

Heritage Railway Association response to the ORR

Consultation on the Publication of ORR Enforcement Notices

This is the Heritage Railway Association's response to the letter from Ian Prosser, Director of Rail Safety, dated 6 July 2010 and entitled "Consultation on the Publication of ORR Enforcement Notices"

A Background on the HRA

1. The Heritage Railway Association (HRA) is the trade association of the 117 Heritage Railways and Tramways in Great Britain.
2. The HRA would like to take this opportunity to thank the Office of Rail Regulation (ORR) for giving us this opportunity to comment on the consultation document.
3. The HRA membership comprises organisations with a total of 20,000 staff who are a mixture of paid and unpaid staff where the average ratio is 1:10. The turnover varies from very small to over £5,000,000 per annum with an average of around £500,000.
4. The sector has a combined turnover of around £79 million. It operates in the transport, heritage and tourism fields which directly affect local businesses and local employment with total turnover of around £320 million.
5. The management of these organisations is often in the hands of persons who are volunteers.
6. Our members have broad business, safety and public interests covering the whole of the UK as well as strong interactions with colleagues in Europe.
7. Our members' operations are monitored by Her Majesty's Railway Inspectorate (HMRI) on behalf of the ORR and other bodies including the Health & Safety Executive (HSE).
8. The HRA meets regularly with representatives of our members and communicates using a bi-monthly newsletter as well as by electronic communication.
9. The HRA therefore represents a group of Small Companies and provides guidance on a wide range of issues to our members.

B General Comments

1. We are unable to determine a reason for considering a change of current policy which will result in the ORR policy differing from that of the HSE.
2. Our members are Small Companies who are regulated by the ORR/(HMRI) as well as the HSE and Local Authorities for differing matters.
3. The policy of the ORR should align with that of the HSE to ensure compliance and minimise the administrative burden on these Small Companies.
4. The reduction in the period for publication from 21 to 3 days is totally inappropriate for Small companies that are largely volunteer run, such as those in our sector, and whose offices are often not staffed during weekdays.
5. We therefore believe that Option 1 should be selected as it is the most cost effective and practicable.
6. Option 3 would be acceptable; however the case for change has not been made.
7. We consider that there is no persuasive rationale or reason for making a change. We therefore reserve our right to take this issue further on our members' behalf.

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C Detailed Comments

We offer the following comments on the options given in section 2 of Annex A to the letter:

Option 1: Do nothing

1. We believe the perceived shortfalls in the current process are illusory. We seek to understand the legal basis for ORR's concerns and an explanation as to why ORR interpret their obligations differently to HSE.
2. Point 2.1 The benefits of the current system include the opportunity to resolve matters before they get into the public arena. Where mistakes have been made by the inspecting authority, HMRI, these can now be resolved before publication thereby reducing the possibility of litigation for defamation or loss of business by a duty holder against the ORR.
3. Point 2.2 The current system works well and raises few questions. However if the ORR believes particular issues need addressing then they should also be addressed by the HSE.
4. Point 2.3 The implication from your wording is that you believe that the ORR have a duty to publish all notices, even if they are in error, when such publication could cause litigation to be brought against the ORR for defamation and loss of business. We do not believe that your interpretation is correct and would seek details of your rationale for this interpretation.
5. Should this matter require addressing by ORR then it should also be addressed by the HSE.

Option 2: Immediate publication

1. The policy of the ORR would not on this option align with that of the HSE and would increase the administrative burden on Small Companies and increase the risk of erroneous notices being made public.
2. Point 2.4 (a) The information currently goes to the duty holder concerned and the representatives of any employees within the three day period and hence we cannot identify the need or benefits of wider publication at this stage.
3. We believe that the legal position of ORR on defamation and their liability for business losses due to publication on a public website of information that is subsequently proven to be false needs consideration.
4. Point 2.4 (b) Is in effect no change in the current process and hence not relevant to the considerations in this document.
5. Point 2.5 As we believe the perceived shortfalls in the current process are illusory, see our response to your points 2.2 and 2.3 above, we do not accept the rationale given here.
6. Once more we fail to see the reasons for and benefits from the proposed changes in process to take it out of line with the HSE process.

Option 3: Publication notices solely on the ORR public register in accordance with ESIA principles

1. Point 2.6 The benefits of consistency with HSE are well made. The technical issues of making the entries searchable are trivial and should be done in any case.
2. Point 2.7 Surely this is the intended purpose of the appeal process as this minimises any reputational or financial loss when the appeal is successful and hence should remain.

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Option 4: Publication on notices solely on the ORR public register as soon as they are served

1. Point 2.8 We believe that the legal position of ORR on defamation and their liability for business losses due to publication on a public website of information that is subsequently proven to be false needs consideration.
2. We do not believe that this point meets the requirements of natural justice.

Section 3: The impact of the ORR preferred Option 2

1. These comments appear to have considered the implications for the larger enterprises such as Network Rail, the TOC's and FOC's. However they have not taken into consideration the impact on Small Enterprises such as our member railways and tramways.
2. Examples include;
 - a. 3.3 & 3.11 The very real impact on a small business of wrongful publication which, whilst removable upon appeal, may have brought about irrecoverable damage to the reputational and financial health of the company concerned.
 - b. 3.4 Unless there is a misprint in your document, there appear to have been 126 successful appeals which implies that there are serious problems with many notices.
 - c. 3.5 We cannot agree that the reduction in the period for publication from 21 to 3 days will give adequate time for parties to prepare themselves. The short period is totally inappropriate for Small companies that are largely volunteer run, such as those in our sector, and whose offices are often not staffed during weekdays.

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