IN THE MATTER OF

THE SECRETARY OF STATE AND THE RAIL STRIKE

ADVICE

Introduction

1. A strike is currently taking place on the railways in the UK. According to the trade dispute letters sent to the employers prior to the ballot of its members, the RMT seeks the agreement of the train operating companies in relation to four matters: (i) an end to the pay freeze in the industry, to be replaced with a pay increase in real terms; (ii) a guarantee of no compulsory redundancies; (iii) an assurance of no detrimental changes to members' working practices and terms and conditions; and (iv) an assurance that the defined benefits railways pension scheme will remain open and affordable to members, with scheme benefits protected.

2. There has been some debate in the press and elsewhere about the extent to which the Government has powers over the train operating companies by whom the members are employed in relation to negotiation of employees' terms and conditions, the extent to which the Government has power over, controls or influences the handling of the strike, and the extent to which the train operating companies alone have the legal power to negotiate with the RMT and to set employees' pay and terms and conditions. The TUC wishes me to advise on the legal position.

3. In that context, this Advice addresses the legal rights, powers and duties of the train operators and the Secretary of State for Transport (the "SoS"), Grant Shapps MP, when it comes to (i) the agreement of terms and conditions of

employment of the sort in issue in the strike and (ii) negotiations aimed at resolving the trade dispute. These are principally set out in the individual contracts between the SoS and each of the train operating companies responsible for delivering rail passenger services, mostly now in the form of the National Rail Contract ("NRC").

4. Below is a summary of the conclusions of this Advice. Based on the assumption that the sample NRCs reflect the position in other contracts across the industry, the effect of the contracts between each train and operator and the SoS is as follows:

(1) Train operators are not free to agree terms and conditions with their employees without the involvement of the SoS. On the contrary: before communicating with or engaging in discussions with a trade union, such as the RMT, about changes to pay, pensions or other terms and conditions, or about redundancy or restructuring plans, the operator must seek to agree a "Mandate" with the SoS. If the operator fails to agree such a Mandate, it risks financial sanctions. Once a Mandate in relation to, for example, pay negotiations or redundancies, has been agreed with the SoS, the operator must act in accordance with it, at the risk of very significant financial penalties if it does not. While the Government had not disclosed the terms of any Mandate, these provisions show that the train operators do not have freedom to negotiate the matters which have given rise to the current trade dispute. The SoS in fact and in law has very extensive powers over the scope of what may be agreed with employees, reinforced by other provisions in the contract in addition to the Mandate.

(2) The SoS also possesses very significant contractual power to direct how industrial action such as the current strike is handled. He has already issued a "Dispute Handling Policy" which a train operator must comply with in relation to industrial action. In addition, the operators were required to notify the SoS in advance about the anticipated effect of the

current strike, and thereafter the SoS and each operator owed a duty to use reasonable endeavours to agree how the strike was to be handled. But it is the SoS, and not the operator, who has overarching direction and control of the strike because the train operators' handling of the industrial action "will be subject always to the Secretary of State's direction"[1] - either because the strategy is agreed with the SoS or because the SoS simply directs how the strike is to be handled. In either case the train operators must comply with the agreement reached with, or the direction of, the SoS under what is referred to as the "Dispute Handling Plan".

(3) The above duties of the operator, and the control exercised by the SoS, are reinforced by a financial stick and carrot. If an operator fails to reach agreement with the SoS about handling the strike, fails to act in accordance with a Mandate or fails to act in accordance with the Dispute Handling Plan (which can include a failure to comply with a direction from the SoS about the strike), the SoS has a discretion to disallow the costs incurred or ignore the revenue lost by the operator consequence of the strike, with the result that the contractual payments due to the operator from the SoS under the contract are reduced.

(4) Conversely, so long as the operator complies with any Mandate or Dispute Handling Plan as agreed or directed by the SoS, then the costs it incurs or the revenue it loses as a result of the strike do not go to reducing the amounts due to it under the contract. Instead, provisions are triggered in the contract aimed at adjusting the contractual payments due to the operator to reflect the financial impact of the strike. The effect of these is, accordingly, to give a financial cushion or form of prospective indemnity to train operators, protecting them against the adverse economic effects of the strike - provided always they comply with what has been agreed or directed by the SoS.

