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OFFICE of the
RAIL REGULATOR

The Chairman, Chief Executive and
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Dear Colleagues

In some public bodies, it is traditional for the outgoing office holder to write a personal letter to his successor. I think it is entirely appropriate that I do so with you.

2. My message is an optimistic one, but also one of the need for caution.
3. Tomorrow, you take over an organisation and a body of people in good shape. ORR is a small organisation, and you will be heavily dependent on a few people in key positions. You need the dedication and hard work of the case workers and the support staff too. They keep the engines running and get the job done and out of the door, time and again. They are professional and talented, and they need and will repay richly your loyalty and support. You need to know that with some in ORR there has been worry and uncertainty about the advent of the new board - worry about jobs, about atmosphere and about policy and direction. That feeling has persisted for a long time, and it has grown as the day has approached. I encourage you to be sensitive to that fact and to reassure all the staff - senior and junior - through your actions as well as your words, especially in the earliest days.
4. The last five years have been turbulent ones for the railway industry, especially the aftermath of Hatfield, during the administration of Railtrack and the creation of Network Rail. In that time, the independence and jurisdiction of ORR has been unjustifiedly assaulted by politicians, the SRA, think tanks and so-called outside experts, and the press have of course fed it all with the oxygen of publicity. It should not be underestimated just how effective the constant repetition of unjustified criticism and imaginary facts can be in shaping political and public opinion. That is why in the last five years it was necessary, over and over again, to explain what we were doing, what was the jurisdictional basis for it and, most importantly, why we were doing it.

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5. In 1999, I gave hardly a thought to the issue of independence. It was a given, and not seriously in doubt, or so I thought. But when it came under pressure first, fire later - from the Department, the Treasury and, most of all, the SRA - the corrosive potential was serious and had to be resisted. If we had simply stayed quiet, it would not have washed over us, it would have washed us away. We began the defence with attempts at private persuasion, but the assailants were determined and it became necessary to make the case publicly. And at the time of greatest peril - when Stephen Byers threatened to legislate - our policy and our approach paid off, with a strong defence of our position from the industry and the banks.
6. Although the Government was persuaded to back off then, it has never lost its overriding objective of control, and I believe it will continue to try to erode ORR's independence and jurisdiction. It failed to do it head on. Now I believe it will try to do it incrementally and by stealth. You will need constant vigilance always to see the thin end of some ingeniously designed, covertly inserted wedges.
7. The footsoldiers in what have sometimes felt like sieges have often been mercenaries. I caution you against the dogged ignorance and hostile agendas of supposed expert commentators in otherwise reputable consultancies, policy institutes and elsewhere. Some of these have used the cloak of the respectability of their organisations to steal past the defences of government and the serious press, and to get themselves listened to and believed by people who ought to know better. When that happens, it becomes necessary to explain, explain, explain, to counter the wild ideas which Ministers and others will hear based on misconceptions or worse. The struggle is constant, and if you let down your guard, these ideas will multiply and gain acceptance very rapidly.
8. DfT and Treasury have some very bright and talented civil servants, and they should be able to keep Ministers away from some of the more unwise things they tend to want to do. However, there are two significant limitations on this potential for sense and good.
9. The first is the complexity of the matrix and why the underground cables are configured and layered as they are. It takes time to master it, and the churn rate of senior civil servants and advisers is not conducive to this. Knowing they need to learn, they therefore tend to listen to some whose own knowledge is unsatisfactory and whose agendas may not be honourable. I suggest you need to get in there - break the door down if you have to - to ensure that the nonsenses, the prejudices and the vendettas do not gain any footholds.
10. The second is the courtier mentality of some senior civil servants. Professional they may all be - or try to be - but some see the road to advancement in a sacrifice of objectivity, giving Ministers what they think they want. Some practitioners of this are hardly subtle. This too is a danger, especially because the tendency of Ministers - especially in this Government - is to want control things. They wrongly assume or accept public responsibility for operational matters



rather than overall transport policy, and then when they start getting blamed for things, they look around for levers to pull; finding none, they want to seize the existing ones (usually from the regulatory authority, because it has the richest endowment) or (worse) create new ones which overlap or conflict with the existing system. This has certainly been the tendency in the current rail review, and there has been a great collision of imperatives in the drafting of the White Paper.

