

Notice in accordance with Section 57C of the Railways Act 1993

27 October 2010

1. This is a notice, given in accordance with section 57C of the Railways Act 1993, (the Act), stating that the Office of Rail Regulation (ORR) proposes to impose a penalty of £3m on Network Rail Infrastructure Limited (Network Rail) for a contravention of condition 1 of its network licence.
2. In accordance with the Act, the penalty should be paid to the Secretary of State. ORR will specify the date by which the penalty must be paid in any final penalty notice given under section 57C(6) of the Act.
3. Representations or objections with respect to the proposed penalty should be made by close of business on 18 November by post to:

Abigail Grenfell
Manager, Licensing and Network Regulation
Office of Rail Regulation
One Kemble Street
London WC2B 4AN
Or by email to: abigail.grenfell@orr.gsi.gov.uk

4. ORR will publish any representations or objections on its website and may quote from them. Anyone making representations or objections should indicate clearly if they wish all, or any part, of their submission to remain confidential to ORR. If such persons make a representation or objection in confidence, they should also send a statement, excluding the confidential information, which they are content for ORR to publish.

Relevant Legal Provisions

5. Under section 57A of the Act, ORR may levy a penalty of such amount as is reasonable if it is satisfied that the licence holder is contravening or has, within the last two years, contravened a licence condition. The amount may not exceed 10 per cent of the licence holder's turnover defined in accordance with the Railways Act 1993 (Determination of Turnover) Order 2005 (SI 2005 No 2185).
6. Section 57B(3) of the Act provides that, in deciding whether to impose a penalty, and in determining the amount of any penalty, ORR must have regard to any statement of policy published at the time when the contravention occurred. Our penalties statement published 1 April 2009¹ applies.

¹ <http://www.rail-reg.gov.uk/upload/pdf/395.pdf>. The penalties statement starts at section 4.

The Contravention

7. The relevant condition of Network Rail's licence is condition 1. The relevant sections of condition 1 are set out in detail in our letter of 7 September, attached in the annex to this notice. ORR is satisfied that Network Rail has contravened condition 1 of its network licence by not achieving the purpose in condition 1.1 to the greatest extent reasonably practicable.

8. In particular, ORR is satisfied that Network Rail has failed to run an efficient and effective process, reflecting best practice, for establishing a timetable and any changes to it, to comply with the general duty to meet the reasonable requirements of its customers to the greatest extent reasonably practicable as required by condition 1.23. The acts and omissions that, in the opinion of ORR, constitute the contravention are set out below.

9. In our letter of 7 September 2010 setting out the nature of the breach² we said that the decision to 'ring-fence' the ITPS project from other industry parties, with occasional updates rather than formal involvement, coloured Network Rail's risk assessment and management so that it gave inadequate weight to communications with its customers. Risk management concentrated on internal business risks and did not consider and mitigate properly the wider risks to the industry. We also considered that there was inadequate testing of the interfaces with other systems and users in the absence of the "pilot implementation in a live project environment" required by Network Rail's IM best practice manual. At the time of the "go-live" decision on 22 January 2010 the number of software defects categorised 'critical impact' and 'high impact' was actually rising; we saw no evidence that the clear risks present in such a situation, including those to Network Rail's customers, were addressed adequately. We concluded that this fell unacceptably short of best practice.

10. We accepted the comment in Network Rail's 26 July letter that "it is perhaps inevitable that many issues might be expected to arise in the transition from the old way to the new way of timetabling" but we considered that this only underlined the importance of Network Rail communicating with its customers and working together to identify and mitigate such risks. As systems operator it is essential that Network Rail works effectively with its customers across the sector in such circumstances.

11. As a result of the system problems which emerged on implementation there were prolonged problems with the timetabling process, about which the train operators had little prior warning. They suffered significant resource and operational impacts for many months as they worked to minimise the impact on their customers. In certain circumstances they were unable to publish information or take bookings and reservations in good time. Despite the efforts of the operators and of Network Rail's

² <http://www.rail-reg.gov.uk/upload/pdf/ITPS-ORR-letter-070910.pdf>

own staff to minimise the impact of the system failings, many rail passengers were affected, and a small proportion suffered serious inconvenience. Freight and passenger charter operators faced particularly significant problems. We consider that in these respects Network Rail fell short of its obligation to run an efficient and effective timetabling process.

12. The penalty which ORR proposes to impose on Network Rail relates to the past breach of condition 1 specified above. In assessing the penalty we have taken into account consequential impacts of this breach. On 7 September 2010 we found that Network Rail was also in breach of condition 2 of its licence because it was not providing the relevant information about changes to the timetable 12 weeks before those changes occurred (T-12). Condition 2 is set out in full in the annex. As the breach of condition 2 was a direct consequence of the original breach of condition 1, we have considered it as part of this penalty decision and do not intend to impose any further penalty in respect of this breach.

