

		RSD Internal Guidance	RIG-2004-16
HANDLING OF RAIL ENQUIRIES AND COMPLAINTS UNDER THE WORKING TIME REGULATIONS 1998 (AS AMENDED)			
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Summary	This RSD Internal Guidance (RIG) gives guidance to Railway Inspectors and Inspector Assistants and on handling enquiries and complaints under the Working Time Regulations 1998 (as amended) .		
Original consultation	N/A		
Subsequent consultation (reviews only)	Jeremy Mawhood – Specialist Inspectors Team Ben Davies – Senior Legal Adviser		

Detail

INTRODUCTION

1 All railway workers are covered by the Working Time Regulations 1998 (<http://www.legislation.gov.uk/ukxi/1998/1833/contents/made>), as amended, (WTR), with effect from 1 August 2003. The [regulations](#) limit the number of hours a worker is expected to work per week, limit night work hours, and provide for rest breaks, paid annual leave, and health assessments for night workers.

2 Hours of work, rest breaks and fatigue are live issues in the rail industry, so there has been considerable interest in these Regulations. However, for safety critical workers as defined under the Railways and Other Guided Transport Regulations Systems (Safety) 2006 (as amended) (ROGS), the WTR provisions are in addition to, not instead of, protection under the ROGS. ROGS Regulation 25 requires controllers of safety critical work to have arrangements in place to ensure that no safety critical worker is so fatigued or liable to become so fatigued, as to be a risk to themselves or the transport system. The WTR require that no employee (including those carrying out safety critical work) works more than an average of 48 hours in each seven days over an agreed reference period, unless the employee agrees in writing (Regulations 4 & 5). ORR does not regard the WTR as a new way of controlling fatigue in the rail sector.

3 The majority of rail workers will be exempt from some key requirements of the WTR relating to rest breaks and night work limits by virtue of the Special Cases Regulation R21 (see paragraph 11). ORR has appointed a Working Time Officer (WTO) (March 2021 - Caroline Barter), who is responsible for investigating complaints and possible breaches of the regulations. The Department for Business, Energy & Industrial Strategy (DBEIS) (formerly Department of Trade and Industry), who are responsible for the Regulations, have agreed that ORR will enforce the Regulations on a reactive basis and will be responsible for working time, night work limits, night work special conditions, health assessments, monotonous and pre-determined working patterns, record keeping and compensatory rest. The WTO may be contacted for clarification on any of the above.

4 This RIG summarises action to be taken by Inspectors, Inspector Assistants and others, and the main provisions of the Regulations that do apply to rail workers, non-mobile urban transport workers (who do not work on road, air or inland waterways) and workers expected to be exempt from the rest break/night work limits requirements.

ACTION BY INSPECTORS AND INSPECTOR-ASSISTANTS

Enquiries and Complaints

HSE will still answer basic WTR enquiries, but will refer all other rail-related WTR enquiries and complaints to the ORR WTO. Inspectors and others,

who receive enquiries or complaints relating to WTR in the rail industry should refer the enquiry or complaint directly to the ORR WTO.

The ORR WTO will carry out an initial investigation. Inspectors are now only expected to become involved in the investigation of a working time complaint if excessive working hours for safety critical workers have been identified.

The ORR WTO will liaise with the Human Factors Team and RSD account holder on matters such as risk arising from fatigue, which will be more appropriately dealt with under ROGS.

Enforcement

7 The WTR will be used to enforce the relevant working time provisions for workers in the railway sector. Enforcement action can only be taken by the WTO, who holds a Warrant under the WTR. Those entitlements under the WTR covering daily and weekly rest periods, rest breaks and paid annual leave are enforced through individual complaint to an Employment Tribunal. The Employment Tribunals Service can be contacted on 0300 123 1024 (Textphone 18001 0300 123 1024). In addition, help and advice on entitlements matters can be sought through the ACAS National Helpline 0300 123 1100. The ORR WTO will be able to offer further guidance in this area should it be required.

