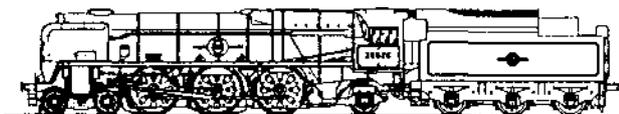


# MERCHANT NAVY LOCOMOTIVE PRESERVATION SOCIETY LIMITED

President: David Shepherd, C.B.E., F.R.S.A.



Owner of Ex-British Railways Southern Region Merchant Navy class locomotive No. 35028 "Clan Line", which is maintained in Mainline Running order.

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25 January 2013

Dear Mr. Mills,

## OFFICE OF RAIL REGULATION PERIODIC REVIEW: CONSULTATION ON SCHEDULES 4 AND 8 POSSESSION AND PERFORMANCE REGIMES

We are writing to respond to the consultation review process dated November 2012.

### **Summary**

*We write as a small business sub-contracting into the heritage sector of the national network charter business through the hire of our steam locomotive. We wish to focus on Section 7/ Schedule 8 aspects of your Consultation dealing with the compensation regime of charter operations. We acknowledge the Consultation focuses on charter operators and that we are not one, but believe it is inevitable that in the event of an issue attributable to our hired locomotive's performance an operator will seek redress from us.*

*Crucial to our case is the principle of identifying proportionate risk. Charter operations need definition, but are counted in the hundreds of activities per annum compared with tens of thousands for large franchised players with corresponding levels of turnover.*

*Much of the heritage charter sector in which we work necessitates the sub contracted hiring in of stock and traction vehicles that are subsequently operated by the charter operator leading to divided responsibilities.*

*We set out to explain that the current charter performance scheme should exert a powerful and meaningful impact on sub-contractors having the real potential to damage their viability to operate. From our perspective there are three reasons for this: (a) that the existing financial cap limit is large, relative to the margins prevailing in this supply side sector of the market and, (b) that while we are not a direct charter operator, we face the potential for charges to be cascaded down to us through the hire process, while (c) we have no natural right of access and challenge to the scheme's due process.*

*In respect of the current capping process, we believe if fairly allocated charges had been more*

widely imposed on those in a small sector bearing a responsibility for poor performance, the scheme would have delivered with a greater impact.

We wish to argue for the concept that heritage operations deserve some wider recognition in the national interest. We however do accept we have performance related responsibilities. We would wish to see greater clarification of industry accepted guidance, processes and standards that could be developed to both improve and deliver on that.

We accept that it is inappropriate to see Network Rail (NR) suffer a financial loss attributed to the mechanics of the charter capping scheme where that loss is the result of the charter operators or his contractors poor performance.

We propose a compensation scheme based on historic annual liquidated costs operated through an Access Charge Supplement, together with a revised incentive programme. We suggest this would deliver a proportionate, transparent, fairer regime that importantly then offers a real incentive for good performance, rather than a shared average scheme that benefits nobody.

### **Who are we?**

We are the Merchant Navy Locomotive Preservation Society Limited (MNLPS) a small, private owner of a heritage steam locomotive regularly used for hire on the NR main line by charter operators. Our web site: <http://www.clan-line.org.uk/> provides a detailed background.



### **What is our Purpose?**

MNLPS is a volunteer educational and charitable Society registered as a company that is limited by guarantee. Its purpose is to maintain its 65 year old steam locomotive, former BR Merchant Navy Class Pacific No.35028 *Clan Line* in main line running order. MNLPS has a membership of nearly 500 and has operated the locomotive on the National Network almost continuously since its withdrawal in 1967. It is routinely considered to be a doyen of the remaining large main line heritage steam engines representing a hallmark of British engineering design and expertise. It is still today in regular use with the British Pullman unit of the Orient Express company who run charter operations operated by Deutsche Bahn Schenker (DBS) under its ORR licence.

To put into perspective the operational risk and financial benefit to the railway industry that we bring, MNLPS presently undertakes the haulage through a TOC (DBS), of some 25 steam charters per year bringing some 5000 - 6000 passengers and £2million in revenues to train promoters. A large proportion of this is re-spent within the industry.

### **Why are we responding?**

While MNLPS is not in itself a charter operator, we are a contractor to this sector and our livelihood and strategic direction is heavily dependent on associated steam charter passenger operations. Hence the outcome and delivery of a policy change arising from this consultation will impact on our future and our ability to actively continue to contribute to the UK's rail national heritage scene.

