



Robert Mills
Office of Rail Regulation
One Kemble Street
London
WC2B 4AN

28th January 2013

Dear Robert

Consultation on Schedules 4 and 8 Possessions and Performance Regimes

I am grateful for the opportunity to comment on your November 2012 consultation document.

The North Yorkshire Moors Railway (NYMR) runs trains over a short rural route section of Network Rail. We serve the niche heritage market, whose customers have requirements that can be distinctly different from those of more normal train operators. The small scale of our operations also limits the number of interfaces and our potential to impact adversely on other industry parties. Nevertheless, where these interfaces do exist, we are aware of the disruptive effect our operations could have on others, and fully support the need for appropriate protections to be in place – be that Network Rail, other train operators, or ourselves.

As has been acknowledged elsewhere the range of issues surrounding compensation under Schedules 4 and 8 are significant and potentially complex. Given the limited scale of NYMR operations, my comments are confined to those few matters which appear to have potential implications for us.

Before commenting on specific points, we wish to make two general observations of particular importance to us:

- As a small operator with extremely limited resources, stability and the avoidance as far as possible of financial uncertainty is of paramount importance. The possibility of an uncapped financial liability arising is a particular concern since potentially such an event could swamp the business.
- The NYMR Track Access Agreement contains a bespoke Schedule 8, including an alternative mechanism in place of Schedule 4, which of course your office has approved. This reflects the unique circumstances of our operation. Although the Schedule has not been in place for the full length of our contract, it is of note that during the six years of NYMR operations over Network Rail

this and earlier provisions in the contract in relation to possessions and performance have worked well. From our perspective there have been no issues of any significance.

With these points in mind, I am pleased to note reference in the consultation document (clauses 1.54-1.56) to the value of bespoke arrangements. NYMR are an Open Access Operator in terms of interaction with Network Rail (a heritage railway with a link to the national network over which some through services operate), and the bespoke Schedule 8 includes a cost cap that reflects our particular circumstances. While either party may at some point wish to revisit the current provisions, should the need dictate, we would still want the freedom to agree a cap with Network Rail if this remains the best solution to the specific commercial conditions applying to our operation.

The above represents our overriding preference, and NYMR do not currently see, or anticipate a need to change the way in which our Schedule 8 applies, nor have Network Rail advised us of any such aspiration. Nevertheless, I give below NYMR's observations on particular questions in the consultation document that we believe have the potential to materially affect us.

- 2.25 - We agree with the emerging ORR view that payment rates for both Schedules 4 and 8 should continue to be set with the aim of fully compensating train operators for the financial impact of service disruption.
- 2.26 - Based on our experience of dealing with Network Rail on performance related matters, which I have always found most satisfactory, we have no further steps to recommend.
- 3.24 - While we might see some marginal benefit from basing payment rates on actual amounts paid, in NYMR's case little material benefit is likely to arise from changing the arrangements currently in our contract because of the relatively few occasions on which they are applied.
- 3.54 - The nature of NYMR's business is that passengers travel for the purpose of going by train - in other words it is the reason for the journey. Thus little is gained in the event of advanced notice of service cancellation, since the effect is the same - the majority of passengers will still choose not to travel. We are, however, still faced with the cost of providing bus/rail replacement to deal with those few passengers that do continue to travel.
- 6.60 (see below)
- 6.61 (see below)
- 7.10 - NYMR accept the logic of using the same methodology for calculating payment rates as applies for freight operators. Our position would be very similar to charter operators in that data is available for use in calculating specific payment rates.
- 7.19 (and 6.60) - The Schedule 8 regime in the NYMR contract replaced the previous arrangement based on the freight regime. Any reversion to this, and in particular removal of incident caps, would cause us considerable difficulty because of the uncertainty created and the potential liabilities that might arise.

While the Access Charge Supplement route would be preferable, since this at least would give certainty, any change that materially increased the cost of operations to protect against some future uncertain eventuality would be burdensome, and in our view unreasonable. Thus, while we would not presume to give a view on what might be most appropriate for freight/charter operators, NYMR's strong desire remains to continue with the current arrangements.

- 7.20 (and 6.61) - While we have been unable to test the market in detail, indications are that obtaining insurance for such uncapped risks would be 'very difficult if not virtually impossible'. For a small operator such as NYMR, where there is little track record from which to measure the probability of a catastrophic performance event, the insurance market would struggle to calculate the upper level of potential financial liability. Always assuming it were possible to purchase at all, pricing such uncertainty is likely to make cover very expensive. Such an additional cost would be a disproportionate burden to bear, that could even threaten viability of the service.
- 7.24 - NYMR agree that the payment rate for charter operator performance regimes should be the same as in the freight performance regime.

I trust these comments are useful and confirm that I have no objection to this letter being published on the ORR website.

Yours sincerely

A handwritten signature in blue ink, appearing to read 'Philip Benham', with a long horizontal flourish extending to the right.

Philip Benham
General Manager