

FAO: Tim Rees
Department for Transport

Our Ref: MPG/BRI207.1

ALSO BY EMAIL
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22 March 2022

Dear Sirs

Anticipated award of Southern, Thameslink & Great Northern franchise to GTR
Our Clients: Bring Back British Rail & the Association of British Commuters

1. We refer to your letters of 16 February and 2 March 2022 received in response to our letters of 1 and 11 February 2022. This letter serves as a response to both and we adopt your additional definitions therein.

Factual Matrix

2. We note the content of your paragraph 6 in which you state that *“the Secretary of State has previously enforced the terms of the TSGN franchise agreement, including through appropriate compensation and remediation actions in respect of GTR’s role in respect of disruption to services experienced in 2016 and 2018.”* This assertion is in stark contrast with the reality of monitoring and enforcement of GTR.
3. In October 2016, the Transport Select Committee produced its report *“The Future of Rail; Improving the Rail Passenger Experience”*¹ which concluded that the TSC had *“little confidence that [the Department] has a firm grip on the monitoring of GTR’s*

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https://publications.parliament.uk/pa/cm201617/cmselect/cmtrans/64/6402.htm?utm_source=64&utm_medium=fullbullet&utm_campaign=modulereports

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*contractual obligations” and further that “It is essential that the Department provide clarity about whether GTR is in default, as a matter of urgency....By early Nov 2016”.*²

4. It was only when our client ABC, instructing this firm, issued a judicial review in June 2017 of the DfT’s lack of enforcement of the TSGN contract that any action was in fact taken. Following an initial hearing, the DfT were ordered to make an enforcement decision within two weeks to avoid a full hearing of the judicial review. This resulted in an ‘agreement’ that GTR pay £13.4 million. The actual arrangement reached in this regard remains hopelessly opaque to this day, despite investigations by the NAO.
5. In an NAO Report³ published in January 2018, it was concluded that the TSGN franchise had not delivered value for money. It stated that *“between September 2014 and September 2017, passengers on the franchise have experienced the worst service performance on the national rail network. Since Govia Thameslink Railway Ltd started operating [Southern services] in July 2015, around 146,000 services (7.7% of planned services) have either been cancelled or have been delayed by over 30 minutes, compared to 2.8% on the rest of the network.”*
6. Further, the NAO states *“The Department considered its options for the future of the franchise including terminating the contract, but decided that enforcing the contract was the most appropriate option. The Department and Govia Thameslink agreed a settlement where the operator will fund a £13.4 million spending programme for missing its targets to date. It is unclear how the Department will incentivise Govia Thameslink to deliver good services for passengers in the future, having removed its ability to use financial performance penalties up to September 2018.”*
7. In light of the swingeing criticism of the DfT in this regard, it is untenable to suggest that the Secretary of State has effectively monitored and enforced the franchise to date, and it is difficult to see how without full openness and transparency a better

² It is notable, in the context of this correspondence, that the DfT came under fire for its, *“evasive and opaque answers to questions”* put to it by the TSC which had, *“hindered [the TSC’s] inquiry and delayed publication of [the] Report”*.

³ <https://www.nao.org.uk/wp-content/uploads/2018/01/The-Thameslink-Southern-and-Great-Northern-rail-franchise.pdf>

outcome can be expected in relation to our concerns regarding renewal of the GTR contract this month.

8. Our clients have deep concerns about how the £13.4m penalty was agreed. In particular we note:

a. On 29 June 2017 the High Court ruled that the DfT must make a final decision within 14 days on whether GTR had breached its performance benchmarks, failing which ABC's judicial review action would proceed to a full contested hearing. This outcome was obtained in part because representatives for the DfT stated in Court that a decision on enforcement was already "*imminent*".

b. It is apparent, however, that what then followed was a "*fast-moving negotiation*", which included many "*verbal*" decisions. The National Audit Office noted that they had not seen evidence of any formal discussions. Quite frankly, let alone any statement made to the Court that was arguably misleading or false, we find such conduct to be astonishing. It is entirely inappropriate to make decisions regarding the handling of public money in such a casual and cavalier manner, particularly when it appears it was done so at least in part to order to avoid proper judicial oversight.

c. The resulting agreement of investing £13.4 million into the service included £10 million for the buyout of GTR's future performance liability, until September 2018. The prospect of settling for future underperformance had first been raised at the Departmental Board Investment and Commercial Committee in March 2017. However, the NAO report notes that the "*the Department did not seek a decision from the Committee on how this should be handled, or support for its approach*".