8 In terms of managing excessive hours of work that are liable to lead to fatigue, it is expected that ORR's preferred enforcement tools in handling potential health and safety breaches in this area will be ROGS Regulation 25 and the ORR guidance document Managing Rail Staff Fatigue (https://orr.gov.uk/data/assets/pdf_file/0005/2867/managing_rail_fatigue.pdf). Most railway undertakings will be aware of the requirement to set limits on hours of work because of the role of fatigue in previous major rail accidents such as the Clapham train crash. However, it is important to remember that the requirements of the WTR apply to all railway activities including those undertaken by Safety Critical workers. The requirements of both ROGS and the WTR must be considered when dealing with these issues. For further advice please refer to the ORR WTO ([paragraph 17](#)).

MAIN PROVISIONS OF THE REGULATIONS

9 The Working Time Regulations 1998 excluded the rail transport sector from their scope, but the Working Time (Amendment) Regulations 2003 extended to all railway workers provisions for:

- a. An average 48-hour working week;
- b. 4 weeks paid annual holiday;
- c. 1 day's rest in 7 (or 2 every 14 days);

- d. 11 hours rest between working days;
- e. 20 minutes rest break if the working day is over 6 hours
- f. Health assessments for night workers
- g. Limits imposed on night working
- h. Special protection for young workers
- i. Adequate rest breaks where the work rate is pre-determined or the work is monotonous

10 The [Appendix](#) provides further details of the various provisions (although it is not expected that inspectors will need to explain the regulations to this level of detail, as this is the ORR WTOs' role). It is possible to obtain a free copy of the DBEIS guidance on the Regulations by searching the DBEIS web site at <https://www.gov.uk/government/publications/department-for-business-energy-and-industrial-strategy-single-departmental-plan/department-for-business-energy-and-industrial-strategy-single-departmental-plan-june-2019> entering the URN number 07/815.

EXEMPTIONS

11 Within the Rail Transport Sector the Regulations set out exemptions from the Working Time entitlements to c, d, e, and g in [paragraph 9](#), in relation to railway workers:

- a. whose activities are intermittent,
- b. whose hours of work are spent on trains,
- c. whose activities are linked to railway transport timetables and ensuring the continuity and regularity of railway traffic

12 DBEIS have not offered any guidance on how these exemptions should be interpreted. HSE will refer any queries about interpretation to RI WTO.

13 Those railway workers exempt from some of the provisions should still have:

- a. an average 48-hour working week (averaged over an agreed reference period not exceeding 52 weeks),
- b. 4 weeks paid annual leave,
- c. health assessments for night workers and

d. equivalent periods of "compensatory rest" (when they are not allowed to take rest breaks as required by the Regulations).

14 There is also a provision for workers to opt out of the 48 hour week requirement, but this has to be agreed in writing and signed by the relevant employees.

OTHER ISSUES

15 The Regulations define "*mobile worker*" as a worker employed as a member of travelling or flying personnel by an undertaking which operates transport services for passengers or goods by road, air or inland waterway. Mobile workers are entitled to the possibly more favourable "*adequate rest*" rather than "*compensatory rest*" (see [Appendix, paras 43-44](#)). As railway workers are not included in the definition of mobile worker as above, they will not be entitled to adequate rest, regardless of whether they are 'mobile' or not.

16 The definition of working time under the WTR is an issue. DBEIS defines working time as any period during which the worker is working, at the employer's disposal and carrying out his activity or duties. All three elements must be in place for it to be defined as working time under WTR. Working Time includes travelling time where it is part of the job, but does not include travelling between a person's home and their usual workplace. The nature of the travel should be considered when deciding whether a person is "at work" or not. In general, if a person is travelling between their normal workplace and home then they would not be considered to be "at work", rather they would be "commuting". If they are travelling to or returning from a worksite that is not their ordinary place of work, then it will be "at work". This includes situations where the worker does not have an ordinary place of work, in such instances, when the worker is travelling from home to the first worksite and then later from the last worksite to home they will be considered "at work".

Employers still have to ensure that their safety critical workers are fit for work under ROGS. On-call or 'lodging' work is not regarded as 'working time' when the worker is permitted to be away from the workplace and is free to pursue leisure activities. The employer should monitor secondary work where it is known that the employee participates in any other such work activity. If the employee is likely to work above the average of 48 hours per week the employer should reduce the employee's hours accordingly, or consult on whether the employee wants to agree to 'opt-out'. The employee is under no obligation to agree to opt-out and may terminate an agreement at any time providing the relevant period of notice is complied with.