Importantly, many heritage charter passengers are tourists rather than travellers in the conventional sense, enjoying visits to heritage sites, destinations and activities. The indirect economic benefit is not readily measurable by us but it is purposeful in supporting the British national identity. Additionally, the rail side passing of heritage steam regularly attracts large audiences that offer an implied benefit to the wider industry.

We should mention that in the national interest and with support from the public, the state through the Science Museum purchased the historic locomotive *Flying Scotsman* with the purpose of restoring it to main line operations. Experience has shown that its cost of preservation is much higher than anticipated, a position many of us in this sector have faced in the reality of the day. That restates the obvious that money is critical to the survival of the UK's preservation heritage sector.

**Central then to our point is a concern that policies that are intended to incentivise good performance and vice versa penalise poor performance, not in itself an unreasonable objective, will if designed around a large scale commercial regime disproportionately impact on a small business and threaten its ongoing viability.**

In common with many small heritage rail operators, we live with the fact that our non profit making activities are unable on a fully built up and allocated cost basis to be sufficient to maintain commercial viability - a prerequisite for a normal business. We therefore rely extensively on a large unpaid volunteer effort ploughing all earnings and donations into the sole purpose of maintaining our locomotive.

By railway norms MNLPS income and margins are naturally thin. A performance regime designed to have teeth and impact on large operators has the real potential, if unconstrained, to destroy much of our level of income. From our experience, we sense it is in the delivery of the performance regime that the real impact can be felt. In our opinion, it is reasonably questionable whether a small sub-contractor in the charter market, where its role has a degree of poorly defined boundaries of responsibilities, can enjoy sufficient transparency to ensure a process of fair risk and reward.

We would have little doubt that while the ORR paper is addressing a compensation regime between Network Rail (NR) and charter operators, in the market there would be a cascade process in which in the event of a delay attributable to a heritage locomotive, the costs would accordingly be reallocated.

## **Consultation**

Our response to Consultation Questions is focused upon Section 7 'Compensation related to Charter Operators' and more specifically to Schedule 8 events.

### **Consultation questions**

**7.10 Do you agree that a separate charter operator payment rate should be calculated using the same methodology used to calculate the freight operator payment rate, but based on delays caused by charter operators to other train operators? If not, please tell us why?**

### **Our Comments**

1. As we are neither a franchise or charter operator it is not appropriate for us to express an informed opinion on the absolute methodologies for the calculation of incentives/penalties. We do however believe these should fairly and transparently reflect real costs and not simply be those of an arbitrary fine.

2. MNLPS accepts that train failure or impaired performance is blight and the operation of heritage locomotives or stock can inevitably bring with it risk. We do have other points to make but we should clearly state that it cannot be appropriate for Network Rail to accumulate a default net loss of some £600,000 pa of costs in a Control Period, for it is not a basis for making good business

decisions upon.

3. We have three questions we would like to put to you:

We ask what evidence is there that the present performance regime is effective. Data in Figure 1 (p9) is difficult for outsiders to interpret but something seems very remiss since late 2009/10/11 where currently Schedule 8 net losses to NR are approximately £75m?

Secondly then, we suspect that the net financial effect on large scale operators is likely to be the difference between two large numbers. Other than where exceptionally and consistently poor performance issues occur, are the amounts likely to disturb the overall balance of behaviour in large multi million pound businesses? This raises the issue of proportionality with tens of thousands of train operations per annum in the main markets compared with only hundreds in the charter sector.

Thirdly, is there data publicly available that separates out the performance of the three main charter sectors (i) Modern stock/haulage (ii) Heritage steam /stock and (iii) Heritage diesel/stock? It would be very helpful to then know by each sector how delays were attributed by broad type: e.g. locomotive performance, point to point timings, overtime embarking/disembarking passengers etc. If this information is available can we please see that - and is there anything that can be learnt from where a focus should be?

4. There is also a commercial interest question to be considered; relatively how many operators are there promoting charter operations compared with the large majority who do not operate in this field - and presumably would have an interest for increased penalties to see any nuisance potential removed?

