ORR consultation on the proposed Railways and Other Guided Transport Systems (Safety) (Amendment) Regulations

Comments by the Heritage Railway Association

Summary

The Heritage Railway Association (HRA) supports the policy underlying the proposed amendments to the Railways and Other Guided Transport Systems (Safety) Regulations 2006 (ROGS), insofar as they impact on heritage railways and tramways. However, it has serious concerns about the proposed manner of implementation. So far as possible, the HRA considers that the Office of Rail Regulation (ORR) should seek to implement the changes on a basis which adopts definitions and procedures in other existing regulations. Such an approach will minimise regulatory burdens.

Introduction

These comments do not address the proposed amendments as a whole, but only the provisions which have implications for the heritage sector. Accordingly, the comments are particularly directed towards the proposed regulation 2A.

The comments are not intended to challenge the policy behind the proposed changes. But, as explained below, there is considerable concern about the manner of their implementation.

General points

The approach adopted by regulation 2A is intended to introduce a determination procedure to make provision for the exclusion of undertakings and vehicles from the requirements imposed on the mainline railway. It is submitted that the system proposed would be unduly bureaucratic and give rise to uncertainties. This approach is to be contrasted with that adopted by the Rail Vehicle Accessibility (Networks) Exemption Order 2010 (SI 2010/904), which is concerned with exempting heritage and tourist lines from the requirements of the disability discrimination legislation (a comparable exercise to the present one and one that is also enforced by ORR). The Order simply lists the exempted undertakings in a Schedule to the Order without need for any determination: see article 1 and the definition "heritage and tourist network", which is defined as "a network named or described in the Schedule or within the grounds of a place named or described in the Schedule".

Furthermore, as demonstrated below, the vague and ambiguous wording surrounding the scope of the determination procedure adopted in regulation 2A is not to be justified by arguing that this arrangement gives ORR desirable flexibility in interpreting its provisions. This is not fair to applicants, or to ORR itself. Both are entitled to be given more specific indications in the text as to the intended scope of the proposals and how they are to be administered. Nor does ORR have to give any reasons for its decisions under the proposed regulation. These considerations are important given that there is no provision for an appeal from a determination, so

that presumably anyone wishing to challenge a decision would have to resort to judicial review, with all the expense that that would involve.

Heading

The scope of the regulation is surely the converse of that stated: it is concerned with determination of exclusions from the mainline railway.

Regulation 2A generally

The wording is inconsistent with that adopted in the original Railways and Other Guided Transport Systems (Safety) Regulations 2006 (ROGS) in certain respects. Thus "must" is employed whereas "shall" is used not only in ROGS but in legislation in general. Also, there seems an insistence on avoiding use of the definite article before "mainline railway", save in paragraph (2) in one instance, whereas "the mainline railway" is used in ROGS. This seems an inelegance and inconsistency for which there is no justification.

Specific issues

<u>Paragraph (1), first line</u>

> The opening words would confine the scope of the Regulations to railways and parts of railways, so that tramways would be excluded from its provisions. It is submitted that there is also need to address the application of the provisions to tramways given the various schemes for tram-trains currently in the offing, the status of which is not clear. There are also ambiguities surrounding the two modes which are considered under sub-paragraph (a) below. It is noted that ORR itself in its list of undertakings contained in Annex E of the ORR consultation document includes tramways.
>
> The concept of "part of a railway" does not fit easily into the new definition of "mainline railway" in regulation 2. It would be preferable if the wording were to be on the lines of: "A railway or part of a railway <u>does not constitute the mainline railway or part of it</u> if the Office . . ".

<u>Paragraph (1) sub-paragraphs</u>

The modes here described should appear in the singular since, for example, an undertaking is unlikely to fall within two or more metros.

Sub-paragraph (a)

> Although the wording reflects that in the Directive, it is submitted that simply following that approach is inappropriate without further definition when transposed into UK law. To take the example of the undefined term "metro", it is demonstrated in Annex E that undertakings such as Midland Metro and Manchester Metrolink, while using that term, are regarded as tramways, and the term "light rail transit", used in the authorising legislation for the London

Tramlink, Manchester Metrolink, Nottingham and South Yorkshire systems, are also tramways according to Annex E.

The phrase “metros and other light rail systems” is flawed for two other reasons. First an “or” should be used instead of “and” since the modes are intended to be in the alternative, not cumulative. And the “other” should be deleted because it implies that all metros are light, whereas the London Underground, a classic example of a metro, is regarded as heavy rail.

Sub-paragraph (b)

The term “network” needs to be defined here and in sub-paragraph (c). (Note the definition in the Networks Exemption Order referred to above.)

Sub-paragraph (c)

There is clearly the possibility of an overlap between undertakings that meet these criteria and those in sub-paragraph (b).

The very useful definition of “heritage railway” in ROGS it to be dispensed with in the amending Regulations, so that the components of the term identified in that definition are removed with nothing put in their place, with the term having to be construed at large.

Paragraph (2)

The “or” in the wording means that there is to be no overlap in these components, so that a heritage line cannot apparently be a museum line or a tourist line. Moreover, no mention is made of the educational and recreational components appearing in the original definition. This surely needs tidying up.

There is no definition of “heritage vehicle”. Following on from paragraph (1)(c), is a museum vehicle or a tourist vehicle intended to be included in the term? For example, do vehicles forming part of the collection of the National Railway Museum fall within this category? Contrast the elaborate provisions contained in articles 3 and 4 of the Networks Exemption Order.

Can the determination be in favour of an individual vehicle and a class of vehicle, as Annex E appears to envisage, or can it also be applied on a more general basis? This needs to be made clear.

Nothing is stated about the frequency which a vehicle might be operated on the mainline railway. Annex E, Note 1, introduces the phrase “occasionally use”. This wording is fraught with grounds for argument; greater precision is needed, which should be embodied in the regulation.

There is the corresponding case of a heritage tramcar being allowed to operate on a standard street tramway. Is such a phenomenon to be taken as outwith these arrangements even if the regulation is to apply to tramways

Paragraph (3)

Nothing is said about the form of the application or of the determination (contrast regulation 30 of ROGS in the comparable position of determining an exemption from any requirement or provision imposed by the Regulations, where the exemption has to take the form of a certificate in writing). Should it not be provided that the application and the determination have to be in writing, otherwise it would appear that even a telephone call could suffice. Surely to publish a note of a determination (and then only if granted) in a list which does not form part of the Regulations is a far too casual arrangement.

Paragraph (4)

The content of the list is apparently to depend on whether or not a favourable determination has been made. There seems nothing to oblige ORR to make a determination unless “a person” has made an application pursuant to paragraph (3). Does this mean that each and every undertaking thought to fall within scope having to lodge an application in respect of an undertaking or a vehicle so as to be included in the list? It should be made clear if the intention is that ORR is, or is not, to be able to make determinations of its own volition.

There appears to be no power for ORR to delete, or for an applicant to apply to delete, undertakings or vehicles from the list once they have been included. If this is so, the list will progressively become out of date.

Once again, the tramway aspects may need to be covered.

Other issues

Regulation 2

It is submitted that the definition of “tramway” should be slightly revised so that in sub-paragraph (b) for the words “or any part” there should be substituted “a predominant part”. This is to avoid certain sections of railway lines that are street-running and operate by line of sight, such as the Weymouth Harbour branch, having the effect, if taken literally, of converting the whole of the mainline railway into a tramway! This adjustment is favoured by the Law Commission arising out of their deliberations into the law relating to level crossings.

Regulation 34

In sub-paragraph (4), should the date “2011” be revised?

Heritage Railway Association
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