CONTACT

17 The contact for this RIG is the ORR Working Time Warrant Holder

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APPENDIX

This Appendix provides further details of the various provisions (although it is not expected that Inspectors will need to explain the Regulations to this level of detail, as this is the ORR's Working Time Officer's role). It is possible to obtain a free copy of the DBEIS guidance on the Regulations by searching the DBEIS website at <https://www.gov.uk/government/publications/department-for-business-energy-and-industrial-strategy-single-departmental-plan/department-for-business-energy-and-industrial-strategy-single-departmental-plan-june-2019> for *working time*

WORKING TIME REGULATIONS

MAXIMUM WEEKLY WORKING TIME

1. The working time (including overtime) in any seven-day period should not exceed an average of 48 hours over a standard 17 week reference period. (Regulation 4(1)).
2. The standard reference period of 17 weeks can be successive periods of 17 weeks calculated on a rolling basis or by collective agreement or workforce agreement. (Regulation 4(3)).
3. Where a worker has not worked on any given day during the 17-week reference period due to sickness, annual leave; maternity, paternity, adoption or parental leave, an equivalent number of days following the reference period should be taken into account for the purpose of calculating the average hours. (Regulation 4(6)).
4. The reference period can be changed for particular workers or groups of workers by a collective agreement or workforce agreement, to no more than 52 weeks, for objective or technical reasons, or reasons concerning the organisation of work (Regulation 23(b)).

NOT PROTECTIVELY MARKED

5. For specified classes of work (Regulation 21 “other special cases”), the reference period may be extended to 26 weeks. (Regulation 4(5)).

6. The limit on weekly working time will not apply to any individual worker who agrees in writing that it should not apply in their case. Such an agreement may be terminated by the worker giving not less than seven days notice to the employer, or such other period of notice up to a maximum of three months as specified in the agreement (Regulation 5(2) & (3)).

7. A young worker’s (over the age of 15, but under the age of 18) working time shall not exceed 8 hours a day, or 40 hours a week. These hours cannot be averaged out and there is no opt-out available. However, young workers may work longer hours in certain exceptional circumstances (e.g. *force majeure*), or where there is a need to maintain continuity of service or production, or to respond to a surge in demand for a service or product, provided that no adult is available to perform the task (Regulations 5A, 27, 27A & DBEIS Guidance)

LENGTH OF NIGHT WORK

8. A night worker's normal hours of work should not exceed an average of eight hours in any 24-hour period, including overtime where it is part of a night workers normal hours of work (Regulation 6(1) & DBEIS Guidance).

9. The reference period for calculating the average hours of night work can be any period of 17 weeks on a rolling basis, or by “relevant” agreement, consecutive periods of 17 weeks. If the worker has worked for his employer for less than 17 weeks the reference period applicable would be the period elapsed since he started work for his employer (Regulation 6(3) & (4)).

10. Night time is defined as being between 11pm and 6am unless a collective agreement sets a different period of not less than seven hours duration and includes the period between midnight and 5am (Regulation 2(1) & DBEIS Guidance).

11. A night worker is someone who, as a normal course, works at least three hours of his or her daily working time at night, or is likely to work at least such proportion of annual working time during night time as specified within a collective agreement or workforce agreement. 'As a normal course' is defined 'on a regular basis' or at least one third of the working time. Occasional, or *ad hoc*, work at night does not make someone a night worker (Regulation 2(1) & DBEIS Guidance).

12. A night worker whose work involves special hazards or heavy physical or mental strain should not perform night work for more than eight hours in any 24-hour period as an absolute limit, without a reference period (Regulation 6(7)).

13. Work will be regarded as involving special hazards or heavy physical or mental strain if it is identified as such within a collective agreement or

workforce agreement that takes account of the specific effects and hazards of night work. Alternatively, if it is recognised in a risk assessment as involving a significant risk to the health and safety of workers under Regulation 3 of the Health and Safety at Work Regulations 1999 (Regulation 6(8)).

14. The limits on the length of night work (including the limit for special hazards) do not apply in the case of certain specified classes of work, "other special cases", subject to workers receiving an equivalent period of compensatory rest (Regulation 21).

15. A collective agreement or workforce agreement can modify or exclude the application of the limits on the length of night work (including the limit for special hazards) in respect of any particular workers or groups of workers (Regulation 23).

