



OFFICE *of the*  
RAIL REGULATOR

**RAILTRACK'S  
PERFORMANCE TARGETS:  
STATEMENT BY THE RAIL REGULATOR**



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## ***Railtrack's performance targets: Statement by the Regulator***

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1. On 19 August 1999 I issued a notice under section 56 of the Railways Act 1993 stating that I proposed to make a final order under section 55 of the Act requiring Railtrack to achieve a 12.7% reduction in Railtrack-caused minutes delay per passenger train in 1999-2000, and imposing a penalty of £400,000 for each one-tenth of a percentage point by which Railtrack failed to achieve the target.
2. As required by section 56(1)(b) of the Act, I gave notice setting out:
  - (i) the relevant condition or requirement for the purpose of securing compliance with which the order was to be made;
  - (ii) the acts or omissions which, in my opinion, constituted or would constitute contraventions of that condition or requirement;
  - (iii) the other facts which, in my opinion, justified the making of the order.

I sought representations and objections with respect to the proposed order by 30 September 1999.

3. Representations were received from 11 organisations. These included one objection (from Railtrack) and three confidential representations.
4. A further representation, from the Health and Safety Executive, has been received dated 17 November 1999. The HSE has made it clear to Railtrack that safety should not be compromised in its compliance with the order and has stated that it is content for the proposed order to be made.
5. I have considered all the representations carefully. I have also considered whether there are any new factors I should take into account, in particular whether Railtrack is still likely to be in breach of its licence in respect of performance. I note that Railtrack has reported improved performance in the first half of the year. However I have not yet seen figures for the important autumn period, and the winter period is yet to come. I also understand that Railtrack has made a provision in its accounts at the interim stage for a possible penalty. I am therefore satisfied that it is still, on a balance of probability, likely that Railtrack will fail to meet the requirement of a

12.7% reduction in minutes delay per passenger train. I have decided, for the reasons set out in the notice of 19 August 1999 and in Appendix 2 to this document, to make the proposed order with minor modifications described in paragraph 27 of Appendix 2.

6. Appendix 1 to this statement is the order which I have made. Appendix 2 sets out my response to the points made in consultation and the changes I have made to the proposed order in the light of these. Appendix 3 is an information order which has also been served on Railtrack in support of the order.

**TOM WINSOR**

**Rail Regulator**

25 November 1999

# *Appendix 1*

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## **Railways Act 1993 – Final Order – Railtrack PLC**

Under section 55 of the Railways Act 1993, I hereby make the following order in respect of Railtrack PLC of Railtrack House, Euston Square, London NW1 2EE—

### **The obligation**

1. In the period of 12 months beginning on 1 April 1999 (the 'total period'), Railtrack shall, in order to comply with Condition 7 (Stewardship of the Licence Holder's Network) of its network licence, ensure that the minutes delay in the total period is at least 12.7 per centum less than the minutes delay in the base year.

### **Monetary penalty**

2. If Railtrack fails to comply with the obligation in paragraph 1, it shall pay to the Regulator, within one month of demand, a monetary penalty of £4 million for each percentage point by which the change in minutes delay in the total period compared with the base year (rounded up to the nearest one-tenth part of a percentage point) is less than 12.7 per centum and pro rata for each one-tenth part of a percentage point.

### **Relief from the obligation**

#### *General*

3. For the purposes of paragraph 1:
  - (a) there shall not be counted as minutes delay any minutes delay which the Regulator determines he is satisfied should be left out of account on the grounds that Railtrack is entitled to relief because it has reduced minutes delay to the greatest extent reasonably practicable having regard to all relevant circumstances including the ability of Railtrack to finance its licensed activities; and
  - (b) having regard to the determination of any dispute after the date of this order and before 7 August 2000 relating to the allocation of any minutes delay which are material to the obligation in paragraph 1, the Regulator may determine an appropriate adjustment should be made in respect of the minutes delay in the base year or the total period.