11. The railway industry has matured in the private sector far, far slower than any other privatised industry I have known. I gave my reasons for this in the foreword to my last annual report, and I will not repeat them here. Coupled with the fear of the juggernaut of government which assumes and asserts that it can do anything irrespective of private rights and the need to protect and nurture confidence (which it hardly understands), the result is fear on the part of the railway companies, a timidity or unwillingness to stand up for themselves and to say - and mean - "thus far but no farther". They have shown they can do it when the stakes are massive, as happened when they collectively wrote to Stephen Byers on 12 October 2001. But when they are being coaxed, cajoled - and even perhaps intimidated - to accept just one more encroachment, to grant just one more concession, they get nervous and will sometimes bend. And you can understand and sympathise with them when they do - they have businesses and jobs to protect, and few will be first to volunteer for the part of David to government's Goliath. In these things, the regulatory authority is often the only bullwark, and we have had to play that role on several occasions.

12. Although Network Rail is now standing up for itself much better, and realises that its early enamour with - indeed its ardour for - a close relationship with the SRA was mistaken, there is still a need for ORR to take the long-term view, to see what may be coming and what it means, and to plan for and - through its decisions - enable the sustainable development of the railway. Politicians will talk about decades of underinvestment and putting right the legacy of the past, but in general - and with some honourable exceptions - they are simply not programmed to make decisions which put the long-term interests of the industry and the public ahead of the short-term political imperatives of the moment. If the fire alarm is ringing, the tendency is often to break the bell to stop the noise, not to put out the fire.

13. Too often the Department or politicians will serve the interests of the moment without adequate thought for the implications or the consequences. They had no appreciation of the consequences of the threat to independent economic regulation of 5 October 2001, even though I explained it in fairly graphic terms to Stephen Byers at the time; they barged ahead, because that was part of the immediate ill-considered plan. At my meeting with Richard Mottram on 10 October 2001, it was plain they had hardly the faintest notion how they were going to get Railtrack out of administration or of the consequences of the certain - that is how he described it to me - merger of ORR with SRA. On 30 October 2001, they insisted Network Rail would live within the October 2000 access charges review settlement, even though on 15 January 2001 I had published the clearest signal that that was completely unrealistic.



14. When they went to Court on 7 October 2001, there was not a breath about the availability of an access charges review to restore the financial position of the company. A year later, much of the Court hearing to get Railtrack out of administration was about how the independent regulatory authority's jurisdiction and willingness to do an access charges review - precisely the same access charges review - meant that the company was not insolvent. The needs of the moment.
15. In the summer of 2002, when I discussed the availability of an access charges review with the Secretary of State and the permanent secretary, I asked them if they were sure - *really sure* - that that was what they wanted, and if they realised that it would almost certainly lead to a substantial increase in access charges. Yes, they knew that and it was what they wanted - a simple informal assessment of infrastructure costs was not enough. And yet, when the time came, they were shocked when we said Network Rail's revenues had to go up, and have subsequently criticised the jurisdiction of ORR under which the access charges review was done, a jurisdiction which Parliament created and which you could have expected the Department and the Treasury to have understood.
16. When the Government made their statements on 15 December 2003 and 9 February 2004, they made them because they wanted something important from ORR. Now they have it, it is my strong belief - based on evidence - that they wish they had not said what they said and, given a chance, they would walk away from it. The twists and turns of the rail review show this - they keep bumping into the 9 February 2004 assurances and try to flatten or circumvent them, usually through creative interpretation which, in my view, stretches them beyond breaking point. Only a strong stand which insists on their being honoured - and repeated reminders to them from ORR that that is what is expected and demanded - will protect the integrity of these assurances. I regret to say that if you are seen - and I stress the point about perception - to give way on them in any appreciable way, you will damage your credibility in the industry and with the financial community from the moment of your inception. I have no expectation you will allow this to happen.
17. The notion that ORR's relationship with government is a bad one is simply untrue. It is professional and sound, especially with the most senior civil servants. The exception is of course Kim Howells, who persisted in misrepresenting the facts of our jurisdiction, perhaps because he did not understand them or maybe because he could not handle them. And of course it was bad when Stephen Byers threatened legislation. But with Alistair Darling it has always been professional, although his engagement was hardly ever warm.
18. That said, it has to be remembered that when Stephen Byers acted as he did in October 2001, he did not act on his sole authority. And even after we, the industry and the banks successfully dissuaded the Government from extinguishing ORR's independence and transferring its jurisdiction, in the succeeding months behind the scenes Treasury and others came back to the same objective over and over again, planning a long campaign of encroachment instead of an all-