16. Young workers should not ordinarily work at night between 10pm and 6am, or between 11pm and 7am if the contract of employment provides for work after 10pm. However, exceptions apply in particular kinds of employment (e.g. Entertainment, Sporting, Agriculture etc), subject to the young worker receiving an equivalent period of compensatory rest and being adequately supervised by an adult worker where such supervision is necessary for the young worker's protection. A young worker should receive compensatory rest within three weeks (Regulation 6A, 27A(2)(3)(4) and DBEIS Guidance).

HEALTH ASSESSMENTS FOR NIGHT WORKERS

17. An adult worker should not be assigned to night work unless they have been offered a free and confidential health assessment. In the first instance, this could take the form of a questionnaire to identify any individuals whose health may be harmed by night work. Workers do not have to take the opportunity to have a health assessment, but the employer must offer it (Regulation 7(1)(3)(5) & DBEIS Guidance).

18. Young workers should not ordinarily work at night between 10pm and 6am, or between 11pm and 7am if the contract of employment provides for work after 10pm. Where they do, young workers should not be assigned night work unless they have been offered a free and confidential health assessment that takes account of their physical and psychological capabilities (Regulation 6A, 7(2)(3)(5) and DBEIS Guidance).

19. Thereafter the opportunity of a free health assessment should be provided to all night workers at regular intervals of whatever duration may be appropriate in his case. In many cases it would be appropriate to do this once a year (Regulation 7(1)(b), 7(2)(b) & DBEIS Guidance).

20. Where a registered medical practitioner advises that a worker is suffering from health problems connected with the fact that the worker performs night work, the employer should, if possible, transfer the worker concerned to

suitable work undertaken during periods other than at night. New and expectant mothers should be given special consideration (Regulation 7(6) & DBEIS Guidance)

DAILY REST

21. An adult worker is entitled to a rest period of eleven uninterrupted hours in each 24 hours (Regulation 10(1)).

22. A young worker is entitled to twelve uninterrupted hours in each 24-hour period that they work. However, this period of rest may be interrupted if the periods of work are split up over the day or are of short duration. The young workers entitlement to daily rest can be reduced or excluded only in exceptional circumstances (*force majeure*). Where this occurs the young worker should receive compensatory rest within three weeks (Regulation 10(2)(3), 27(1)(2) & DBEIS Guidance).

23. A collective agreement or workforce agreement can modify or exclude an adult's entitlement to daily rest in respect to particular workers or groups of workers (Regulation 23).

24. An adult's entitlement to daily rest does not apply to shift workers who cannot take a daily rest period between the end of one shift and the start of the next - subject to the worker receiving the equivalent compensatory rest (Regulation 22(1)).

25. The adult entitlement to daily rest does not apply to workers engaged in activities involving periods of work split up over the day, for example a morning and evening shift, as may be the case for cleaning staff, etc subject to workers receiving an equivalent period of compensatory rest (Regulation 22(1)).

26. The adult entitlement to daily rest does not apply to workers in certain specified classes of work, "other special cases", subject to workers receiving an equivalent period of compensatory rest (Regulation 21).

WEEKLY REST PERIOD

27. An adult worker is entitled to an uninterrupted rest period of not less than 24 hours in each seven-day period (Regulation 11(1)).

28. An employer can amend this entitlement to provide two uninterrupted rest periods of not less than 24 hours, or one uninterrupted rest period of not less than 48 hours, for each fourteen-day period (Regulation 11(2)).

29. The weekly rest period should not include any part of the daily rest period entitlement except where this can be justified by objective or technical reasons or reasons concerning the organisation of work (Regulation 11(7)).

30. Young workers are entitled to a rest period of not less than 48 hours in each seven-day period. This can be reduced to 36 hours where justified by technical or organisation reasons but cannot be averaged out over a two week period. The rest period may be interrupted in the case of activities involving periods of work split up over the day or of short duration (Regulation 11(3), (8) & DBEIS Guidance).

31. A collective agreement or workforce agreement can modify or exclude an adult's entitlement to weekly rest in respect of particular workers or groups of workers (Regulation 23).