*Power to initiate determinations*

4. A determination may be made by the Regulator under paragraph 3 at any time after the end of the total period and whether on the Regulator's initiative, notified to Railtrack on or before 31 July 2000, or on the application of Railtrack (under paragraph 5).

*Right of Railtrack to require Regulator to make determination*

5. Railtrack shall be entitled, by notice given to the Regulator on or before 31 July 2000, to require the Regulator to make a determination for the purposes of paragraph 3. Any such notice shall be accompanied by a statement by Railtrack specifying—
  - (a) the number of minutes delay which Railtrack asserts should not be counted as minutes delay;
  - (b) the reasons for leaving them out of account;
  - (c) any adjustment which Railtrack asserts should be taken into account in making an adjustment under paragraph 3(b); and
  - (d) the reasons for making such an adjustment,and containing such additional information as Railtrack wishes the Regulator to take into consideration in making his determination.

*Representations etc. from any person*

6. In making a determination under paragraph 3, the Regulator shall be entitled to take into consideration any representations or objections by any person which are timeously made and not withdrawn.

**Certificates**

7. Not later than 31 May 2000 Railtrack shall provide to the Regulator a statement of the minutes delay and each component of the definition of minutes delay during the base year and the total period.
8. Not later than 31 May 2000 Railtrack shall provide to the Regulator a certificate in the form specified in Schedule 2 to this order, given on behalf of Railtrack by two directors of the company, at least one of whom shall be a non-executive director.

## Definitions and interpretation

### *Definitions*

9. In this order—

"base year" means the period of twelve months beginning on 1 April 1998;

"certificate" means a certificate given under paragraph 8;

"director", in relation to a company, has the meaning ascribed to it in section 741 of the Companies Act 1985;

"minutes delay" means the amount calculated by the formula  $x/y$  where:

X is the aggregate number of minutes delay of passenger trains in the base year, a period or the total period (as the case may be):

- (a) measured in accordance with the system operated by Railtrack pursuant to Condition B of the Railtrack Track Access Conditions; and
- (b) allocated as being the responsibility of Railtrack in accordance with the procedures set out in:
  - (i) the track access contracts between Railtrack and each of the franchise operators, Heathrow Express Operating Company Limited and Eurostar (UK) Limited and any other relevant passenger train operator and that Condition B; and
  - (ii) the TRUST Attribution Guide issued by Railtrack and in force from time to time subject (in respect of the Guide in force at the date of this order) to such modifications (including any new delay code) as may be approved by the Regulator,

and generally on the basis upon which allocation was actually and demonstrably effected during the year commencing 1 April 1998 and used to calculate the Railtrack-caused delays per passenger train movement shown in Table A on page 49 of the Network Management Statement; and

Y is the total number of passenger train movements in the base year, a period or the total period (as the case may be) ascertained on the same basis as that used to

determine the number of passenger train movements for the purposes of Table A on page 49 of the Network Management Statement.

"Network Management Statement" means the statement published by Railtrack in March 1999 in accordance with paragraph 4 of Condition 7 of its network licence;

"period" means a period as specified in Schedule 1 to this order;

"Railtrack" means Railtrack PLC;

"Railtrack Track Access Conditions" means the document having that name incorporated in track access contracts to which Railtrack is a party; and

"total period" has the meaning ascribed to it in paragraph 1.

#### *Interpretation*

10. In this order (unless the context otherwise requires)—
- (a) references to paragraphs are to paragraphs of this order;
  - (b) paragraph headings are for convenience of reference only and do not form part of, and shall neither affect nor be used in the construction of, this order;
  - (c) where, for the purpose of any track access contract referred to in the definition of "minutes delay", the base year, a period or the total period would be treated as starting or finishing other than at the beginning or end of the date stated, it shall be so treated for the purpose of all definitions and calculations in this order; and
  - (d) terms and expressions defined in the Railways Act 1993, or Railtrack's network licence shall have the same meanings in this order.

