



OFFICE OF RAIL REGULATION

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Sir David Higgins
Chief Executive
Network Rail Infrastructure Limited
Kings Place
90 York Way
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Dear David,

ORR's decision not to impose a penalty for the freight performance licence breach and extension to timescales

I wrote to you on 19 December 2011 to inform you that we had found Network Rail in breach of your licence for your failure to deliver your regulatory target for freight performance to the greatest extent reasonably practicable. We made an enforcement order on 19 January 2012 requiring you to set up a recovery board and to agree to the reasonably practicable steps the board considers are necessary to remedy the breach.

Our policy is that we will always consider whether to impose a penalty for a licence breach. The Railways Act 1993 requires us to do this within 3 months of making an order. In making our decision we have followed our April 2009 penalties statement taking into account the Macrory principles¹, the 5 principles of better regulation² and our section 4 duties. The penalties statement states that the main purpose of a penalty is to incentivise future compliance with the licence in general.

We are concerned that Network Rail did not try to deliver this regulatory target to the greatest extent reasonably practicable, apparently because you considered that it was no longer relevant and that affected train operators wanted to consider an alternative target. Over the last year you have discussed with the FOCs the option of changing the existing

¹ To change behaviour, eliminate financial gain, restore harm, deter future non-compliance, be appropriate to offender and the regulatory issue and proportionate.

² Proportionality, targeting, consistency, transparency and accountability.





target but you have not provided any evidence that, in the meantime, you were making every effort to meet it. Disregard for a regulatory target would normally be a key factor in deciding that a penalty would be appropriate. However, a number of factors in this particular case suggest that a penalty would not be appropriate.

In looking at the particular circumstances of the breach itself, we considered whether a penalty would incentivise you to comply with your specific freight obligations. We consider that the approach in the enforcement order, tasking those most affected by the breach to find the reasonably practicable solutions, gives the right incentive at this stage. It would not be proportionate to impose a penalty on top of this.

We are encouraged by the positive engagement within the recovery board from both you and the freight operators and can see that there is real commitment to understanding the causes of poor performance and finding sensible solutions. However, we do expect you to take a cooperative approach to agreeing what steps are reasonably practicable to remedy the breach even if expenditure is involved.

We also considered whether a penalty would incentivise compliance with your obligations more generally. However, we are already taking enforcement action with regards to performance in the long distance sector and discussing other aspects of performance with you separately. We therefore do not think that a penalty is required in this particular case to give additional incentive.

Our Board has therefore concluded that, in light of all the circumstances, a penalty is not appropriate in this case. But if you are not compliant with your licence obligations within the set timescales and we conclude that this is because of a failure on your part, we will not hesitate to take further action.

Extension to the timescales

The order requires you to agree the reasonable practicable steps and timescales within 6 weeks of the formation of the recovery board. However, the recovery board has indicated that, because of the amount of work involved to fully understand the problem and develop solutions, it would like an additional 4 weeks to ensure that it develops robust and meaningful plans. We are content to extend this deadline and Tim Robinson has confirmed that Network Rail is also content. We will write to you separately with an amendment to the enforcement order.

I am copying this letter to Paul Plummer, Robin Gisby and Tim Robinson and to the members of the freight recovery board. I am also placing a copy on our website.

with best regards

Richard Price

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