



NOTICE IN ACCORDANCE WITH SECTION 55(6) OF THE RAILWAYS ACT 1993, AS AMENDED, OF THE OFFICE OF RAIL REGULATION'S DECISION NOT TO MAKE A FINAL ORDER, OR MAKE OR CONFIRM A PROVISIONAL ORDER, IN RELATION TO NETWORK RAIL INFRASTRUCTURE LIMITED'S CONTRAVENTION OF CONDITION 9 OF ITS NETWORK LICENCE

8 MARCH 2005

1. This document constitutes a notice, published in accordance with section 55(6) of the Railways Act 1993, as amended (the "Act"), stating that:

- (a) Network Rail Infrastructure Limited ("Network Rail") has contravened Condition 9 of its network licence, in that it is not planning its renewal, maintenance and enhancement of the network in a timely and efficient manner so as to enable it to specify its requirements for temporary changes to the national timetable (except in respect of changes arising from emergencies or severe weather conditions) so that the procedures to revise the national timetable in respect of such changes can be completed not less than 12 weeks prior to the date of any such change, contrary to paragraph 2(a) of that Condition;
- (b) On 2 September 2004, the Office of Rail Regulation ("ORR") served on Network Rail, and published, a notice in accordance with section 55(6) of the Act of its intention not to make an order in relation to Network Rail's contravention of Condition 9 (the "September Notice")¹ on the basis that:
 - (i) Network Rail had agreed to restore compliance with Condition 9 by means of the measures set out in the recovery plan it submitted to ORR in its letter of 23 July 2004 and in accordance with the timetable set out in the Annex to the notice and, on that basis, ORR was satisfied that, for the purposes of section 55(5B)(a) of the Act, Network Rail had agreed to take, and was taking, all steps as it appeared to ORR for the time being to be appropriate for Network Rail to take for the purpose of securing compliance with Condition 9; and

¹ Notice in accordance with Section 55(6) of the Railways Act 1993, as amended, of the Office of Rail Regulation's intention not to make a final order, or make or confirm a provisional order, in relation to Network Rail Infrastructure Limited's contravention of Condition 9 of its network licence (http://www.rail-reg.gov.uk/upload/pdf/s55-6_notice.pdf)

- (ii) on the basis that these measures were implemented, ORR considered that making an order at that stage would not provide any more impetus to remedying the problem and risked distracting Network Rail's management from other changes necessary to the transformation of its business. Accordingly, ORR did not consider it appropriate at that stage to make an order for the purpose of securing compliance with Condition 9;
- (c) Network Rail has not fully delivered the recovery plan which formed the basis of the September Notice and, furthermore, it has become clear that Network Rail needs to take certain measures, in addition to those outlined in its letter of 23 July 2004, to secure compliance with Condition 9 in accordance with the timetable set out in the September Notice;
- (d) ORR has, therefore, reconsidered its obligations to take enforcement action in respect of Network Rail's contravention of Condition 9;
- (e) Network Rail has agreed to restore compliance with Condition 9 by means of the measures set out in the September Notice, and the additional measures set out in its letter dated 28 February 2005 to ORR, and in accordance with the timetable set out in the Annex to this notice (the "Timetable"). On that basis, ORR is satisfied that, for the purposes of section 55(5B)(a) of the Act, Network Rail has agreed to take, and is taking, all such steps as it appears to ORR for the time being to be appropriate for Network Rail to take for the purpose of securing compliance with Condition 9; and
- (f) ORR, having considered its duties under section 4 of the Act and the representations made by various parties, does not consider it appropriate at this stage to make an order for the purpose of securing compliance with Condition 9. ORR considers that, on the basis that Network Rail takes the steps it has set out in its letter of 28 February 2005 and any further steps needed to restore compliance, enforcement action would not, at this stage, add to the existing pressures and incentives on Network Rail to deliver, and thus, secure more effective or timely compliance with Condition 9.

Background

2. Condition 9 of its network licence requires Network Rail to:

"plan its renewal, maintenance and enhancement of the network in a timely and efficient manner to enable it to specify its requirements for temporary changes to the national timetable (except in respect of changes arising from emergencies or severe weather conditions) so that the procedures to revise the national timetable in respect of such changes can be completed not less than 12 weeks prior to the date of any such change".

3. The ability to access, in advance, accurate information about train services is very important to rail users. This information allows passengers to plan

their journeys, and, particularly on longer distance routes, reserve seats and sleeper berths. In addition, it enables them to access the cheaper advance-purchase tickets. The latter has become an important aspect of train operating companies' yield management systems.