#### **Effective date**

11. This order shall take effect on [the day following the making of the order].

TOM WINSOR  
Rail Regulator  
24 November 1999

# *Schedule 1*

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## Periods

<b>Period number</b>	<b>Duration</b>
1	1 April 1999 – 1 May 1999
2	2 May 1999 – 29 May 1999
3	30 May 1999 – 26 June 1999
4	27 June 1999 – 24 July 1999
5	25 July 1999 – 21 August 1999
6	22 August 1999 – 18 September 1999
7	19 September 1999 – 16 October 1999
8	17 October 1999 – 13 November 1999
9	14 November 1999 – 11 December 1999
10	12 December 1999 – 8 January 2000
11	9 January 2000 – 5 February 2000
12	6 February 2000 – 4 March 2000
13	5 March 2000 – 31 March 2000







## *Appendix 2*

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### **Response to representations and objection**

1. The Regulator received representations from the following organisations:

Railtrack PLC (an objection)  
London Regional Passengers Committee  
Rail Users' Consultative Committee for Wales  
Connex Rail Limited  
Strathclyde Passenger Transport  
Merseytravel  
Metro (West Yorkshire PTE)  
Nexus (Tyne and Wear PTE)  
English Welsh and Scottish Railway (EWS)  
Association of Train Operating Companies

In addition he received three confidential responses (two of which were from parties which also made a public response). He received a further response, dated 17 November 1999, from the Health and Safety Executive.

This Appendix sets out the Regulator's response to these representations. Copies of the representations which were not confidential can be inspected in the ORR library.

### **Railtrack PLC**

2. In its response Railtrack said that it regarded improving its performance as a key priority in its stewardship of the network and was doing all it could to bring performance up to the standard the Regulator has demanded by March 2000. Railtrack stated that it had already achieved a great deal in terms of performance since 1995-6, and had created powerful processes to improve performance. In the first 24 weeks of 1999-2000 it said it had reduced delay per passenger train by an amount equivalent to around 12% compared with the same period last year, and:

“Railtrack expects that performance for the remainder of the year will show a considerable improvement compared with 1998/9. However, with the most difficult parts of the year still to come it is still too early to be sure of the out-turn for the year as a whole.”

3. Railtrack noted that the Regulator had not quantified the costs to Railtrack of complying with the proposed order, and that it expected the Regulator to take due account of these costs in the forthcoming review of access charges. The Regulator confirms that his proposed conclusions on this point will be contained in his December 1999 statement on the periodic review.

4. Railtrack objected to the proposed order on the grounds that:

“Railtrack believes that the penalty proposed by the Regulator is disproportionate and inappropriate and that the Regulator’s enforcement action is unfair and unreasonable.”

*The proposed penalties*

5. Railtrack has argued (paragraph 17 of its submission) that the proposed penalties are entirely inappropriate, being excessive and disproportionate to the matters which the Regulator has identified. The company claims that the proposed penalties would be in breach of the principle of proportionality to which it considers the Regulator must have regard. The Regulator has reviewed the specific arguments put forward by Railtrack and has concluded that the proposed monetary penalty remains appropriate in all the circumstances of the case.

6. Railtrack argues in paragraph 8 of its submission that the Regulator’s own consultants find its management processes to be powerful. However, the Regulator also notes that his consultants went on to say, in their report on Railtrack’s performance over the current control period, that:

“Overall, the Regulator could reasonably have expected performance to have shown greater improvement at a national level”.

7. The remainder of this section addresses Railtrack’s specific arguments concerning the penalty in more detail.

8. Railtrack argues (paragraph 19 of its submission) that it is misleading to describe the proposed penalty as incentivisation as this carries with it the implication of reward. It also argues (paragraph 20 of its submission) that since the Regulator has not been able to quantify the cost of compliance there can be no incentivisation arising from this aspect of his proposal. However, the Regulator considers that Railtrack’s renewed commitment to try to do all it can to meet its targets is evidence tending to suggest that his proposed action has indeed incentivised the company in the desired manner.