9. In April 2018, the Public Accounts Committee reported on Rail Franchising in the UK⁴. The Department's position in evidence to the committee was "that it could still find Govia Thameslink in breach of its contract if performance deteriorated". As the PAC

⁴ <https://publications.parliament.uk/pa/cm201719/cmselect/cmpublic/689/68902.htm>

quite correctly point out, this was not a credible threat because *“the Department has already decided once that it could not use the performance regime in the contract. The standards expected of all public services dictate that penalties should always be determined by the actual level of performance. Settling on the basis of future performance means the Department has fewer levers available to it to manage Govia Thameslink’s performance if it does not improve.”*

10. In May 2018, GTR was one of the main parties responsible for the so-called Timetable Collapse as identified by the ORR’s Glaister Review⁵. The Department again imposed only minor obligations which amounted to (a) an agreed £15 million spend on ‘tangible improvements’, and (b) a profit cap (the amount of which has never been made public). The profit cap was intended to last until September 2021, however it was actually released in March 2020. GTR was therefore never directly fined by the Department either for the Timetable Collapse or the 2017 ‘agreed penalty’. Indeed the only fine levied on GTR came from the ORR in relation to the Timetable Collapse⁶, and by its letter to the ORR dated 10 December 2018⁷, the Department appears to have sought to limit any fine levied by setting out the obligations under the 2017 agreement and inviting the ORR to take that agreement *“into account when determining any enforcement action or sanction”*. This can be read as an attempt to reduce the sanction applied by the ORR.

11. In relation to this issue, the TSC later noted that *“The culpability of GTR in relation to its staffing levels should be considered in the context of a £13.4 million settlement it reached with the DfT in July 2017. This was predominantly to buy out part of its future contractual performance liabilities for the period to September 2018, on the understanding that the sum would be spent on “various measures aimed at improving services for passengers, including extra train crew.”*⁸

⁵ <https://www.orr.gov.uk/search-news/orr-inquiry-concludes-passengers-let-down-rail-industry-failures>

⁶ <https://www.orr.gov.uk/monitoring-regulation/rail/investigations/gtr-northern-may-2018>

⁷ <https://www.orr.gov.uk/sites/default/files/om/orr-final-penalty-notice-for-gtr-may-2019.pdf> at page 52

⁸ <https://publications.parliament.uk/pa/cm201719/cmselect/cmtrans/1163/116302.htm>

12. The conclusions reached by the PAC in their February 2019 report on Rail Management and Timetabling⁹ was equally damning, finding amongst other things that *“Overall, we concluded that the franchising model is broken and that the Department’s management of the TSGN franchise was completely inadequate.”* They also warned that *“we are concerned that the Department is still not adequately protecting taxpayers’ money in its management of Govia Thameslink Railway.”*
13. Against the background of all of the above facts and independent oversight, it is impossible to agree with your suggestion that *“appropriate compensation and remediation actions”* have been taken in respect of GTR (indeed there has never been a fine levied against the company), and accordingly this goes to further justify our client’s serious concerns regarding the end of contract term decisions that you are in the process of making.
14. As widely reported in the press, GTR’s performance remains a significant concern, and they are currently experiencing a higher rate of cancellations due to professed ‘covid absences’ than any other rail franchise. A 2 March letter to GTR from the Chair of the London Assembly’s Transport Committee stated *“Before Covid-19, GTR had faced serious timetable issues due to a shortage of train drivers. While I understand that Covid-19 has made training new drivers difficult, I fear that your long-standing shortage of train drivers has exposed GTR to the problems you now face and the impact of Covid-19 should no longer be blamed on the reduced train service you are currently providing for train passengers.”*¹⁰