4. The September Notice recorded the basis of ORR's decision not to make a final order, or make or confirm a provisional order, in relation to Network Rail's contravention of Condition 9 as follows:

- (a) Network Rail had agreed to restore compliance with Condition 9 by means of the measures set out in the recovery plan it submitted to ORR in its letter of 23 July 2004 and in accordance with the timetable set out in the Annex to the notice and, on that basis, ORR was satisfied that, for the purposes of section 55(5B)(a) of the Act, Network Rail had agreed to take, and was taking, all steps as it appeared to ORR for the time being to be appropriate for Network Rail to take for the purpose of securing compliance with Condition 9; and
- (b) on the basis that these measures were implemented, ORR considered that making an order at that stage would not provide any more impetus to remedying the problem and risked distracting Network Rail's management from other changes necessary to the transformation of its business. Accordingly, ORR did not consider it appropriate at that stage to make an order for the purpose of securing compliance with Condition 9.

Findings on licence breach

5. ORR's findings on licence breach and assessment of Network Rail's recovery plan as at September 2 2004, when the September Notice was served on Network Rail and published, are set out in paragraphs 4-12 of the September Notice.

6. Since September 2004, Network Rail has remained in contravention of Condition 9.

Compliance with Recovery Plan in the September Notice

7. ORR has monitored compliance with the recovery plan. Evidence received by ORR shows:

- (a) Network Rail has made significant progress in putting in place the key building blocks of the recovery plan; but
- (b) Network Rail has not fully delivered the recovery plan which formed the basis of the September Notice.

8. Although most uploads of revised timetables to the Train Service Data Base (TSDB) have been made on time, there have been a number of late uploads. In some cases Network Rail considers these late uploads to be due to late bids of revised timetables by train operating companies but it also acknowledges that in the past this was largely due to Network Rail's changes

to the possession plan and, in general, the train operating companies claim their problems arise from Network Rail deficiencies. ORR considers that Network Rail has failed effectively to manage the overall industry process.

9. Although not clear at the early stages of the recovery plan, deficiencies in the accuracy of these uploads have been such as seriously to limit their utility to train operating companies, in particular for long distance operators such as West Coast Trains Limited, CrossCountry Trains Limited, Great Western Trains Company Limited and Great North Eastern Railway Limited. Evidence of the numbers of errors in uploads has been provided by train operating companies, The Association of Train Operating Companies ("ATOC") and Network Rail. The impact of errors in the uploads can be seen in the frequent delays (reported by ATOC), between the date on which Network Rail has claimed to have completed the upload and the date on which train operating companies have felt sufficiently confident in the data to open services for reservation and the sale of advance purchase tickets. There is no reason for train operating companies to delay unnecessarily the opening of services given the commercial advantages to them of, for example, yield management systems that rely on the sale of advance purchase tickets. In addition, there is substantial qualitative evidence of the problem that accuracy represents, including admissions from Network Rail.

10. Although accuracy was not explicitly referred to in the recovery plan, it was implicit that, in order for train operating companies to make use of the revised timetables within a reasonable period, revisions had to be fit for purpose both in terms of timeliness **and** accuracy. Indeed, the timetable set out in the Annex to the September Notice obliged Network Rail to complete a "full upload of Train Service database" by particular dates so that there could be a "fully revised timetable available [] weeks in advance". ORR does not consider that Network Rail can be said to have complied with its obligations in this regard where, at the relevant upload dates, there are significant errors in the data uploaded.

11. Until Christmas, although issues about the accuracy of timetable revisions had been raised by ATOC on behalf of train operating companies, Network Rail believed these to be, largely, matters of perception arising from the manner in which train operating companies carried out their checking. However, following the problems with TSDB over Christmas, Network Rail accepted that there were significant errors in the revisions, and indeed in the base data within TSDB. Network Rail recognised that this was not acceptable. It recognised that a number of these errors arose as a result of a failure of earlier parts of the process (e.g. notification of firm possession plans) and leaving inadequate time to correct problems at the end of the process. It proposed to move to, and has indeed already taken a number of important steps toward, processes that sought both to control the number of errors introduced during the revision and upload process and to check for errors following upload. This co-ordinates with the train operating companies' own processes to enable an agreed position to be determined so that necessary corrections can be made.

12. Further, Network Rail has already acknowledged that it needs to review the resourcing of its Train Planning Centres and its overall management of the various stages of the T-12 process.

13. For these reasons it now appears clear that the requirements of the September Notice for a "fully revised timetable available [] weeks in advance" are not being met as the timetable is often incomplete and not fit for purpose, as a result of a number of identifiable deficiencies in Network Rail's processes. Therefore it is clear that Network Rail needs to take further steps if compliance with Condition 9 is to be achieved in line with the timetable set out in the Annex to the September Notice and it is necessary for ORR to take a new decision as to whether or not it should take enforcement action under section 55 of the Act.