9. Railtrack argues (paragraph 21 of its submission) that it is already subject to highly effective incentives and that the proposed penalties would penalise Railtrack twice. However, the Regulator is satisfied that performance has not been adequate (as evidenced by its failure to meet its own targets) and the proposed level of penalty took specific account of the incentives already provided by the contractual performance incentive regime.
10. Railtrack asserts that the fact that the performance targets have emerged as an additional requirement since the last review should affect the way they are treated in the periodic review. However, the Regulator considers that it was clearly the intention that performance should be a key dimension on which Railtrack would be measured and the monitoring of key performance indicators (which included train performance) was explicitly mentioned in the Regulator's statement for Railtrack's prospectus. The Regulator has already indicated that he may wish to adjust future revenues where Railtrack has under-delivered in the current period, but that in assessing the appropriate adjustment he would take due account of any penalty under the final order.
11. Railtrack argues that payment of the penalty would mean that the money would not be available for future development of the network. It also implies that its credit rating has been put on negative watch because of the draft notice. However, the Regulator has emphasised that his intention is to secure compliance not to penalise the company. He has stressed that any penalties should be treated as a reduction in profit and must not result in reduced investment. He also notes that the credit watch announced by Standard & Poor's arose from the signal the proposed order gave of a general toughening of the regulatory regime, rather than specifically from the proposed order. The Regulator accepts that, under the provisions of the Railways Act 1993, any penalty imposed will be paid to the Consolidated Fund so that, unless reallocated for railway purposes by the Government, the money will be unavailable for use within the railway industry. However, whilst this is a matter he has taken into account, he notes that the logic of Railtrack's point is that a penalty should never be imposed. That is unsustainable. He considers that, in appropriate cases, the imposition of a penalty may reduce the likelihood of a licence breach occurring or continuing. The incentive, and therefore the reward to the licence holder of achieving compliance, will be the avoidance of paying the penalty.
12. The Regulator has also considered Railtrack's arguments (paragraphs 26 to 34) concerning the actions of other regulatory bodies, and relevant legislation. Railtrack argue that the analogy with the Director General of Water Services' action against

Yorkshire Water is false. The Regulator does not agree. It would, for example, have been possible for the Regulator to adjust Railtrack's price controls (at the periodic review) in a similar manner to the Yorkshire Water case. However, this would have had the effect of penalising the company *ex-post* rather than incentivising it *ex-ante*. He also notes that the Director General of Water Services does not have the power to impose a monetary penalty. Of the other utility regulators, only the Director General of Gas Supply has such a power at present. The Regulator notes the examples of penalties imposed by financial regulators quoted by Railtrack and fines imposed by the courts for criminal offences committed under health and safety legislation. He agrees that they do not lead to any simple or definitive conclusion, in so far as they may be relevant. The Regulator was, and continues to be, conscious of the absence of external guidance on the basis for assessing the level of a penalty. As he indicated, he has sought to draw on published guidance or examples of actions by other regulatory bodies and to indicate the factors which he has taken into account. The position is made more difficult because, in this case, the penalty can only be set when the final order is made, rather than when the breach occurs. However, the Regulator considers that the mechanism in paragraph 3 of the order will enable and oblige him to take proper account of further arguments in mitigation where, for example, performance has been affected by matters outside Railtrack's control.

13. Finally, Railtrack argues that the Regulator has failed to take account of mitigating factors, such as its commitment to improving performance and co-operation with other industry partners. The Regulator has taken account of past mitigating factors in reaching his conclusion, and has provided scope for the target to be adjusted in future if justified. Moreover, it lies within Railtrack's power to mitigate the impact of the order by complying with its terms. Railtrack asserts that its explicit commitments to improving performance make it hard to justify the penalty as a deterrent. The Regulator disagrees. Railtrack committed itself to improving performance in the targets which have not been met. What counts is actions, not words. The Regulator is satisfied that he has given appropriate weight to all relevant matters in determining the need for, and the level of, the monetary penalty. The Regulator is also satisfied that the procedures adopted are in accordance with the Railways Act 1993 and all other applicable rules of law and the process has been fair.