out assault. I cannot believe that these centralising and controlist tendencies will suddenly evaporate with the advent of a corporate board to replace a single office-holder. Mice - even brave ones - should always beware the blandishments of cats.

19. The statements which Government made about the importance of the independence and jurisdiction of the ORR on 12 June 2002, 15 December 2003 and 9 February 2004 are immensely valuable; they need to be hung onto. But it is also necessary that you know that they were extracted from them almost under duress. In 2002, the Government needed me to make a statement about my willingness to do an interim access charges review. Without it, they would not have been able to get Railtrack out of administration and complete the establishment of Network Rail. (And remember that this was the same interim review they had been prepared in October 2001 to legislate to stop.) In 2003 and 2004, we made it clear that without the December and February statements (and the permanent secretary's letter of 16 December 2003) we would not agree to defer the increase in access charges in the first two years of CP3 or the higher proportion of Network Rail's income going in as grants. I have no doubt whatsoever that we would not have got those statements without our using that leverage. When there is no leverage, it is wise to expect nothing.

20. There are probably two things more than anything else which have enabled ORR to survive and be able to do the job well, taking the industry and others with us.

21. The first is that what we do matters. Unlike much of the meddling and micro-management of the SRA, the industry knows that our licensing, access, competition, financial and appellate jurisdictions are necessary - they are jobs which need to be done. And they need to be done well, which is the second strength.

22. Opaque procedures and criteria, and uncertain rationales for decisions, are anathema to confidence and would deny us support. That is the kind of thing the industry gets elsewhere, but they do not get it from ORR. From the beginning, I have publicly committed ORR to the highest standards of public administration, to transparent criteria, to ensuring and showing that our understanding of the case which is put to us and the analysis we do on it is sound, to giving those affected a fair hearing, and then - crucially - to publishing the reasons for decisions. We have done these things - and we have published our promise to do them - knowing we were creating legitimate expectations. And we have kept to them. Many of the messages of support which I have received throughout my term of office - and particularly now at the end of it - have stressed how important the industry considers the soundness and fairness of our processes to be, and how much they appreciate the efforts we make to communicate what we are doing and why we are doing it, including through the ORR website ("the best and richest source of reliable information in the railway" is how one put it to me).



23. These things really matter. Having the industry's support and respect puts wind in your sails, and gaining acceptance of our decisions - and that is of course not the same as pleasing everyone! - is the surest way to build up protectors for ORR when the seas get choppy.

24. I believe that the ways in which we have strengthened the institutional, financial, regulatory and contractual regime really are the best recipe for improved performance and greater cost efficiency, and the industry agrees (despite its scepticism at the beginning). Of course they can be improved further, and they should be. As you know, I have urged government not to dissolve these strengths and throw the industry backwards in the vain hope that something better can be quickly devised. The improvements in infrastructure-caused problems and cost control are coming through strongly *now*. You can intensify and protect those improvements, but to do that you need to defend what we have created and the existing processes for its change over time. Incremental change - doubtless wearing a mask of radicalism, for understandable political reasons - is by far the greatest and the best hope for the future.

25. You will of course have a bright start, with much goodwill and most wanting you to succeed. But, of course, all honeymoons end some time. And when one party is unfaithful or is thought to be, the atmosphere changes dramatically and, whatever is done to try to repair it, it will never be the same again. I wish you a long and happy honeymoon and thereafter a faithful and enduring partnership with the industry, with government and with the public.

26. It has been a great privilege and honour to do this job for five years. At times it has been exasperatingly difficult, but always, in the end, rewarding. I leave you an ORR which is fit and, with the right encouragement and support, will serve you - and most importantly the public interest - well. I wish you every possible success and the very, very best of luck.

TOM WINSOR