[1] See §5.2 to Chapter 2.2. of the sample NRC with South Western, referred to below.

5. To give the impression that the train operators alone have the legal power to determine terms and conditions of employment or, to negotiate the matters at issue in the trade is therefore incorrect. By means of his power to direct how industrial action is handled, coupled with the Mandate provisions in the contracts with operators, it is probably more accurate to state that the SoS has overall legal direction and control of the handling of the strike.

Background and Assumptions

6. Since privatisation, the statutory framework for the provision of railway services is set out, principally, in the Railways Act 1993 and the Railways Act 2005. The SoS has power to provide or agree to provide financial assistance to any person for the purpose of securing the provision of railway services and any purpose relating to railway services.[2] The "appropriate designating authority", which for services operating in England is the SoS, designates the services for the carriage of passengers as the authority considers should be provided under franchise agreements.[3] The term "franchise agreement" is defined in s.23(3) of the Railways Act 1993 as an agreement to which the SoS, the Scottish Ministers or the Welsh Ministers is a party and under which another party, the franchise operator, undertakes to provide services for the carriage of passengers by railway throughout the term of the franchise.

7. The detail of how franchised passenger services are to be provided is set out in the contracts themselves, even though some provisions are required by statute.[4] NRCs with private sector train operators have now replaced the previous franchise agreements, and most of the franchise operators in England provide passenger rail services within their franchises under NRCs. But some do so pursuant to franchise agreements known as Emergency Recovery Measures Agreements ("ERMAs"); an example is the agreement with XC Trains Limited in relation to the Cross Country Franchise made in October 2020.

[2] Railways Act 2005, s.6

[3] Railways Act 1993, s.23. In relation to Scotland-only services the authority is the Scottish Ministers and for Wales-only services it is the Welsh Ministers: see s.23.

[4] See, for example, s.28(3) and s.29(3) of the Railways Act 1993.

8. For the purpose of this Advice, I have been provided with copies of the NRCs between (i) the SoS and First MTR South Western Trains Limited ("South Western"), dated 19 May 2021 (the "SW NRC"); (ii) the SoS and Abellio East Anglia Limited ("Abellio"), dated 10 September 2021. I have also been provided with the ERMA between the SoS and XC Trains Limited, the start date of which was 18 October 2020. The contracts are available to the public.[5]

9. The provisions of the NRCs with South Western and Abellio of most relevance to this Advice are set out in Chapter 2.2, under the title "Rail Workforce". Those Chapters of the two NRCs are almost identical and any differences are not material to this Advice.[6] I assume and I am instructed that the relevant provisions of other NRCs with train operating companies are also extremely similar in their wording, meaning and effect.

10. The ERMA with XC Trains has a different overall structure. However, in Part 2 of Schedule 6.7, under the heading "Pay and Industrial Relations and Dispute Handling", the ERMA sets out very similar provisions to those found in Chapter 2.2 of the NRC. While some of the terminology is a little different, the substance of the provisions is pretty much the same as the provisions in Chapter 2.2 of the NRC, which are considered in detail below. For example:

    (1) §§1.2-1.7 of Part 2 of Schedule 6.7 of the ERMA requires the Franchisee, before engaging with a trade union in relation to matters such as pay negotiations, changes to remuneration, pensions, restructuring or redundancies, to consult with the SoS with a view to agreeing a "Mandate" about such matters. Once a Mandate is agreed, the Franchisee must act in accordance with it, and it risks financial sanctions if no Mandate is agreed or it acts in breach of the Mandate. These provisions closely mirror the provisions of §§1.1-1.6 of the SW NRC.

[5] See First MTR South Western Trains Limited 2021: rail contract (publishing.service.gov.uk); East Anglia national rail contract (publishing.service.gov.uk); Direct award franchise agreement: Cross Country 2020 (publishing.service.gov.uk).

[6] There are three extra paragraphs, §§11.3-11.5, at the end of Chapter 2.2 of the NRC with Abellio, a difference which is not relevant to this Advice.