*The proposed enforcement order*

14. Railtrack's response states (paragraph 35) that by seeking to enforce specific annual passenger targets contained in the 1998 NMS effectively as if they were a licence condition and by focussing exclusively on the passenger target for 1998-99 in

isolation, Railtrack believes the Regulator is acting unreasonably, and puts into question the status of all targets in Railtrack's Network Management Statements and the planning process that lies beneath them. Railtrack's reasons for believing this are then set out.

15. Railtrack states (paragraph 36 of its response) that it cannot agree with the Regulator's statement (paragraph 15 of the Regulator's notice) that:

“the NMS targets for 1998-99 and 1999-2000 are enforceable commitments by Railtrack under its network licence.”

This point was covered extensively in the Regulator's notice. Specific points raised by Railtrack in following paragraphs of its submission are covered below.

16. Paragraph 37 of Railtrack's response says that operators and funders did not, in advance of the 1998 NMS, express the requirement that Railtrack should achieve a further level of national improvement in performance in terms of Railtrack-caused minutes delay to either passenger or freight trains. The Regulator notes however that the process which led to the 1998 NMS was inadequate (this was one of his predecessor's July 1998 conclusions) and in any case considers it was appropriate for him, in the light of responses from some consultees (notably from the Franchising Director) that the 1998 NMS targets were inadequate, to require more challenging targets. This point was addressed in paragraph 19 of the Regulator's notice.
17. In paragraph 37, Railtrack then argues that it agreed to increases in the targets because they represented improvements that Railtrack was intent on making, not because Railtrack considered it was in breach or potential breach of its licence. Railtrack ought to be aware that under the Railways Act 1993 it is for the Regulator to be satisfied whether a contravention is occurring or likely to occur, not Railtrack. A similar point is made in paragraph 40 of Railtrack's response, and the answer is the same. The document accompanying the July 1998 commitments was specifically expressed to be a notice given under section 55(6) of the Railways Act, and that the commitments were accepted by the Regulator for the purposes of section 55(5)(b). The status of the commitments was therefore made clear at that time.
18. Railtrack disagrees (paragraph 38) with the implication (paragraph 17 of the Regulator's notice) that by agreeing with the Regulator that the content of the NMS was important in demonstrating compliance with Condition 7, Railtrack had accepted that an output measure included in the NMS became a binding commitment so that failure to achieve it was a breach of licence. A similar argument is given in paragraph

39 of Railtrack's response where Railtrack disagrees with the Regulator's view that the 1998 commitments (which retrospectively revised the NMS) became enforceable under Condition 7. The performance targets were a key output commitment in the 1998 NMS (as revised) and thus a key element whereby the NMS, as required by Condition 7, demonstrated Railtrack's plans to meet the Condition 7 general duty. Therefore, as argued in paragraph 18 of the Regulator's notice, there is a strong prima facie case that Railtrack is in breach of its network licence.