Factors that justify the imposition of a penalty

13. Our penalties statement states that, in deciding whether to impose a penalty, we will take full account of the particular facts and circumstances of the contravention, we will act in accordance with our duties under section 4 of the Act and we will take account of five principles of good regulation: proportionality, targeting, consistency, transparency, and accountability.

14. Our primary objective in setting a penalty is to change the future behaviour of the licence holder and to incentivise it and others to comply with their obligations both specifically and in general. We therefore consider that it is appropriate to take into account our deeper concerns around customer service culture this case exemplifies, rather than focusing solely on the specific aspects of the contravention.

15. Network Rail has already suffered reputational damage and additional costs as a result of the breach and has taken effective action to mitigate and remedy specific failings. We do not think that a penalty would add additional incentive in this respect. However, we consider that it is appropriate to impose a penalty to provide added impetus to Network Rail's actions to achieve a consistent focus on customer interests across the full range of its activities. It will reinforce the lessons Network Rail has already identified in relation to improvements to its customer service culture more generally across the company.

Factors that justify the amount of the penalty

16. In line with our penalties statement we have considered factors falling into three categories:

- (a) proportionality;
- (b) mitigating and aggravating factors; and
- (c) our financing duty.

Proportionality

17. The penalty should be proportionate to seriousness of the contravention, and this will normally be our starting point in calculating the amount. In considering the seriousness we will look at:

- (a) the actual and potential harm caused to third parties including passengers and other railway users and to the public interest purpose of the obligation (including to the effectiveness of the regulatory regime); and
- (b) the culpability of the offender including whether the licence holder has acted negligently, recklessly, knowingly or intentionally.

18. We set out in the penalties statement five levels of seriousness ranging from a technical or de minimis contravention to a very serious contravention, with corresponding financial ranges. Ultimately we consider that, having taking into account the factors referred to above, any decision on a proportionate penalty is a matter of judgement and not arithmetic. This is particularly the case where the full extent of the actual impact on third parties cannot be quantified.

19. The ITPS breach affected weekend services on most routes to varying degrees for a number of months. The actual harm to passengers and freight users was minimised by the enormous efforts of both Network Rail and the operators, although there was a significantly more serious effect on charter services. Whilst operators will be compensated for revenue and other losses, they have also suffered reputational damage and disruption to their businesses.

20. Timetabling is a vital process to the operation of the network and the consequences of getting it wrong are serious. Potentially, there could have been greater harm if the operators and Network Rail had not been able to mitigate the impacts to the extent that they did. We also consider that Network Rail was culpable because it did not give sufficient weight to the potential impact on its customers in its risk assessment and it should have considered and communicated the risks better.

21. Having considered the factors set out above, we have decided that this contravention falls into the moderately serious level in our penalties statement, which suggests a starting point between £2m–10m. Taking all relevant factors into account ORR has decided that the minimal actual harm to passengers and the fact that services did not stop running points to a penalty towards the lower end of this range. We have therefore decided that the starting point should be £4m.

22. This compares to a starting point of £6m, also in the moderately serious range, for the Portsmouth resignalling penalty in 2007, where train services were restricted for a number of months affecting passengers in one location. We also compared this to a penalty in 2008 with regard to engineering overruns over the Christmas period in 2007-08 which caused serious disruption. This was considered to be a serious breach where Network Rail was failing to plan and execute engineering projects which require

possessions in an efficient and economical manner and in accordance with best practice. .

Mitigating and Aggravating Factors

23. Our penalties statement also says that we will adjust the penalty up or down from the starting point take account of any relevant mitigating or aggravating factors.

24. Network Rail acted quickly to address the problems with ITPS and to accept responsibility for the impacts, both in the short and long term. It co-operated fully with our investigation, with full involvement of senior directors, at a time when many of the relevant people were busy working to resolve the problems. It has made many corrective changes to the system and is now once again achieving T-12 delivery. It is agreeing compensation for its customers including payments which are over and above those automatically determined by the schedule 4 and 8 regimes. We consider that these are all mitigating factors.

25. We have already criticised Network Rail's failure to take adequate account of the impact of its actions on its customers on previous occasions, with the Portsmouth resignalling project in 2007 and 2007/08 Christmas engineering overruns. We do not think that this case is as serious as previous cases; Network Rail has made progress in this area since 2008 and its decision to ring-fence the project internally was made deliberately to avoid placing additional burdens on its customers. But the assumption that there would be no impact on its customers was flawed; Network Rail did not consider the risks to its customers' businesses adequately nor did it communicate those risks to them. We have therefore considered this to be in some degree a recurrence of previous problems, which is an aggravating factor.