(2) The ERMA includes provisions specifically directed to industrial action, requiring the Franchisee to comply with the "Dispute Handling Policy" issued by the SoS and to seek to agree a "Dispute Handling Plan" with the SoS in relation to actual anticipated industrial action.[7] The Franchisee's handling of the industrial action is always subject to the direction of the SoS, and the Franchisee is under a duty to comply with the terms of the agreement reached with the SoS and/or the directions of the SoS, both of which are defined as the "Dispute Handling Plan".[8] These provisions, and the accompanying financial incentives to comply with the Plan, are almost identical to the parallel provisions in §§5.1-5.4 of Chapter 2.2 of the NRC, which I consider in detail below.

(3) The other sections of Schedule 6.7, Part 2 of the sample ERMA are very similar to the equivalent provisions in Chapter 2.2 of the NRC, considered below.

11. Against that background, I use the SW NRC as a model of the provisions which apply across all NRCs and all ERM, specifying the powers the SoS holds in respect of the negotiation and agreement of employees' terms and conditions and the handling of industrial action. I assume that any differences in the precise wording of the NRCs or the ERMAs do not affect the substance of this Advice. From the sample contracts I have seen, that assumption seems justified and correct.

The SW NRC

12. The NRCs are very long and extremely detailed documents. Under the SW NRC, First MTR South Western Trains Limited is the "Operator", responsible for running the passenger and other rail services specified in the SW NRC.[9] The

[7] Schedule 6.7, Part 2, §§5.1-5.4.

[8] Schedule 6.7, Part 2, §5.2.

[9] See §3.1 in the section "Objectives" at p 14. The Operator is also under a more specific obligation to co-operate with "Specified Persons", which includes the SoS and Network Rail, in relation to "Specified Matters" (which are widely defined): see Chapter 3, §1.1 and the definition of

Operator is under a general obligation to co-operate with the SoS and owes a duty to use all reasonable endeavours to operate the specified "Passenger Services" every day.[10] The NRC explains in extensive and minute detail exactly how that is to occur. It is divided into Chapters and capitalised terms are defined in the definitions section, set out in Chapter 10.

13. It is Chapter 2.2, dealing with "Rail Workforce", which is of most relevance to the present dispute and to this Advice. These provisions too are extremely detailed, but I have attempted to summarise them below with a particular focus on the relevance for the trade dispute which led to the strike.

14. **Mandates Agreed With SoS**. The first key obligation under Chapter 2.2 concerns the agreement of a "Mandate" with the SoS about workforce matters. The broad intention and practical effect of this is to prevent any discussions or negotiations with unions about any changes to workers' pay, pension, benefits or terms and conditions, or about any proposed redundancies or termination benefits, unless and until a "Mandate" has been agreed with the SoS. Once the Mandate in relation to those matters is agreed with the SoS, the Operator must act in accordance with it.

15. In summary:

(1) Prior to engaging with any recognised trade union[11] about an actual or potential "In-Scope Matter", the Operator must provide the SoS with all relevant information about that matter. For this purpose, an "In-Scope Matter" is very widely defined to include a wide range of matters relating to the terms and conditions of "Business Employees", meaning all the employees of the Operator, of its affiliates or of any company to whom the relevant rail services have been delegated or sub-contracted.[12] Examples of "In-Scope Matters" relating to such employees are the

"Specified Persons" at p 505.

[10] See Chapter 4.1, §1 at p 60.

[11] See the definition of "Trade Union", p 516.

[12] See definition of "Business Employees" p 431

following:

> (a) pay negotiation strategies;
>
> (b) changes to any remuneration strategy, pension arrangements or staff benefits;
>
> (c) any proposed restructuring or redundancy plans;
>
> (d) any proposed changes affecting Business Employees...which either Party reasonable believes (a) is likely to give rise to material industrial relations risks (including a risk of Industrial Action)....
>
> (e) any proposed variations to terms and conditions of employment of any Business Employee...
> .....
>
> (h) any negotiation or consultation strategies regarding any of the matters at (a) to (g) above.

The duty to inform the SoS arises as soon as the employer learns of a communication from a trade union about a potential "In-Scope Matter"[13] – for instance, as soon as it heard anything from the RMT about an actual or potential trade dispute about members' pay.