19. Paragraph 41 of Railtrack's response argues that the Regulator is being unreasonable and unfair in giving no credit for the over-achievement of the freight target in his conclusions on the passenger target. The targets were clearly established as two separate targets by Railtrack and no provision was made for an aggregate target. The Regulator therefore does not accept this argument.
20. Paragraph 42 of Railtrack's response argues that it is unreasonable to proceed on the basis that when it agreed to yearly targets Railtrack envisaged that its performance would be cumulated in this way. Paragraph 43 goes on to argue that the Regulator is "in effect regarding each annual target as separately enforceable, in isolation from the prior and subsequent years. Railtrack considers this approach to be unreasonable." The Regulator's view is that by looking at the two years together he is avoiding focussing purely on one year's performance. This point is made in paragraph 24 of the Regulator's notice.
21. Railtrack asks whether, if performance in 1998-99 had exceeded the improved target, the Regulator would have similarly cumulated the excess with the 1999-2000 target. The Regulator confirms that in such a situation, and depending on how the targets were expressed, he would have considered the 1999-2000 target in the light of what had been achieved in 1998-99, and depending on the circumstances would have expected to accept such cumulation.
22. Railtrack (paragraph 43) notes that it has put forward proposals for an assessment based on a rolling three year average, and that if in any year out-performance is to be disregarded but enforcement action taken in respect of underperformance this indicates an asymmetric approach which "will not only be perceived as unfair but will increase regulatory risk and Railtrack's cost of capital". The Regulator is considering these issues in the context of performance targets for the next control period. He also wishes to establish with Railtrack firm targets in respect of the year beginning 1 April 2000.

23. Railtrack notes (paragraphs 44 and 45) that some factors contributing to the measurement of Railtrack's performance are outside Railtrack's control. This was recognised in the Regulator's notice (paragraph 23 of the Regulator's notice). If there is a material increase in the effect of such factors in 1999-2000, or additional evidence is provided to substantiate the reasons given for the shortfall in 1998-99, and the Regulator is satisfied that Railtrack has taken action to mitigate their effect to the greatest extent reasonably practicable, the Regulator would take these factors into account under the heading "Relief from the Obligation" in paragraph 3 of the order.
24. Railtrack argues (paragraph 47) that the requirement in paragraph 9 of Condition 7 for a Reconciliation Statement is not consistent with the use of enforcement action for a failure to meet a specific target or the suggestion that such a failure is a breach of Condition 7. The Regulator considers that failure to achieve a key output target, in the circumstances set out in the notice is a prima facie case of failure to meet the duty, and this forms the basis for his proposed action. The nature of information given in any NMS will vary and therefore, for example, in areas where no target is provided or where there is a reason justifying the shortfall, reconciliation may be appropriate. The purpose of the Reconciliation Statement is to report on progress since the last year's Network Management Statement. The argument that the mere reporting of a shortfall excuses the licence holder from the consequences of failure to comply with the duty in Condition 7 would render the Condition largely meaningless and unenforceable. That is not the purpose of licence conditions nor a proper construction of this Condition. The Regulator therefore regards the argument as unsustainable.
25. Railtrack argues (paragraph 48) that the Regulator's proposed action "will inevitably lead to a much more cautious approach to the drafting of the NMS, making it of less use to train operators and funders". Railtrack questions "whether this would be a positive step." The Regulator reiterates that the Network Management Statement is a means by which Railtrack demonstrates how it will comply with the general duty. If Railtrack were to seek to take a more "cautious approach" the Regulator would still need to satisfy himself that such an approach was consistent with the duty.
26. In paragraph 49, Railtrack states that it "welcomes the Regulator's suggestion that once the performance regime is reformed following the Regulator's current consultation and review process there will no longer be any need for enforcement action in this field". The Regulator wishes to make it clear to Railtrack that, depending on the outcome of his consultation on the periodic review, he expects that performance targets will be a matter for enforceable commitments as part of the periodic review settlement, albeit in a context where incentive regimes should be

more effective. Railtrack goes on to question whether it is appropriate, reasonable or consistent to bring forward an aspect of the periodic review process in isolation from the rest of that process. The Regulator does not consider that taking action to enforce a licence obligation in the current control period constitutes bringing forward an aspect of the periodic review process which is concerned with the next. These are separate issues. Nor does he consider that he is being unreasonable in taking this action when there are contractual regimes in access agreements approved by the Regulator incentivising performance. The Regulator's notice makes it clear that the Regulator considers that the contractual performance regimes have not provided sufficient incentives. The introduction of the new Condition 7 in September 1977 was intended to enable stewardship obligations, including as to performance, to be enforced, in this case by the proposed enforcement order. Railtrack considers it a further element of unreasonableness (paragraph 51) that an enforcement order would expose Railtrack to the risk of private actions for damages. The Regulator was aware of this when proposing the order and regards it as an element of the legal framework of which Railtrack should have been aware when it made and then failed to meet the commitments. It has existed since the Railways Act 1993 was brought into effect.

