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Dear Colleague

Empowering stakeholders through enforcement

We recently consulted you¹ on a proposal to consider, if enforcement action were to become necessary due to a licence breach, a new option for such action. We proposed, in suitable circumstances, to set up a recovery board with a remit to develop and agree an action plan to remedy the breach. In line with our strategy, this would be designed to encourage decentralisation of decisions closer to users of the railway, partnership working and an environment in which the industry takes responsibility for, and solves, its own problems.

We had a generally positive response from consultees (annex a); most agreed that this could work in certain situations.

Some concerns were raised. Several respondents noted that using a recovery board might slow the process of recovery down, and suggested that this approach should only be used in the right circumstances. There was some concern that we would use this approach to the exclusion of others or that it might dilute ORR's statutory responsibilities. One commented that other sanctions must be available if the recovery board was not delivering the expected outcomes. Another questioned how we would decide if a breach was serious enough to merit the use of a recovery board. Network Rail was concerned that inappropriate use of this approach would lead to distraction, wasted resources and reputational damage.

We see this approach as one tool that we could use if we needed to take regulatory action, certainly not as our only option. The use of a recovery board will depend on the nature of the breach and the remedy required; we would only use it where we think it will have most benefit. We agree that there could be cases where we will need to take action more quickly and we will continue to do so where necessary.

¹ Our initial consultation letter of 19 February 2010 can be found on our website at http://www.rail-reg.gov.uk/upload/pdf/empowering_through_enforcement_190210.pdf





Most people commented on the membership of the recovery board. There were concerns that having too many members would make it difficult to reach a unanimous decision. Conversely, some were concerned that their interests would not be taken into account if they were not represented, because they were not invited or did not have the resources to field a representative. National differences and interests of funders were also raised. There was a difference of opinion as to whether passenger groups should be represented. Some commented that the remit of the board and its powers and rights must be clear with specified measurable outcomes.

We agree that the membership of any recovery board is key to the success of this approach and will be dependent on the willingness of affected parties to be involved. Any recovery board would be carefully designed to meet the circumstances of the case and its remit would include a requirement to take the interests of all relevant parties into account. Its purpose would be to give affected parties direct influence over the actions to remedy the breach. Generally the board membership would include the rail company(s) most significantly and directly affected by a breach, but there may be instances where we would include passenger groups or funders. If we were to set a recovery board up under an enforcement order, we would be required to consult all interested parties beforehand; if set up under a provisional order, we must confirm that order within three months.

Several people commented on ORR's role in the recovery board, suggesting that we should be closely involved either as an active member or an observer. Again, we think this will need to be decided case-by case. We said in our consultation that if the board could not agree a plan or one of the members thought the plan was not being delivered, it could refer the matter to us. We would, as a minimum, have an overview of what the recovery board is doing as part of our normal monitoring of enforcement action. There may be instances where we would want to take a more active role; if so we would make our reasons clear when we defined the scope and remit of the board.

Network Rail said that it is likely that it would already have set up its own stakeholder group to resolve problems but noted that a recovery board set up under an enforcement order would shift the balance of power to the operators. It wondered how ORR would deal with a situation where actions were needed by other members. Our aim is to promote partnership and an environment where the industry takes responsibility for, and solves, its own problems. We would expect parties on the recovery board to work together to carry out all necessary actions. We would not find the licence holder culpable for the failure of a recovery plan due solely to the inaction of another board member.



Some consultees raised the issue of preventative action: one said that this approach should only be used once bilateral discussions had failed and another questioned whether we could set up a “pre-emptive” recovery board. We prefer parties to resolve problems themselves where possible and there are many examples where we have sought to encourage this before we reach the point where enforcement action is necessary.

DfT thought that this approach should only apply to Network Rail breaches and not to a breach by a TOC. It had a number of questions on the detail of how this would work in practice. We believe that this option is most likely to be appropriate in relation to a licence breach by Network Rail but we would not wish to rule out considering it for breach of an operator licence.

One operator opposed the idea, saying that it was uncomfortable with the idea of sitting on a recovery board directing a competitor what to do, and would not like others to have similar powers if it was found in breach. It felt that it already had adequate methods for intervening against a supplier through its contractual arrangements, and that involvement on a recovery board may conflict with contractual processes. We would not follow this approach if it created such conflicts, and it would not be a feasible way forward if a key party declined to join a recovery board. However this should not prevent us from considering it as an option in suitable circumstances.

On the basis of the generally positive response to this consultation we confirm that we will consider the recovery board model as an option for any enforcement action we find it necessary to take in future. We will review its effectiveness in the light of experience.

Yours sincerely

Michael Lee

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Michael Lee

Annex a – responses to the consultation

Arriva Trains Wales

DB Schenker

Network Rail

Cross Country

First Group

Transport Scotland

Southern

South West Trains

Northern

Passenger Focus

Department for Transport

Virgin Trains

Rail Freight Group

GMPTE

TfL

Chiltern