(2) The width of "In-Scope Matters" is underlined by other provisions of Chapter 2.2. First, there is a very limited exclusion for changes made in the ordinary course of business as part of day to day management in accordance with pre-existing HR policies and which are not likely to give rise to a "material industrial relations risk (including a risk of Industrial Action");[14] that exclusion will not apply to the elements at issue in the current trade dispute. Second, if doubt exists whether a matter is an "In-Scope Matter", the Operator is still obliged to inform the

[13] See §1.1(a).

[14] See §4.2, relating to changes to working practices made in the ordinary course of business in accordance with HR policies existing at the start date of the SWNR Contract. But this only applies to "day to day management" of the business and to changes which are "not likely to give rise to material industrial relations risk (including a risk of Industrial Action)".

SoS in any event.[15] Third, the SoS has a wide discretion to determine that an matter is an "In-Scope Matter" and thus requires a Mandate.[16] Fourth, even where a matter was not initially an "In-Scope Matter", if in the light of developments there is a "material industrial relations risk" (including a risk of Industrial Action), a "material negative impact on productivity", the Operator must notify the SoS so he can decide whether the matter is an "In-Scope Matter". In light of all these reasons, it seems clear that the matters which form part of the current trade dispute fall within the definition of "In-Scope Matters".

(3) Before communicating with any trade union, such as the RMT, about any of the above matters, the Operator must consult with the SoS with a view to agreeing a "Mandate".[17]

(4) There is a very powerful economic incentive on the part of the Operator to agree a Mandate because, if the Operator acts without one and incurs costs or loss of revenue which the SoS determines in his "sole discretion" arose "in connection" with an In-Scope Matter, then the SoS in his "sole discretion" may direct that the Operator in effect bears those costs by treating any lost revenue as "Revenue Foregone" and increased costs as "Disallowable Costs".[18] This would arise, for example, if the Operator negotiates pay increases or enhanced redundancy terms without agreeing a Mandate in advance and the SoS decides these led, as they inevitably would, to increased wage costs on the part of the Operator.

[15] See §1.1 and §4.3 of Chapter 2.2.

[16] See §4.1 of Chapter 2.2.

[17] §1.2 of Chapter 2.2. It must also procure that any other "Relevant Employers", meaning its "Affiliates" or those to whom it has delegated or sub-contracted services, do the same.

[18] The detail here is complicated. Payments due under the NRC are calculated pursuant to Appendix 1 of Chapter 7.1: see Chapter 7.1, p 167 and the formula at §2.1 of Appendix 1 p 184. "Disallowable Costs" are described in Appendix 2: see definition p 446. By means of a very complicated formula these costs go to reduce the amount of the Periodic Payment due to the Operator: see Appendix 1 to Chapter 7.1 at p 187 and the definition of "Actual Costs" at p 419. By the same token, "Revenue Foregone", which is defined at p 495, is treated as part of "Actual Revenue" for the purpose of the calculation and so reduces the amount due to the Operator: see (ii) of the definition of "Actual Revenue" at p 421 and Appendix 1 to Chapter 7.1 at p 187.

By treating these costs as "Disallowable Costs", the Periodic Contract Payments due to the Operator would be reduced accordingly.

(5) Once a Mandate has been agreed with the SoS about, e.g., pay negotiations, proposed changes to employees' benefits or redundancies, the Operator must act in accordance with it.[19] The Operator must also procure that its Affiliates act in accordance with the Mandate.[20] The SoS exercises further control over the process because, in addition, any negotiations with any trade union regarding the subject-matter of a Mandate must take place in accordance with the "Employment Policy Framework", which means guidance and directions issued by the SoS, unless the SoS directs otherwise.[21]

(6) Once more, there is a powerful economic incentive for the Operator to adhere to the Mandate because if the Mandate is breached or an Operator acts outside it, and the SoS determines "in his sole discretion" that the Operator incurred costs or lost revenue because of its acts or omissions, the SoS can decide to disallow any such loss of revenue or increased costs. This operates by means of the SoS deciding to treat increased costs as "Disallowable Costs" or lost revenue as "Revenue Foregone", just as set out above in circumstances where no Mandate is agreed.[22] So if, for example, the Operator did not follow an agreed Mandate on the negotiation strategy with a union about changes to terms and conditions or increases in pay, the SoS has the potential to penalise the Operator financially by disallowing the extra costs to the employer's wage bill.