Assurances Given

15. We note the assurances given in paragraphs 7 – 10 of your letter of 16 February. Nothing in your response leads us to conclude that the Secretary of State is taking into account the potential fraudulent conduct of LSER in determining whether to extend the contractual relationship with GTR for TSGN. Whilst you rightly of course

⁹ <https://publications.parliament.uk/pa/cm201719/cmselect/cmpublic/1793/179302.htm>

¹⁰ <https://twitter.com/CarolinePidgeon/status/1498963917845975042/photo/1>

state that GTR is a separate entity to LSER, the fact that they are part of the same group is in itself cause for serious concern.

16. In response to BBR and ABC’s campaign, the Go-Ahead Group has commented to the press that the issue affecting Southeastern was “*contained within a separate company – London and Southeastern Railway – and had **nothing whatsoever to do with Govia Thameslink Railway**”¹¹ [our emphasis]. This is patently false. In fact, all of the directors of Govia Ltd are also on the boards of GTR and LSER. The CEO and CFO of Go-Ahead are also on the boards of all four companies (both historically and at present). The following table shows the directorship in March 2020 when the first inquiries into the alleged fraud began:*

Directors of LSER	Directors of GTR	Directors of Govia Ltd
David Brown	David Brown	David Brown
Elodie Brian	Elodie Brian	Elodie Brian
Carolyn Ferguson	Carolyn Ferguson	Carolyn Ferguson
Alistair Gordon	Alistair Gordon	Alistair Gordon
Bernard Tabary	Bernard Tabary	Bernard Tabary
Charles Hodgson	Charles Hodgson	Charles Hodgson
Felix Beeson	Ian McLaren	
David Statham	Patrick Verwer	
	Stephen White	

17. You state that they have separate executive management, but it is clear that the governance structure within the group is itself defective in that it did not identify the dishonest conduct at an earlier stage. It is also not clear, from the evidence in the public domain at this time, precisely which staff (including directors) were involved in dishonest conduct. Your mere indication that GTR and LSER operate through difference executive management teams is therefore not sufficient to ameliorate wider concerns that there is in effect endemic or institutional dishonesty within the both GTR and LSER. Indeed similarities between the operation and governance structure within GTR and LSER would be expected, being part of the same group. Frankly,

¹¹ <https://www.itv.com/news/meridian/2022-02-03/government-legal-threat-over-future-of-uks-largest-rail-franchise>

where one group company has conducted a serious fraud on the taxpayer then another group company, sharing the same directors and structures, should be considered potentially tainted.

18. It is important to also recognise that the apparent fraud conducted by LSER has recently been identified in Go-Ahead's accounts as having taken place over a far longer period than previously thought. Whereas the malpractice was suspected to date back to 2014, it is now apparent that it commenced at LSER's foundation in 2006, and therefore under the auspices of directors from across the group companies, and LSER's external auditor.
19. These matters are addressed further in the recent s.57C notice upon which we intend to write separately, but we note the content of paragraph 42 in which it is observed that *"Current and future contracts for the provision of franchise services are, and will remain, highly dependent on high value money flows between the contractual parties, frequently based on complex contractual terms. Rail operators will often have more information than the DfT regarding the operations and finances of the franchise. Very substantial amounts of taxpayer monies are involved."* This is undoubtedly true and we would query what steps, if any, could in practice be taken by the Department to guard against losses to parties that are known to engage in sophisticated dishonest conduct of the type demonstrated by LSER.

Requests

20. In light of your confirmation that no decision has been reached by the Secretary of State, we accept that you are not obliged to respond under the Pre-Action Protocol for Judicial Review and we welcome your continued engagement in the spirit of openness and transparency.
21. With regard to your particular responses set out in paragraph 12(a) – (e), we comment as follows:
 - a. Nothing in your first paragraph is additional to information already in the public domain, nor does it address the specific requests made in our letter. It is

unclear why you are not able to confirm the nature or extent of the contraventions of the franchise agreements. Would you please confirm why this is being withheld and provide a date by which it will be made public.

