nor achieved lasting performance outcomes for passengers and freight and it has not yet made longer-term plans to take and use engineering access effectively and efficiently. The region has not provided a clear, timebound plan for renewing the overhead lines from Paddington to Airport Junction and a mitigation plan to ensure reliability until that work is complete.

b. Understanding operational factors driving increased delay.

Wales & Western does not fully understand to what extent different operational factors are driving increased delay when incidents occur. This hampers its ability to precisely and efficiently target improvements. The region has not yet delivered an effective operational business and culture change programme that will promote success of the Western route following the significant change to the mix of traffic during CP6 and its plans to do so are not yet fully defined and developed. Project Brunel is still under development and to date has far greater focus on asset interventions rather than operational measures to manage and reduce delay. It is not yet fully scoped with clear, timebound milestones for all aspects of delivery. It is also unclear how Project Brunel's benefits and any structural improvements from this project will be incorporated into the region's wider Western route and regional performance recovery plan, to deliver sustainable improvement.

c. Learning lessons from incidents.

There are weaknesses in Wales & Western's processes for learning lessons from incidents. There is an urgent need for it to review lessons from the introduction of major network changes on Western (including GWEP and Crossrail) to ensure that it applies that learning in managing HS2 interfaces. There are specific instances of lessons from major disruption events not being fully learnt and implemented. These include lessons from the 19 September 2022 overhead line failure not being fully reflected in Wales & Western's response in the 7 December 2023 overhead line failure incident, including ineffective action taken to improve its management of stranded trains. Lessons relating to the management of Nuneham Viaduct, in particular the impact of its closure on passengers and freight, have not been fully reviewed. These examples demonstrate that Wales & Western needs to improve governance around incident learning reviews to make sure they are

fully and effectively implemented, and knowledge is shared across the industry.

d. Leadership structures and governance

There are weaknesses in Wales & Western's leadership structures and governance. We consider that the region is not currently set up to drive optimised train performance outcomes. Network Rail has not demonstrated how the region's overarching strategy and governance for delivering good train performance provides clear line-of-sight and appropriate accountability. We consider that the incident at Nuneham Viaduct demonstrated substantial weakness in the region's approach to understanding and managing the network effects of engineering decisions, and also in how it identifies and escalates resultant performance risks both internally and with operators. Wales & Western's proposed changes to leadership structures and governance currently lack sufficient maturity.

5. There are substantial discrepancies within Wales & Western when compared to train service performance and best practice in other regions. We consider there is a need for a more mature operating culture where different stakeholder requirements can be better balanced and factors directly within Wales & Western's control are managed more precisely. We also consider there is a need to improve governance arrangements to align the management of operations and assets for the benefit of freight users and passengers.
6. In conclusion, for the reasons set out above, we consider that Network Rail is failing to achieve to the greatest extent reasonably practicable having regard to all relevant circumstances its obligations to secure the operation and maintenance of the network in accordance with best practice to meet the reasonable requirements of persons providing services relating to railways in respect of the facilitation of railway service performance. Network Rail has failed to demonstrate that it is taking and will take all necessary steps across the region to improve performance. Project Brunel is not sufficiently developed to address longer-term asset sustainability, asset reliability and operational practices and it is limited to the Thames Valley area of the Western route. Progress to date, and the scope of current commitments do not provide a sufficiently developed strategic plan so as to satisfy ORR that Network Rail is doing everything reasonably practicable to secure the operation of the network. In particular, some of the plans in place are either too immature or insufficient in scale.

7. The proposed order requires Network Rail to produce to ORR, by 31 August 2024, a robust and evidenced plan identifying those further activities that it will undertake to secure the operation and maintenance of the network in accordance with best practice to meet the reasonable requirements of persons providing services relating to railways in respect of the facilitation of railway service performance to the greatest extent reasonably practicable. Network Rail will also be required to implement the plan consistent with any timing set out therein, or in the absence of a timing as soon as reasonably practicable and deliver to ORR within one month of ORR's request a report demonstrating why it is satisfied that the plan has been implemented.
8. The proposed order also provides that, if by 31 October 2024, ORR is satisfied that Network Rail has failed to produce the plan, Network Rail is to pay a reasonable sum, in accordance with section 55(7A) of the Act, in the sum of £3,000,000.
9. In calculating the reasonable sum, we have followed our penalties statement and had regard to our section 4 duties. We consider that a reasonable sum will incentivise Network Rail to ensure it reaches compliance with condition 1 of its network licence and deter future non-compliance. It will also underpin longer-term actions for improvements, such as the development of the Project Brunel plan.
10. We have considered the harm caused to customers of Wales & Western by Network Rail's failure to deliver its regulatory requirements. There will have been a significant number of passengers impacted by Wales & Western poor performance, which will have also had a significant impact on operators. We therefore assess that the harm to Wales & Western customers is significant.
11. We have also considered the culpability of Network Rail. We recognise that Network Rail has paid compensation to train operators for lost future revenues through Schedule 8 to the relevant track access contract. It has not benefitted financially from the breach. We have not seen evidence of Network Rail's senior managers or Board acting recklessly, knowingly or intentionally in a way that would undermine performance delivery. However, Network Rail's behaviour demonstrates weaknesses in management of performance. We therefore consider that Network Rail bears some culpability in relation to its delivery of critical industry processes such as operational management and planning.

12. We have applied a number of mitigating factors. Network Rail has been proactive in taking forward improvement initiatives by appointing new senior members of the region's leadership team and developing Project Brunel. It has also committed to making improvements to performance governance and has provided some examples of where lessons have been learned. Network Rail has also fully cooperated with ORR's investigation.
13. Given that Network Rail is funded by taxpayers and railway users, and taking into account all our Section 4 duties, we have considered whether it is more appropriate to scale a reasonable sum so that it is broadly capable of being funded by executive bonuses.
14. Network Rail's Regulatory Statement for 2022–2023 set out that bonus payments to all executive directors in Network Rail amounted to £3,000,000. Although it is for Network Rail to decide how to fund any reasonable sum, we believe that it is appropriate to scale that reasonable sum so that it is broadly capable of being funded by executive bonuses.
15. ORR therefore proposes to make a Final Order that includes provision for Network Rail to pay the sum of £3,000,000 in the event that it fails to produce the plan by 31 August 2024.