16. It is clear from the above that for a train operator such as South Western to begin to negotiate with the RMT about the union's demands in the current

[19] §1.4, Chapter 2.2.

[20] §1.4, Chapter 2.2 and see the definition of "Relevant Employer" at p 492, referring to the definition of "Affiliate" at p 424.

[21] See §2.3 of Chapter 2.2 and the definition of "Employment Policy Framework" at §2.1(a).

[22] See §1.3(c).

trade dispute - that is, to negotiate about a pay increase, no compulsory redundancies, no detrimental changes and the protection of defined benefit pension entitlements - would trigger the duty to agree a Mandate with the SoS. Those matters, individually and cumulatively, amount to "In-Scope Matters" and as soon as a train operator heard from the RMT about potential claims for increase in pay, guarantees of no redundancies and so on, it had to inform the SoS. It follows that, unless all of these matters were covered by an existing Mandate agreed with the SoS, the Operator could not communicate with, negotiate about or agree to those matters without first and seeking to reach an agreement with the SoS on a Mandate. Once the Mandate was agreed, the Operator would be obliged to comply with it. Any Operator who communicated with, negotiated about or and reached agreement with the RMT about the matters in dispute without agreeing a Mandate or in breach of the terms of a Mandate would risk very significant financial sanctions.

17. I have not seen the terms of any Mandate agreed with South Western or any other operator, and I understand they are not publicly available. But it is obvious that the terms of any Mandates agreed with the SoS may greatly circumscribe the powers of the operators to negotiate with the RMT about the terms and conditions of its members which are the subject of the current trade dispute. To give an obvious example, the Mandate could limit the train operators' ability to negotiate pay increases by setting a ceiling on what could be agreed. The practical effect of these provisions, therefore, is to give the SoS extensive powers over such negotiations.

18. **Terms of Employment**. The above provisions are reinforced by §§3.1-3.5. By §3.1, the Operator is again prevented from implementing any In-Scope Matter, such as changes to employees' pay, other than in accordance with a Mandate, and §3.2 prevents the Operator and other Relevant Employers from changing the terms of conditions of any of its employees, including by making any additional payment to them, without the prior consent of the SoS (though it may not be unreasonably withheld or delayed).

19. **Industrial Action**. The SoS also exercises very significant control over the present trade dispute through the provisions in the NRC which specifically deal with industrial action. How that control is exercised is illustrated by the summary of the provisions below:

(1) The SoS has already, it seems, issued a "Dispute Handling Policy" which deals with industrial action, though neither I nor the TUC have not seen a copy of this.[23] The Operator must comply with this policy in relation to industrial action.[24] It provides one means by which the SoS controls the Operator, and other operators, in relation to any strike.

(2) In addition, once the Operator reasonably believes that "Industrial Action"[25] is likely to occur - which can be as a result of the Operator complying with a Mandate agreed with the SoS or for any other reason - it must notify the SoS of various matters, such as the anticipated effect on rail services, and provide him with other information he may request. In the current dispute, an individual Operator would have known that industrial action was likely to occur at the latest once it received the letter which the RMT was obliged to send at least seven days before the opening of voting in the ballot for strike action,[26] so triggering this duty.

(3) As soon as reasonably practicable after the above notification and in any event within three weeks, by §5.2 of Chapter 2.2 the Operator must tell the SoS of its proposals for dealing with the Industrial Action in accordance with the Dispute Handling Policy. But at this stage powers of the SoS kick in because §5.2 goes on to say (my emphasis added):

> The Operator and the [SoS] shall use reasonable endeavours to

[23] See the definition of this term, p 446.

[24] Chapter 2.2, §5.1.

[25] Widely defined at p 463 so as to include any concerted action taken in connection with the employment of any employees of the Operator, of an operator of any other railway facility, of third parties who supply staff to the Operator or employees of agents or sub-contractors of the foregoing: see §§1.1(f)(i)-(iii) of Chapter 9.4.4 at p 378.