32. The seven-day period or (as the case may be) fourteen-day period should be taken to begin at such times on such days as provided for within a "relevant" agreement. In the absence of an agreement, the period should begin from midnight between Sunday and Monday (Regulation 11(4) & (6)).

33. The adult entitlement to weekly rest does not apply to shift workers when they change shift and cannot take a weekly rest period between the end of one shift and the start of the next, subject to the workers receiving compensatory rest (Regulation 22(1)).

34. An adult's entitlement to weekly rest does not apply to workers engaged in activities involving periods of work split up over the day, for example, a morning and evening shift, as may be the case for cleaning staff etc subject to those workers receiving an equivalent period of compensatory rest (Regulation 22(1)).

35. An adult's entitlement to weekly rest does not apply to workers in certain specified classes of work, "other special cases", subject to workers receiving an equivalent period of compensatory rest (Regulation 21).

REST BREAKS

36. An adult worker required to work more than six hours on any day is entitled to an uninterrupted rest break of not less than 20 minutes, which they,

if applicable, are entitled to spend away from their workstation (Regulation 12(1) and (3)).

37. The break should be taken during the six-hour period and not at the beginning or end of it. Employers must make sure that workers *can* take their rest, but are not required to make sure they *do* take their rest (DBEIS Guidance).

38. Rest breaks when no work is done may not meet the definition of working time for the purpose of calculating the maximum weekly working time (DBEIS Guidance).

39. A collective agreement or workforce agreement can modify or exclude the adult entitlement to a rest break in respect of any particular workers or groups of workers. It can also determine if a worker is to be paid for rest breaks if not already provided for in the workers contract (Regulation 23 & DBEIS Guidance).

40. An adult's entitlement to a rest break does not apply to workers in certain specified classes of work, "other special cases", subject to workers receiving an equivalent period of compensatory rest (Regulation 21).

41. A young worker who works more than 4½ hours is entitled to a rest break of at least 30 minutes, which should be consecutive if possible and can be spent away from the workstation if they have one. If a young worker is working for more than one employer, the time he or she is working for each one should be added together to see if they are entitled to a rest break. A young worker's entitlement to breaks can be reduced or excluded in exceptional circumstances only (*force majeure*). Where this occurs, the young worker should receive an equivalent period of compensatory rest within three weeks (Regulation 12(4) & DBEIS Guidance).

42. Where the pattern of work puts a workers health and safety at risk, in particular because the work is monotonous or the work rate is predetermined, the employer must provide adequate rest breaks e.g. short breaks more frequently. No derogations apply in this case (Regulation 8).

COMPENSATORY REST /ADEQUATE REST

43. In any case where a worker is required, by the application of Regulations 21 (other special cases), 22 (shift workers) or 23 (collective or workforce agreements), to work during a period that would otherwise be a rest period or rest break, the employer shall, wherever possible, allow an equivalent period of compensatory rest. The regulations give all workers a right to 90 hours of rest in a week. This is the total of the entitlement to daily and weekly rest periods. The exceptions allow workers to take rest in a different pattern to that set out in the regulations. The principle is that everyone gets his or her

entitlement of 90 hours rest a week on average, although some rest may come slightly later than normal (Regulation 24 & DBEIS Guidance).

44. Adequate rest applies to 'mobile workers' in **road** and **air** or **inland waterway** transport only. It is defined as 'regular rest periods, the duration of which are expressed in units of time and which are sufficiently long and continuous to ensure that, as a result of fatigue or other irregular working patterns, workers do not cause injury to themselves, to fellow workers or to others and that they do not damage their health, either in the short term or in the longer term' (Regulation 2(1) & 24A(2)).

ANNUAL LEAVE

45. A worker is entitled to four weeks' paid annual leave each year. Where workers are paid for bank holidays or public holidays, these may count towards the annual entitlement (Regulation 13(1) & DBEIS Guidance).

46. A week's leave should allow workers to be away from work for a week. A week's leave is the same amount of time as the working week (DBEIS Guidance).

47. In the absence of a "relevant" agreement, the leave year will be deemed to begin on the 1st October each year if they were employed on or before 1st October 1998. If they were employed after that date the workers leave year commences on the anniversary of their appointment (Regulation 13(3)).

48. The entitlement for new starters should be proportionate to the amount of the leave year that they work (Regulation 13(5) & 15A(2)).

