



ASSOCIATION of TRAIN OPERATING COMPANIES

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10th December 2003

Dear Michael,

Consultation on Changes to Access Rights and Moderation of Competition: Comments on Use It or Lose It

The Rail Regulator proposed in the consultation “Access Rights and Moderation of Competition” that rights could be lost if they were timetabled but not used. Network Rail responded that the length of non-use that would trigger the loss of rights should be reduced. This note comments on the Regulator’s proposal and on the consequences of the Network Rail counter-proposal. We shall focus the effect on franchised operators, but recognise that the proposal will equally apply to open-access operators.

The original policy of “use it or lose it” was developed in an environment in which train operators exercised significant discretion over the services they operated. The new franchising arrangements will take this away. A franchised operator that does not exercise a timetabled right for any significant period will be in breach of its franchise agreement and subject to enforcement action by the SRA.

Looking at the proposals for “use it or lose it” for timetabled rights in the context of a franchised operator is therefore something of an irrelevance in protecting the public interest since long before action is taken by Network Rail to remove rights, it is probable that the SRA will already have acted.

The concern for a franchised train operator is however that something happens to prevent it from running the timetabled services in circumstances where it is a moot point whether this inability to run the services was “due to non-economic reasons beyond the operators’ control”. For example, an economic reason – as opposed to a non-economic reason – beyond the control of the relevant train operator would not give protection in the event of non-use of the timetabled right. Would therefore a strike of drivers for higher pay be regarded as an economic reason or a non-economic reason? Likewise a reason for non-use determined to be an economic reason within the control of a train operator.

To have access rights taken away in these grey areas would automatically put the train operator in breach of its franchise obligations. Train operators are therefore sensitive to anything that makes this possibility more likely.

The Network Rail proposal to reduce the period of time that a timetabled right is not used down to the EU minimum of 31 days will increase risk for franchised train operators. Risk costs money, and anything that adds to the cost of rail operations must have a very good reason for doing it.

ATOC believe therefore that in the case of franchised operators, the proposal by Network Rail to seek a reduction in the length of time a timetabled access right is unused down to 31 days does not have this good reason. All it has is the disadvantage of introducing additional risk. It is a solution looking for a problem. For these reasons, ATOC rejects the Network Rail proposal and supports the proposal put forward by the Rail Regulator in paragraph 2.18 of the consultation document.

The case of open access operators’ access rights is somewhat different. ATOC does not however believe that there will be a material difference between the effect of the Rail Regulator’s proposals and the Network Rail proposal. Under both proposals non-use will result in the loss of rights, and under both proposals it will happen reasonably quickly.

Moreover, one of the biggest protections against unused capacity is the rigorous application of the Regulator’s Criteria for the Approval of Access Agreements, which includes a judgement on the readiness of the open access operator to use the capacity that is granted.

I hope that this is helpful. If you require any further input, please do not hesitate to contact me.

Regards,

A handwritten signature in black ink, appearing to read 'Alec McTavish', with a small dot at the end.

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