[26] See s.226A of the Trade Union and Labour Relations (Consolidation) Act 1992.

> agree how the relevant Industrial Action shall be handled, bearing in mind the Dispute Handling Policy, provided however that the Operator's handling of such action will be subject always to the SoS' direction, such agreement and/or direction being the "Dispute Handling Plan". The Operator shall, and shall procure that each Relevant Employer shall, act in accordance with the Dispute Handling Plan.

The effect of this provision is tolerably clear. It is that (i) the parties must seek to agree a Dispute Handling Plan, which provides a further means by which the SoS is involved in determining what can or cannot be negotiated in respect of a strike; but (ii) even if no such Plan is agreed, the SoS retains the ultimate right to direct how the Operator is to act in the strike. The effect, it seems to me, is that the Operator has little bargaining power in agreeing a Dispute Handling Plan because, if it does not agree one, the default position is direction by the SoS. I do not know if a Dispute Handling Plan was agreed with any train operator in relation to the current strike or what any such Plans may say. Depending on their wording, such Plans may set the parameters of what can or cannot be agreed by the train operators. But the effect of the underlined words is that the SoS always retains the overarching power and authority to direct how the current strike is handled and the terms on which it may be or may be not settled. Any suggestion that the resolution of the strike is the sole responsibility of each Operator is impossible to reconcile with this provision: rather, §5.2 gives the ultimate power and direction of the handling of the strike to the SoS.

(4) Moreover, the obligations on the Operator to comply with the agreed plan or the directions of the SoS are backed by financial sanctions and incentives. First are the provisions on the financial stick. These are triggered in the event that (i) no agreement is reached on how the industrial action is to be handled or (ii) the SoS reasonably considers Industrial Action has occurred because of an Operator not complying with its obligations in Chapter 2.2 (for example, because it has not complied with its duties to notify the SoS about any potential issue with

a union about an "In-Scope Matter" or has not acted in accordance with a Mandate, the Dispute Handling Policy or a Dispute Handling Plain[27]). In those circumstances, and where either (i) or (ii) above results in loss of revenue or increased costs, the SoS has a discretion not to allow the Operator to recover such lost revenue or additional costs. This is because the SoS has a discretion to treat such increased costs as "Disallowable Costs" and any revenue lost as a result of the strike as "Revenue Foregone", with a consequential reduction in the payments due to the Operator.[28]

(5) But there is also an important financial carrot. So long as the Operator (i) has complied with Chapter 2.2 and the Dispute Handling Plan and (ii) the SoS is satisfied that the Operator acted reasonably in taking all reasonable steps to avoid the Industrial Action or to mitigate its effects, then by §5.4 the SoS will not treat any increase in costs as "Disallowable Costs" and nor will he treat loss of revenue as "Revenue Foregone". This means, in practical terms, that the periodic payments due to the Operator are not reduced. Instead a "Financial Target Amendment Event" and a "Cost Budget Change Event" shall occur.[29] The detail of how these trigger events operate is complicated and is described in Chapter 7.5; but their broad effect is to require the parties to seek to agree updates to the annual Cost Budget to reflect the financial impact of such events[30] - meaning, in this context, the strike. If there is no such agreement, the SoS may "reasonably" determine the "Agreed Updates" which reflect the financial impact of the relevant trigger event - that is, the strike.[31] The Government has not disclosed, and the RMT does not

[27] See, respectively, §1.4, 5.1, 5.2 of Chapter 2.2.

[28] See §5.4 to Chapter 2 and the explanation above of how "Disallowable Costs" and "Revenue Foregone" affect the periodic payments.

[29] Chapter 2.2, §5.4(d).

[30] See the definition of "Cost Budget Change Event" at p 442 and Appendix 1 to Chapter 75 at §1.2, making clear this will includes the circumstances set out in §5.4 of Chapter 2.2. The consequences of this set out in Chapter 7.5, especially at §2.7. See, similarly, the definition of a "Financial Target Amendment Event" at p 454 and §5.2 of Appendix 1 to Chapter 7.5. The effect of this "Trigger Event" is set out in Chapter 7.5 at §2.12

[31] See Chapter 7.5, §2.7 (Costs Budget Change Event) and §2.12 (Financial Target

know, if the provisions of §5.4 have been or are expected to be triggered in the current dispute; but it can be seen that, if they are triggered, they have the potential to offer an Operator very significant financial cushioning against the adverse financial consequences to it of the strike.