*Form of the draft order and certificate*

27. Railtrack questions whether the Regulator should require that one of the signatories be a non-executive director. The Regulator accepts Railtrack's argument that the manner in which it engages its corporate responsibility is a matter for the company, and has modified paragraph 8 and Schedule 2 to the proposed order so as simply to require that the certificate be signed by a single director. He has also corrected a typographical error in Schedule 1. The Regulator has retained the statement that the information is to be provided for the purposes of the Railways Act 1993. This is merely a statement of fact.
28. Railtrack notes (paragraph 54) that the draft information order was dated 4 October 1999 and expresses concern that this indicated that the Regulator was not giving himself an adequate opportunity to consider Railtrack's representations and objections before making his final order. The Regulator considers that the fact that the final order, and a revised information order are being made in November 1999, addresses this point. There has been very full consideration of what the Railtrack has said.

**Health and Safety Executive**

29. In a representation dated 17 November 1999, albeit one discussed with the Office of the Rail Regulator in advance of this, the Health and Safety Executive stated that

some drivers and train managers helping them in work on driving techniques had identified a tension between driving “defensively” and achievement of performance targets. The HSE has reinforced the Regulator’s message that any action necessary under the order should not detract in any way from Railtrack’s paramount obligations to maintain the safety of the network, and has stated that it is content for the proposed order to be made. The Regulator notes this, and also that the particular concern is in respect of drivers, who are not employed by Railtrack. He reiterates that safety must remain paramount.

### **London Regional Passengers Committee (LRPC)**

30. The LRPC stated that it fully supported the Regulator’s concerns that Railtrack should be required to deliver on its promises, but said that it would be a pity if action by the Regulator against Railtrack distracted attention from the fact that “most of the net increase in lost minutes is due to factors deemed to be within the TOCs control”. These are not material to Railtrack’s own targets. The Regulator is taking this particular action because he considers it necessary to secure compliance with Railtrack’s network licence; there are no similar conditions in train operator licences. The Regulator is aware of the actions train operators are taking to improve performance, and that the Shadow Strategic Rail Authority is monitoring train operator performance and in 1998 sought action plans from train operators to improve performance. He also notes the work being done by Railtrack and train operators following the National Rail Summit in February 1999.

### **Rail Users’ Consultative Committee for Wales**

31. The RUCC for Wales supported the proposed action. It raised three major points:
- (a) a concern that “corners may be cut” in order to minimise delays (e.g. drivers instructed to proceed at slow speed rather than wait for hand signalling to be put in place in the event of a track circuit failure). The Regulator reiterates that safety must remain a paramount concern. He is drawing this specific point to the attention of the Health and Safety Executive and Railtrack’s Safety and Standards Directorate;
  - (b) how the Regulator will ensure that the money to pay the penalty will come out of the profits of the company and not out of the amounts which Railtrack must spend on investment. The Regulator will be monitoring Railtrack’s delivery of its investment plans closely, and is reviewing the adequacy of those plans as part of the periodic review;

- (c) ensuring that if a penalty is levied the money stays within the railway industry. Under the Railways Act 1993 the penalty is paid to the Consolidated Fund and it is a matter for government to decide how it should be spent.