As previously requested would you please give an indication of when a determination can be expected.

- b. Your response makes no reference to the terms of reference and / or scope documents requested, nor does it give any information on whether the DfT has undertaken an investigation of GTR as part of a wider review, nor does it state whether the reports have been provided to external bodies. Please address these issues by return.

It is unclear why you are not in a position to provide a copy of the final report at this stage. Please confirm (a) whether you have asked the Owning Groups for their agreement to publish the final report, and (b) any reason why it is not in the public interest for the final report to be published forthwith.

- c. Noted.

- d. Your response sits in the context of two recent written answers provided by Wendy Morton MP in questions raised by Louise Haigh MP, namely:

- i. UIN 128359 – regarding what assessment has been made of the capacity of the OLR to run TSGN in the event it becomes necessary this month. We note Ms Morton’s response is that contingency plans are in place to allow a seamless transition to OLR operation as of 1 April 2022.

- ii. URN128360 – seeking confirmation of whether a cost benefit analysis has been conducted of the OLR operation of TSGN. The response from Ms Morton on this point indicated that paragraph 14 of the Award Policy, which in particular includes reference to a value for money assessment (which is not the same). In this regards we would be

grateful if you could explicitly confirm that no cost benefit analysis has taken place or is in preparation.

Paragraph 14(c) of the Award Policy dictates a relevant factor to be *“the wider government objective of enabling the continued provision of passenger rail services by private sector operators.”* Whilst you state that the Secretary of State will consider this as a relevant factor, in the absence of any cost benefit analysis having taken place to compare the operation of the OLR versus the private sector, does the Secretary of State acknowledge that paragraph 14(c) may have the perverse effect of requiring the Secretary of State to give greater weight to a private entity over the OLR, irrespective of the demonstrable better performance of the OLR. If so, does the Secretary of State consider that he is bound to follow the 2013 policy in this regard?

e. Noted.

Provision of Information

22. Whilst we note your assertion of obligations of confidentiality, we are uncertain whether you have invited GTR to waive any alleged right of confidentiality. Further to our request at paragraph 5(b) above, given that you recognise the benefit of transparency and openness, we would ask that you confirm whether you have invited GTR to waive any such right of confidentiality, or if you have not then you do so and confirm GTR's response.

Letter of 2 February 2022

23. The content of your letter is noted. The only issue that requires further response at this time is that of Ms Yates' FOI request, which is obviously highly relevant to our clients' own interests.

24. In that regard, it is a matter of serious concern that Ms Yates' request for an internal review of the decision not to provide documents in response to her FOI request has

been extended by a month to 6 April 2022, beyond the relevant date for termination / renewal of the Contract. We understand that Ms Yates requested an internal review on 9 February 2022 and then provided an analysis to assist that process on 16 February 2022. On 3 March 2022 your Mr Pocock then gave an assurance that a response would be forthcoming by the deadline of 9 March 2022.

25. It is peculiar then that between 3 and 9 March 2022 it became evident that a further month would be required to consider the relevant issues. The rather opaque explanation given was that *"the additional time is needed to carry out a thorough review"*. We do not believe that this decision reflects well on the DfT or the Secretary of State in circumstances where the delay causes real prejudice to Ms Yates' (and indeed our clients') ability to meaningfully scrutinise the Department's public functions.

s.57C Notice

26. Since drafting the bulk of this response, we have had sight of the notice under s.57C of the Railways Act 1993 issued on 17 March 2022 in respect of your proposed fine on LSER.¹² Nothing in that documents fundamentally affects the matters set out in this letter however we shall be writing to you further to address issues set out in your announcement and to comment on the proposed fine.

Yours faithfully



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https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1061458/lser-penalty-notice.pdf