49. The leave entitlement may be taken in instalments, but it may only be taken in the leave year in respect of which it is due. It cannot be replaced by a payment in lieu except where the worker's employment is terminated. If a worker's employment ends, they have a right to be paid for the leave time due and not taken (Regulation 13(9) & DBEIS Guidance).

50. The arrangements for taking leave can be covered by a "relevant" agreement, or in the absence an agreement, the notice period that a worker must give should be at least twice that of the period of leave requested. A refusal of leave, by the employer, must be given within a period equivalent to the leave requested, in advance of the earliest day requested (Regulation 15).

51. Payment for annual leave should be based upon normal working hours. This would include any shift premium, commission or bonus payments, but not overtime unless it is guaranteed as part of the contract of employment (Regulation 16 & DBEIS Guidance).

UNMEASURED /PARTLY MEASURED WORKING TIME

52. The working time limits and rest entitlements (apart from those applicable to young workers), do not apply if a worker can decide how long he or she works. However, the entitlement to paid annual leave does still apply. A test, set out in the regulation 20, states that a worker falls into this category if "the duration of his working time is not measured or predetermined, or can be determined by the worker himself". An employer needs to consider whether a worker passes this test. Workers such as senior managers, who can decide when to do their work, and how long they work, are likely to pass the test. Those without this freedom to choose are not (Regulation 20(1) & DBEIS Guidance).

53. There is an exception for workers who have an element of their working time pre-determined, but otherwise decide how long they actually work. Simply put, additional hours which the worker chooses to do without being required to by his employer do not count as working time; therefore, this exception is restricted to those that have the capacity to choose how long they work. The key factor for this exception is worker choice without detriment. Regulations concerning the maximum weekly working time and length of night work shall apply only to so much of the work as is measured or predetermined or cannot be determined by the worker themselves (Regulation 20(2) & DBEIS Guidance).

YOUNG WORKERS: *FORCE MAJEURE*

54. A Young Workers entitlements to a maximum 8 hour working day/40 hour working week, restrictions on night work, daily rest and in work rest breaks do not apply if an employer requires them to work temporarily because of an unusual or unforeseen occurrence on an exceptional event which could not be avoided and which requires immediate attention. In such circumstances the regulations do not apply only if no adult worker is available to perform the work and the young worker is provided with an equivalent period of compensatory rest to be taken within the following three weeks (Regulation 27 & DBEIS Guidance).

DUPLICATE ENTITLEMENTS

55. Where a worker is entitled to a rest period, rest break or annual leave, under both a provision of these Regulations and under a separate provision (including regulatory or provision of their contract), the worker may not take advantage of both rights separately, but may in any particular respect, take advantage of the one that is the more favourable (Regulation 17).

RECORDS

56. Employers must retain adequate records for a period of two years. The records should show that maximum weekly working time and night work limits are being complied with. Employers must also retain copies of night worker health assessments and keep a record of those workers who have signed an individual opt-out in respect of the maximum weekly working hours (for the

latter employers do not need to record the hours actually worked) (Regulation 9 & DBEIS Guidance).

ENFORCEMENT

57. The limits on working time and night work, the right to a health assessment and transfer from night work, the provision of adequate breaks for workers engaged in work which may put their health & safety at risk and the keeping of records are enforceable by the ORR, HSE (or local authority, CAA or VOSA) (Regulation 28 & DBEIS Guidance).

58. The entitlements to rest and leave are enforced through Employment Tribunals. If the worker wants to make a complaint to a Tribunal it should be done so within three months (Regulation 30 & DBEIS Guidance).

59. A worker can also complain to an Employment Tribunal if they suffer any detriment (dismissal or other action) imposed by their employer for:

- refusing to exceed the limit on average weekly working time;
- refusing to work when entitled to a rest period, break or annual leave or;
- failure to sign or agree to vary or extend a workforce agreement.
- being a representative of members of the workforce for the purpose of these regulations.
- making allegations in good faith about breaches of the Regulations etc (Regulation 31).

60. If the worker wishes to claim under the WTRs, the Advisory Conciliation and Arbitration Service (ACAS), will offer the services of a conciliator to help the employer and worker to reach a settlement without the need for the Tribunal hearing.

Action
(optional)