5. In considering the impact on small sub-contractors, we believe that ORR should be aware of the practices by which private locomotive owners operate within the steam heritage charter market. We are of the opinion it is crucial to see where and how the performance regime has its likely financial effect:

- A Heritage Train promoter usually contracts individually with both a stock and locomotive provider. In some cases the stock provider may also be the promoter. The promoter then either directly or indirectly contracts with a charter operator that has an appropriate access agreement with NR and importantly in colloquial terms has the 'safety case' to operate the specific type of haulage.
- An outline train plan with a broad itinerary is drawn up and submitted by the charter operator (many months in advance of a trip) to NR. This also considers technical issues such as station access, train load, the performance expected from the stated haulage, gauging and route clearance. If considered viable, confirmation of target, if not final timings, are provided. Thus in effect a performance envelope is being offered. There is an implied input from a private locomotive owner but usually only in certain cases is there a contract condition established between charter operators and said locomotive owner.
- Inherently, one-off point-to-point timings for a steam hauled train that will be used as a measure of performance are notoriously difficult to forecast, while an overall target to destination may be more readily achievable. For example off loading hundreds of passengers from limited access heritage stock at intermediate stations is a regular cause of delay. To argue for more station time readily leads to an unacceptable plan and potential rejection, but overall the journey should meet targets. Where charters are regular operations the experience gained is put to good use and often such trains become part of the working train timetable.
- The charter operator usually provides the competent train crew and in the heritage sector that process relies heavily on the appropriate skills the crew have for that particular type of

locomotive. In an ever ageing society and despite the best will and good relationships, that task becomes ever the more difficult for charter operators to maintain and implies significant cost in ongoing training.

- The locomotive owner is responsible for presenting his locomotive in a mechanically fit and safe condition to the charter operator who crew the train. The owner is normally responsible to see that there are sufficient fuel and water supplies, and any replenishment necessary for the journey. Additionally, he is required to provide a support team that undertakes the servicing of the locomotive and attends to any related minor operational issues
- The performance of a steam locomotive in relation to the load carried essentially relies upon its mechanical condition, the quality and quantity of the fuel / water available, the skill and experience of the train crew and the support given by the owner's team. These inputs and any performance related issues incurred during an operation are reasonably measurable through the owner's detailed log.
- Familiarity with a steam locomotive and its nuances, rail-head conditions, weather and live priorities established within the NR system are much more variable in dictating performance and are outside the influence of the owner.
- Delay is measured through NR's TRUST computerised system that measures actual vs. stated timings and importantly, the subsequent allocation of fault that leads to penalty charges. However and importantly, a locomotive owner has no natural access to that process and no direct right of challenge. We submit if we are to bear charges this arrangement is patently unfair.

As a small sub-contractor with no natural right of challenge, itself a time limited process, our analysis forces us to conclude that there are obvious areas of divided responsibilities which provide the basis for conflict in the event of a dispute. Currently it is usually through goodwill that such issues are resolved but in the event of a forced high penalty regime it would seem inevitable that approach would be sorely tested.

Probably as an outcome of that situation, it is our understanding that in respect of the current regime capping process, it is doubtful if the penalty regime has been sufficiently applied to those hired in vehicles that are alleged to bear a responsibility for poor performance. If that is correct, then that would probably have undervalued the schemes applicability.

6. We suggest that charter operations could be properly considered as marginal business to both train/charter operators and NR. It would be difficult to foresee the circumstances in which extraordinary levels of capital investment are made purely and solely into the heritage charter business through either NR facilities, that of otherwise used stock (with the exception of specialty services) or by haulage providers or indeed locomotive owners. Thus charters bring largely unplanned marginal income to the railway industry as a whole and as long as their operational impact is not widely and negatively disproportionate, it deserves special treatment.

#### **Consultation questions**

**7.19 Do you agree with our proposal not to require Network Rail to provide incident caps to charter operators on the basis this currently results in a subsidy to charter operators? If not, please tell us why?**

**7.20 Do you agree that incident caps are something that could be provided to charter operators by the private insurance market? If not, please tell us why?**

We would like to take these questions together.

The present cap of £5000 per incident and not per operation should be recognition that if applied

down the chain, an **unrestricted penalty** scheme is inappropriate for small contracted in players. £5000 is a significant amount in our charitable business and we believe to most in our sector. It is our view that the present cap if applied more widely would generally be sufficient to provide an incentive to drive good performance from small players such as us, though we accept that is only part of the problem.

However, if the cap was to be removed, and then become unrestricted / replaced with an average cost recovery scheme, the question is would performance proportionately improve? Our view is probably not - at least while retaining a similar level of charters. This is because the heritage business is unlikely to be sufficiently robust to withstand high and likely uninsurable penalties. In our judgement many providers would then cease to operate. Hence in a perverse way, there would be fewer charters to be counted and leave NR patently open to criticism of a lack of enterprise!