Assessment of Network Rail's revised recovery plan

14. Network Rail has, in its letter to ORR of 28 February 2005, set out certain measures (in addition to those set out in the recovery plan in its letter of 23 July 2004 which formed the basis of the September Notice) which it is now taking to restore compliance with Condition 9 as required by the timetable set out in the Annex to the September Notice.

15. These additional steps are:

- (a) review of staffing at the three Train Planning Centres;
- (b) Network Rail taking full management control of the whole industry process; and
- (c) implementation of the new quality checking processes.

16. In relation to (a) - the review of staffing at the three Train Planning Centres - Network Rail has made three key statements in its letter:

- (a) "As an immediate step to address the latest resource issue, we have increased further the planned quota in each Train Planning Centre to 85 members of staff ... we believe that planned levels in the Train Planning Centres are now appropriate to ensure that we can meet our obligations not just on Condition 9 ... but all our contractual timetabling obligations, for both passenger and freight operators."
- (b) "we will not hesitate to increase staffing levels if we feel it to be necessary, to fill any resource gaps".
- (c) "Iain Coucher continues to review resource requirements on a regular basis, and has advised Richard O'Brien that he is able to recruit to the level he deems necessary."

17. ORR considers that these statements provide the assurance and evidence ORR is seeking in relation to this additional step.

18. In relation to (b) - Network Rail taking full management control of the whole industry process - Network Rail has made four key statements in its letter:

- (a) "We recognise the need for coordination of this work programme and Network Rail's responsibility for doing this."
- (b) "One action that we are already taking is to ensure that all parties are clear on required actions ... [and] we are setting up a series of coordination meetings every six weeks starting on March 11 for the industry's T-12 representatives. The primary objective of these meetings will be to make certain all parties know the key dates for bid, offer and upload and can commit to them. Where parties are less confident of meeting bid dates, we can work together to establish how to improve the situation."
- (c) "We have devised a comprehensive suite of reports governing the Recovery Plan and quality checking process. As further evidence of our increased leadership role in this regard we would propose that these become the industry standard for reporting on Informed Traveller. We will administer the process on behalf of the industry."
- (d) "We recommend that Robin Gisby chairs a review meeting with ORR and ATOC jointly on a fortnightly basis to review progress against the agreed joint Plan."

19. As a consequence of Network Rail's proposal set out in paragraph 18(b) above, certain of the milestones set out in the Timetable are different from those in the September Notice to reflect the fact that Network Rail has agreed to seek to develop specific milestones with each train operating company in relation to the process to be followed prior to full uploads of TSDB so that that step can be completed for all train operating companies by the relevant milestones in the Timetable. Where agreed milestones for any train operating companies are notified to ORR, they will, for that operator, replace the milestones indicated in the Timetable.

20. ORR considers that these statements provide the assurance and evidence ORR is seeking in relation to this additional step.

21. In relation to (c) - implementation of the new quality checking process - Network Rail has made two key statements in its letter:

- (a) "Iain Coucher described to you our new internal checking procedures in his letter of 9 February. We can confirm that other parties are now also engaged in what is proving to be a productive process which is succeeding in reducing and eliminating errors."
- (b) "The two reports [of errors] compare the views of Network Rail and the Operators, which ensures that the checking process is not restricted to Network Rail's own view of what is or is not correct."

22. ORR considers that these statements provide the evidence ORR is seeking in relation to this additional step.

23. In summary, on the basis of the assurances and evidence in relation to the additional steps above given by Network Rail in its letter of 28 February 2005, taken with the evidence of the steps already taken by Network Rail under the recovery plan accepted by ORR in September 2004, ORR is satisfied that Network Rail, for the purpose of section 55(5B)(a) of the Act, has agreed to

take and is taking all such steps as it appears to ORR for the time being appropriate to take for the purpose of securing or facilitating compliance with Condition 9.

Representations on Appropriateness of Making an Order

24. Network Rail contends that, based on this plan, enforcement action by ORR would be inappropriate because:

- (a) Network Rail believes it is doing everything practicable at this stage and has demonstrated its commitment to recovery of compliance by pro-actively taking steps to address emerging issues and is committed to working with the rest of the industry to achieve the underlying purpose of Condition 9. An enforcement order would not increase this level of commitment or provide any additional impetus.
- (b) Network Rail rejects strongly any assertion that it suffers no commercial loss, or commercial or reputational risk from its non-compliance. Particularly on reputational risk Network Rail asserts that it has sought to build the reputation of the company on 'delivering what we promise'.
- (c) Network Rail asserts that it has steadfastly protected the reputation of the industry by resisting engaging in debate in the media and submits that its behaviour has been exemplary.
- (d) Network Rail believes that enforcement action would be counterproductive in that it would be demotivational to the many hard working staff in the Train Planning Centres and would have a detrimental effect on the increasingly constructive relationship that these staff have with their counterparts in train operating companies.