20. These provisions operate in synergy and in tandem. For example, if an Operator could not settle the current strike in advance owing to the terms of Dispute Handling Plan agreed with the SoS or because of a direction from the SoS - for instance, that a pay award should not exceed x per cent. - I doubt the SoS could say the Operator had failed, for that reason, to take all reasonable steps to avoid the Industrial Action. The result would be the "carrot" provisions in §5.4 would potentially be engaged, to the financial benefit of the Operator. The automatic occurrence of a "Financial Target Amendment Event" and a "Costs Budget Change Event" would each trigger the provisions in Chapter 7.5, aimed at varying the payments due to the Operator to protect it against the financial impact of such events. So long as the Operator complied with the agreement about how to handle the strike or the directions of the SoS, it has the benefit of a potential financial indemnity against the revenue it loses as a result of the strike. By the same token, this financial protection reduces the Operator's financial incentive to resolve the strike.

21. Conversely, if an Operator settled the current strike in breach of the Plan agreed with the SoS or in breach of a direction issued by the SoS about how the strike should be handled, then (i) the "carrot" provisions would be inapplicable because the Operator would have failed to comply with the "Dispute Handling Plan"[32] and (ii) the "stick" provisions in §5.3 would be engaged because the Operator would necessarily have failed to comply with its obligations under Chapter 2.2, and more specifically its obligation to comply with the Dispute Handling Plan. The Operator thus risks very significant financial penalties if it fails to comply with the agreed plan or directions of the SoS in relation to the

Amendment)

[32] See §5.4(b). This is because a "Dispute Handling Plan" is defined as both the agreed Plan or the direction of the SoS: see §5.2

strike.

22. Neither I nor the TUC have seen any Dispute Handling Plan in connection with the current strike. It may have been agreed or it may have been the result of a direction of the SoS. In either case, it may obviously dictate and control the strategy the employers are to adopt in negotiations and what, if any, offers can be made to the RMT.

23. **Other provisions**. The powers of the SoS to direct and control employees' terms and conditions are strengthened by other provisions of the SW NRC. For instance, and by way of summary:

(1) By §2.1 of Chapter 2.2, regardless of whether a Mandate is agreed, the Operator is subject to the principles on the pay of employees, among other matters, set out in the "Reward and Peoples Principles" and the "Employment Policy Framework". Both of these documents are issued by the SoS and set out principles, instructions and guidance.[33]

(2) By §6.2 of Chapter 2.2, the Operator must use "all reasonable endeavours" to comply with any changes to the Dispute Handling Policy and the Employment Policy Framework, both of which are issued by the SoS, and any other industry agreements "as may be directed by the SoS from time to time". The Operator must also ensure its Affiliates do the same.

(3) Chapter 2, §7.1 the Operator must deal with the SoS in an open and co-operative way and must, in particular, disclose to the SoS on an "ongoing basis" anything, in broad terms, which might reasonably be relevant to an "In-Scope Matter".

(4) By §11.1 to Chapter 2 the Operator requires the prior written consent of

[33] See the definition of "Reward and People Principles" at p 495 and that of "Employment Policy Framework" in §2.1(a).

the SoS before making increases or decreases to the total number of employees or the total number in any particular role of more than 5 per cent.

Conclusion

24. I will not exhaust the reader by summarising the above, and a summary of my key conclusions is set out at the outset of this Advice. What is clear is that the SoS has very extensive contractual powers, via the Mandate provisions, to affect how any train operator negotiates changes to employees' terms and conditions. In addition, the SoS has legal power to give overall direction as to how the industrial dispute is handled - either by means of an agreement with the operators or by means of issuing a direction about how the strike is to be handled. Reinforcing each of these powers are strong financial rewards and sanctions as to the amount of the contractual payments to be received by train operators.

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