



# Policy Briefing

5<sup>th</sup> January 2023

## The Secretary of State's control of the National Rail Dispute

This briefing demonstrates that the Secretary of State has always been and remains in control of the dispute, from setting the negotiating mandate, to controlling any dispute that arises on the railway. Any deviation from either the Mandate or the Secretary of State's control of the dispute makes an operators liable to a significant financial penalty.

The briefing is based on analysis of the governments' National Rail Contracts (NRCs) and its remaining EMAs and ERMA contracts. In the NRCs the relevant chapter is titled in each case 'Rail Workforce' (Chapter 2.2). In the EMAs and ERMAs', which some TOCs are still on, the relevant wording is found in Part 2 of Schedule 6.7, under the heading "Pay and Industrial Relations and Dispute Handling".<sup>1</sup>

It also draws on Michael Ford KC's Legal Advice to the TUC from June 2022.<sup>2</sup>

### Duty to inform the Secretary of State and agree a Mandate

At the latest within 3 weeks of any communication, written or verbal from a trade union, the TOC must inform the Secretary of State and in relation to any matter that is 'In-Scope', must agree a Mandate. (Chapter 2.2, paras 1.1 and 1.2)

In-Scope matters include almost everything that a union might want to negotiate on:

- “(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 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

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1 <https://www.gov.uk/government/publications/first-mtr-south-western-trains-limited-2021-rail-contract>

[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/1059883/east-anglia-rail-contract.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1059883/east-anglia-rail-contract.pdf)

<https://www.gov.uk/government/publications/xc-trains-limited-2020-rail-contract>

2 See, for example, <https://www.tuc.org.uk/news/conservative-government-has-misled-public-its-role-directing-rail-firms-dispute-says-tuc>

Employee... ..

(h) any negotiation or consultation strategies regarding any of the matters at (a) to (g) above.”<sup>3</sup>

## **Duty and incentives on Train Operators to act within the Mandate**

The operator must act within the Mandate if it is to escape financial penalty. If it does not, any costs incurred may be borne by the operator rather than by the DfT, as per their normal contracts.

*“If the Operator or Relevant Employer breaches a Mandate or acts outside the scope of a Mandate in relation to the relevant In-Scope Matter, and, in any such case, in doing so incurs costs, or loses revenue, then the Secretary of State may in the Secretary of State’s sole discretion direct that: (i) any loss of revenue shall be treated as Revenue Foregone; and (ii) any increase in costs shall be treated as a Disallowable Cost, in each case where the Secretary of State in the Secretary of State’s sole discretion determines that such loss of revenue or increased costs (as the case may be) arises in connection with actions taken (or omitted to be taken) by the Operator or Relevant Employer in relation to the relevant In-Scope Matter. (Chapter 2.2, para 1.3)”*

As Michael Ford KC comments:

*“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.”*

## **Secretary of State’s control of Dispute Handling and Industrial Action**

- As soon as it thinks there is a prospect of industrial action, the operator must agree with the DfT a ‘Dispute Handling Plan’ within the overall DfT ‘Dispute Handling Policy’. Failure to do so may result in financial penalty as above.
- A key part of the DHP is recognition that the Operator’s handling of such Industrial Action will be subject always to the Secretary of State’s direction.
- The operator must continue to adhere to any agreed Dispute Handling Plan. Failure to do so may result in a financial penalty:

*“As soon as reasonably practicable following a notification set out in paragraph 5.1 above, and in any event within three (3) Weekdays following such notification, the Operator shall propose a process it intends to adopt to deal with the relevant Industrial Action in accordance with and subject to the Dispute Handling Policy. The*

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<sup>3</sup> <https://www.gov.uk/government/publications/first-mtr-south-western-trains-limited-2021-rail-contract>, p. 465

*Operator and the Secretary of State shall use reasonable endeavours to 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 Industrial Action will be subject always to the Secretary of State's 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. (Chapter 5.2 'Industrial Action'. (Chapter 2.2, paras 5.3-5.3).*

The Dispute Handling Policy, published by the DfT following an FOI request, makes clear that each Dispute Handling Plan must be agreed at all stages by the DfT.

- On Day 1 after notice of a ballot is received the TOC must inform DfT
- 3 days after notification, it must send its high-level Dispute Handling Plan to the DfT
- By Day 9, the DfT will say whether the high-level plan is approved or if not what it should do instead.
- By Day 25, 3 days after notice to take action is served the TOC must send its final DHP with an outline of the costs to the DfT in terms of disruption and lost revenue for approval.
- On 28 the DfT will give the TOC the final green light to go ahead and they must stay in close liaison throughout.<sup>4</sup>

Michael Ford KC comments that:

*"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."*

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<sup>4</sup>[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/112395/2/dispute-handling-guide-for-tocs.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/112395/2/dispute-handling-guide-for-tocs.pdf)