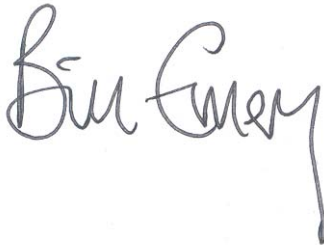
26. On balance we consider that the mitigating factors outweigh the aggravating factor so should reduce the penalty to £3m.

Financing Issues

27. ORR has a duty under section 4 of the Act not to make it unduly difficult for a network licence holder to finance those activities in relation to which ORR has functions. In the case of Network Rail, this duty might have a bearing on the level of penalty ORR might impose. In this case, ORR does not consider that the proposed penalty would make it unduly difficult for the licence holder to finance its activities. ORR also considers it consistent with its duties in general, in particular those under sections 4(1)(a) (to protect the interests of users of railway services), 4(1)(c) (promoting efficiency and economy) and 4(1)(g) (enabling persons providing railway services to plan their businesses with a reasonable degree of assurance).

Conclusion

28. Having regard to ORR's duties in section 4 of the Act, the factors listed in ORR's penalties statement and for the reasons set out above, ORR has decided that it should impose a penalty of £3m in respect of Network Rail's contravention of condition 1 as described in this notice.

A handwritten signature in black ink that reads "Bill Emery". The signature is written in a cursive style with a long, vertical tail on the letter 'y'.

Bill Emery

Chief executive

Annex: the relevant licence obligations

1 Network management

Purpose

1.1 The purpose is to secure:

- (a) the operation and maintenance of the network;
- (b) the renewal and replacement of the network; and
- (c) the improvement, enhancement and development of the network,
in each case in accordance with best practice and in a timely, efficient and economical manner so as to satisfy the reasonable requirements of persons providing services relating to railways and funders, including potential providers or potential funders, in respect of:
 - (i) the quality and capability of the network; and
 - (ii) the facilitation of railway service performance in respect of services for the carriage of passengers and goods by railway operating on the network.

General duty

1.2 The licence holder shall achieve the purpose in condition 1.1 to the greatest extent reasonably practicable having regard to all relevant circumstances including the ability of the licence holder to finance its licensed activities.

...

Timetable planning

1.23 In complying with the general duty in condition 1.2 the licence holder shall:

- (a) run an efficient and effective process, reflecting best practice, for establishing a timetable, and any changes to it; and
- (b) where necessary and appropriate, initiate changes to relevant industry processes,

so as to enable persons providing railway services and other relevant persons to plan their businesses with a reasonable degree of assurance and to meet their obligations to railway users.

2 Timetable information for passengers

General duty

2.1 The licence holder shall provide access to appropriate, accurate and timely information relating to planned movements of trains on the licence holder's network, to enable railway passengers to plan their journeys.

Publication of national timetable

2.2 In complying with condition 2.1, the licence holder shall, except in so far as ORR may otherwise consent, publish, or procure the publication of, a national timetable of railway passenger services.

Changes to the national timetable

2.3 In complying with condition 2.1, the licence holder shall:

- (a) establish and maintain efficient and effective processes, appropriately reflecting best practice; and
- (b) apply those processes to the greatest extent reasonably practicable having regard to all relevant circumstances,

so as to provide appropriate, accurate and timely information on relevant changes to holders of passenger licences so that the latter can in turn provide information to railway passengers on the planned movements of the trains concerned.

For the purposes of this condition 2, “relevant changes” are changes to the national timetable occasioned by:

- (i) any renewal, maintenance and enhancement of the network; or
- (ii) any restriction of use of which the licence holder is, or reasonably ought to be, aware.

2.4 The licence holder shall be in compliance with condition 2.3 where it has provided holders of passenger licences with access to information about relevant changes not less than 12 weeks before the date on which such changes are to have effect.

2.5 In circumstances where the licence holder is not in compliance with condition 2.3 by virtue of condition 2.4, the licence holder shall not be in breach of condition 2.3 to the extent that:

- (a) providing the information 12 weeks or more before the relevant changes are to have effect would conflict, to a significant degree, with its duty under condition 1.2; and
- (b) it provides access to information about relevant changes to holders of passenger licences as soon as is reasonably practicable having regard to all relevant circumstances.

Access to information for enquiry services

2.6 The licence holder shall grant access to information it holds on the planned movement of trains on its network to persons providing or seeking to provide credible enquiry services relating to the operation of railway passenger services on the licence holder’s network. The licence holder shall grant access to such information as these persons may reasonably require for the proper carrying out of their operations. The licence holder shall grant access to the information on reasonable terms (including the prices charged, means of access and confidentiality).