### **Connex**

32. Connex Rail Limited stated that it had no reservations with respect to the action being taken but identified three areas of concern:

- (a) the use to which the money from fines/penalties is put. This is addressed in paragraph 31(c) above;
- (b) the risk that attribution of delays "is open to serious manipulation". The Regulator has made it clear to Railtrack that he would regard it as a matter of serious concern if the proposed order resulted in any such manipulation. In addition his recent consultation document on incentives asks for views as to how the mechanism could be improved ;
- (c) the risk that the imposition of a monetary penalty will cause Railtrack to take a "much more defensive approach" in dealing with train operators, and that Railtrack may focus on track infrastructure investment rather than other areas such as stations and depots. The Regulator reiterates that he will take action if he considers that Railtrack is failing to meet any of its stewardship obligations. He expects train operators and funders through the account planning process to ensure that plans are in place to meet their reasonable requirements.

### **Strathclyde Passenger Transport (SPT)**

33. SPT welcomed the Regulator's proposed action. But, quoting an example of the planning of a bridge renewal, it stated that "It would be unfortunate if Railtrack's obsession with achieving the targets it itself set causes it to lose sight of the wider picture". The Regulator believes there are sufficient means available through the network licence and the Track Access Conditions to ensure this is not the case.

### **Merseytravel**

34. Merseytravel welcomed the proposed order. It looked to ORR "to ensure investment and operational expenditure is not reduced, especially where this may have an impact on future performance and network quality". The Regulator has made clear his position on this matter which is addressed in paragraph 31(b) above.

### **Metro (West Yorkshire PTE)**

35. Metro expressed support for the Regulator's proposed action.

### **Nexus (Tyne and Wear PTE)**

36. Nexus asked what would happen to any penalties levied. This is covered in paragraph 31(c) above.

### **English Welsh and Scottish Railway (EWS)**

37. EWS stated that it considered that the action proposed by the Regulator was the correct course to take in the circumstances. Major points were:

- (a) EWS noted that the operation of the delay attribution system had led to dispute between it and Railtrack. EWS called on the Regulator to reinforce the point publicly that either in terms of delay attribution or in terms of maintenance and renewal work, Railtrack's actions to comply with the order should not disadvantage freight. The Regulator notes the non-discrimination condition in Railtrack's licence and he expects Railtrack to comply with it;
- (b) EWS said that it would wish to see any penalties levied being spent directly on enhancements to the network. This point is covered in paragraph 31(c) above.

### **Association of Train Operating Companies**

38. In its public response the Association of Train Operating Companies stated that the quality of network (and other services) provided by Railtrack was of paramount importance to train operators. A confidential response was also supplied which was copied to Railtrack by the Association.

### **Confidential responses**

39. The Regulator received three confidential responses. These did not raise material points not considered elsewhere.

### **Office of the Rail Regulator November 1999**



## *Appendix 3*

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### **Condition 7 (Stewardship of the Licence Holder's network); and Condition 13 (Provision of Information to the Regulator) of the network licence of Railtrack PLC**

1. In accordance with the provisions of paragraph 7 of Condition 7 and paragraph 1 of Condition 13 of its network licence, I hereby require Railtrack PLC to provide to me at the Office of the Rail Regulator, 1 Waterhouse Square, 138-142 Holborn, London EC1N 2TQ:
  - (a) on or before 23 December 1999, a statement of the amounts represented by X and Y in the definition of "minutes delay" in the first to eighth periods (inclusive);
  - (b) not later than 28 days after the end of each period after the eighth period, a statement of the amounts represented by X and Y in the definition of "minutes delay" in the period in question; and
  - (c) not later than 21 days after the provision of the statement under sub-paragraph (a) and 7 days after the provision of each statement under sub-paragraph (b), a brief statement of:
    - (i) any circumstances which occurred during the period to which the statement relates which Railtrack believes may be relevant circumstances for the purposes of paragraph 2 of Condition 7 of its network licence; and
    - (ii) the actions taken or which Railtrack will take to mitigate the effects of those circumstances, or the reasons why no such actions are reasonably practicable;
2. Words and phrases defined for the purposes of the final order of even date issued by the Rail Regulator to Railtrack PLC shall have the same meaning in this request.

**TOM WINSOR**

**Rail Regulator**

24 November 1999