25. Prior to receipt of Network Rail's letter of 28 February 2005, ORR received a number of representations from ATOC, the Strategic Rail Authority, the Rail Passengers Council and individual train operating companies relating to, in particular:

- (a) the impact on public expenditure, in the longer term, of continuing uncertainty for the revenues of train operating companies;
- (b) concerns about the sufficiency of the steps being taken and that Network Rail should not underestimate the scale of the challenge; and
- (c) the need for the provision of timely information to operators at all stages of the process.

ORR has carefully considered each of these representations in coming to its decision.

Findings under section 55 of the Act

26. Section 55(1) of the Act obliges ORR, if it is satisfied that a licence holder is, or is likely to, contravene any condition of its licence, to make a final order

requisite to secure compliance. Section 55(2) of the Act provides for ORR to make a provisional order.

27. There are exceptions to the obligation to make an order, as follows:

- (a) section 55(5) provides that ORR must not make an order if it is satisfied that the duties imposed on it by section 4 of the Act preclude making an order;
- (b) section 55(5A) provides that ORR must not make an order if it is satisfied that the most appropriate way of proceeding is under the Competition Act 1998; and
- (c) section 55(5B) 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 to be appropriate for it to take for the purpose of securing or facilitating compliance with the condition;
 - (ii) or 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 must make an order only if it considers it appropriate to do so.

28. ORR is satisfied that:

- (a) for the purpose of section 55(1) and 55(2) of the Act, Network Rail is in contravention of Condition 9 of its network licence;
- (b) for the purpose of section 55(2), it is not requisite that a provisional order be made;
- (c) for the purpose of section 55(5) of the Act, ORR's duties under section 4 of the Act do not preclude it from making an order;
- (d) for the purpose of section 55(5A) of the Act, action under the Competition Act 1998 would not be relevant to addressing this contravention;
- (e) for the purpose of section 55(5B) of the Act, ORR is satisfied that Network Rail's revised recovery plan does represent an agreement to take all such steps as it appears to ORR for the time being to be appropriate for Network Rail to take for the purpose of securing compliance with the licence condition and that Network Rail is taking such steps;
- (f) for the purpose of section 55(5B) of the Act, ORR, having considered its duties under section 4 of the Act and the representations made by various parties, does not consider it appropriate at this stage to make an order for the purpose of securing compliance with Condition 9. ORR considers that, on the basis that Network Rail takes the steps it has set out in its letter of 28 February 2005 and any further steps needed to restore compliance, enforcement action would not, at this stage, add to the existing pressures and incentives on Network Rail to deliver, and thus, secure more effective or timely compliance with Condition 9; and

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- (g) for the purpose of section 55(6) of the Act, ORR should serve notice on Network Rail that it does not intend to make a final order, or make or confirm a provisional order, in respect of Network Rail's contravention of Condition 9 of its network licence.

Keith Webb

KEITH WEBB

OFFICE OF RAIL REGULATION

ANNEX

Target	Milestones
Commencing 20 November 2004, fully revised timetable available four weeks in advance.	<p>10 May 2004 - confirmed possession plan notified to train operators</p> <p>16 October 2004 - revised timetable offered to train operators</p> <p>23 October 2004 – full upload of Train Service Database complete</p>
Commencing 26 March 2005, fully revised timetable available six weeks in advance.	<p>30 August 2004 - confirmed possession plan notified to train operators</p> <p>29 January 2005 - revised timetable offered to train operators</p> <p>12 February 2005 – full upload of Train Service Database complete</p>
Commencing 21 May 2005, fully revised timetable available eight weeks in advance.	<p>26 March 2005 – full upload of Train Service Database complete</p> <p>Other milestones to be agreed between each train operating company and Network Rail and notified to ORR and, failing notification of agreement, to be</p> <p>25 October 2004 - confirmed possession plan notified to train operators</p> <p>12 March 2005 - revised timetable offered to train operators</p>
Commencing 23 July 2005, fully revised timetable available ten weeks in advance.	<p>14 May 2005 – full upload of Train Service Database complete</p> <p>Other milestones to be agreed between each train operating company and Network Rail and notified to ORR and, failing notification of agreement, to be</p> <p>17 January 2005 - confirmed possession plan notified to train operators</p> <p>30 April 2005 - revised timetable offered to train operators</p>

Target	Milestones
Commencing 24 September 2005 fully revised timetable available twelve weeks in advance.	2 July 2005 – full upload of Train Service Database complete Other milestones to be agreed between each train operating company and Network Rail and notified to ORR and, failing notification of agreement, to be 14 March 2005 - confirmed possession plan notified to train operators 18 June 2005 - revised timetable offered to train operators