If NR are of the view that some £600,000 pa of non recovered costs incurred over Control Period 4, but needed to be, then two more obvious approaches are as suggested – (a) private insurances or (b) by expanding the scheme of an Access Charge Supplement (ACS). Dealing with these turn:

- (a) On insurance aspects we have historically explored this matter with no measure of success. MNLPS are insured for product liability /indemnity issues with major railway insurers. At the moment normal insurance arrangements will pick up legal liability to third parties, that could include Network Rail or any of the Train Operating Companies, but there would have to be either injury or damage caused to their property. Our understanding which we have again refreshed is that insurers will not underwrite penalty/financial loss schemes. If ORR has a different perspective we would welcome the hearing of that.
- (b) In respect of adopting the ACS cost liquidation approach, then presumably this would need NR to annually recover its unallocated costs - we suggest this could be a basis for the setting of a forthcoming year's ACS costs derived from the previous year's performance.

We are however strongly of the opinion that action alone would not distinguish between good or poor players or improve performance because it is then an average burden applied to all. On the upside, it should not threaten heritage operations so fiercely which open ended costs would.

A better solution might be to opt for an ACS scheme, but set out that charter operators where more than £X'000 pa of NR cumulative attribution cost has been justifiably allocated for poor performance (when operating either on a particular route/or with a particular locomotive) must then post a returnable performance bond if they wish to continue with offering those specific services.

If a bond is then set at say 3 x £X'000 with further increments for continued poor performance the incentive for good behaviour would undoubtedly prevail. It would gradually eliminate marginal performers and force a culture of improving standards through recorded proof thereof. There could be access agreements reducing exposure where a non passenger hauling test train/regime is being undertaken as that is in search of better performance. Further, it would not be over stringent in addressing relatively minor reasons for delay as they would not exceed the primary threshold. It is also fair and proportionate.

### **Conclusions:**

1. We are supportive of a performance regime but believe that within the charter sector heritage operations require special recognition of their role that includes a national interest, limited earning potential and the practicalities of operating vintage machines.
2. We are of the opinion that the heritage charter issue needs to be considered in a proportionate manner recognising that a punitive uncapped, uninsurable scheme has the

real financial potential to destroy this sector. We believe that a railway built on interfacial commercial arrangements of differing interests may however struggle with accepting a more holistic approach.

3. The practice within the charter sector whereby promoters hire in privately owned locomotives and then contract their operation to third parties, inevitably leads to divided responsibilities. The performance regime as currently operated leaves little room for representation by private suppliers who inevitably face picking up cascaded penalty charges but can expect no prize for good performance.
4. We contend that charter operation is in reality a marginal business that brings spare capacity into operation.
5. If rigorously applied, we suggest that the existing cap of £5000 for charter businesses does represent a significant incentive for sub contracted heritage operators but it may not cover all of NR's costs.
6. We agree that it is inappropriate for the present scheme to leave NR with a Schedule 8 Control Period 4 deficit of around £600,000 where that is the result of the charter operators or his contractors poor performance.
7. Our information is that the private insurance market will not insure this type of purely financial risk.
8. Removal of the charter cap leading to unlimited penalties that are subsequently cascaded through the supply chain has a real potential to destroy small players in the heritage sector. We suggest an alternative approach is to use a liquidated compensation scheme based on an ACS methodology that would recover the previous year's historic NR costs spread over the number of charter trains operated that year. That alone however would not ensure good performance. To address that, the scheme should include a financial boundary designed to be at a sufficient but not an overburdening penalty, and applied to all. Continued poor performance by a particular operator/operation that exceeds that cost boundary can be identified through NR's data. In cases then where despite poor performance continued operations are sought, the requirement is for the posting with NR of a returnable bond. This can be set at suitable start and multiplier levels sufficient as to achieve the goals.
9. The charter industry would benefit from a cohesive review of standards, targets and their policing.

We would also like to take the opportunity to say that in our experience charter train operational performance could be improved more immediately and quite simply through the following means:

- i. Bidding and Offer timescales for trains to be adhered to by charter train operators and Network Rail.
- ii. Charter trains which run frequently to appear as 'Q' trains in the working timetable.
- iii. Pathways which are frequently used through high traffic areas to appear as 'Q' trains in the working timetable.
- iv. Identify routes with no pathways for charter trains recognising this may need to be broken down into the day of the week, time band(s) and charter train traction.

We thank you for the opportunity to respond to this consultation.

Yours sincerely

For The Merchant Navy Locomotive Preservation Society Limited



T C Robbins  
Chairman

MEMBER OF THE HERITAGE RAILWAY ASSOCIATION



Award for Excellence 2001

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