

RE: FIXED PENALTY AND FAILURE TO PURCHASE

OPINION

1. I am asked to consider the query raised by Mr [REDACTED] a civil servant employed by the Department for Transport, in his letter of the 9th January last in which he questions the legality of the 'Fixed Penalty' scheme operated by Northern since August 2011. It is worthy of note that in the intervening period there has been no legal challenge to the use of the fixed penalty system despite its significant use.
2. The cause of Mr [REDACTED] concern is that whilst the enforcement provisions of the Railway Byelaws, as set out in Byelaw 24, do provide for a penalty to be imposed in respect of a breach of Byelaw 18, such a penalty can only be a court imposed penalty and cannot be a penalty such as is he asserts is imposed by Northern's Fixed Penalty scheme. Although Mr [REDACTED] does not provide any reasoning, merely stating that "*It is our view...*" I assume that he has been influenced by the words "*Fixed Penalty*" as well as aspects of the wording of Byelaw 24 and in particular the linking of the words "*Offences and level of fines*" and the reference to "*... a penalty not exceeding level 3 on the standard scale*". This is indeed the standard phraseology of legislation creating an enforcement regime to be determined by the magistrates' courts. Mr [REDACTED] argument appears to be that if the enforcement regime anticipated by the legislation is that of the magistrates' courts there is no lawful basis upon which an alternative enforcement regime may be founded. However, this presupposes that the 'Fixed Penalty' scheme is a scheme of punitive enforcement.
3. In seeking to address Mr [REDACTED]'s concerns it is necessary to consider the process by which Northern seeks to meet its obligations in respect of fare evasion. If a passenger is found to have travelled without having paid the appropriate fare they will receive a 'Failure to Purchase' notice requesting payment of the outstanding fare. This opportunity to pay is given notwithstanding that Northern are prima facie entitled to prosecute pursuant to Byelaw 18.
4. If the individual concerned does not pay the outstanding fare Northern send a "Fixed Penalty Notice". This notice makes clear that the intention of Northern is to exercise its right to bring a prosecution in accordance with Byelaw 18.1. The letter states, "*Your matter is in the process of being prepared for disposal at the Magistrates' Court*". However, it also makes clear that there is an alternative route that will obviate the need for court proceedings. The procedure is the payment of what is identified as the fixed penalty. This may properly be viewed as an offer to enter into a contractual relationship. For the payment of a sum which is the total of the 'fixed penalty' fee and the outstanding fare – the consideration – Northern agree not to exercise its right to prosecute as provided by the byelaws.
5. Whether or not to enter into the arrangement is entirely at the discretion of the passenger. The sum of £80 is a properly costed assessment of the average amount of time needed to process a typical case of this kind and is not intended to represent a punitive sum. It is perhaps better to regard the transaction as a 'Fixed Payment'. Use of the word 'penalty' gives a misleading impression that the regime is a step in the road of the process of prosecuting rather than reflecting the reality which is that it is an offer to allow a passenger to adopt an alternative arrangement that allows him to avoid court proceedings.
6. The only aspect of the series of correspondence that is perhaps a little unfortunate is some of the wording contained within the initial 'Failure to Purchase' letter. The standard letter contains the sentence "*Should payment [of the outstanding fare] not be made then a Fixed Penalty Notice will be issued.*" This may convey the incorrect impression that a penalty will be imposed if the fare is not paid whereas in reality the individual will be told that they are to be prosecuted however they can avoid that course should they not wish to contest the allegation by entering into an entirely voluntary agreement to pay a fixed payment – fixed at the average cost of processing the application plus the outstanding fare.
7. I emphasise that it is impossible to envisage that any injustice has occurred as a result of this wording. The 'Failure to Purchase' letter does no more than request the outstanding fare and if the individual

does not pay that amount when they then receive the Fixed Penalty Notice it makes clear on the face of that document that the fixed penalty itself is the voluntary arrangement referred to above.

8. Once more it is important to emphasize that no injustice can have occurred as a consequence of the current wording. Anyone who has been contacted following a further incident will have received a fixed penalty notice that on the face of that document makes clear that payment of the penalty is available as an alternative to court proceedings. They will have then been in a position to exercise their right to trial or to choose to enter into an agreement to pay the properly costed fixed payment as a consequence of which Northern will waive its right to prosecute.
9. In conclusion it is important to note that the 'Fixed Penalty' scheme operated by Northern does not impose a financial penalty. The prosecution process operated by Northern initially requests payment of the outstanding fare. The next stage informs the individual that there will be a prosecution but offers a fixed penalty as an alternative to that process that may be accepted or rejected. The final stage involves court proceedings and prosecution. The absence of any attempt to impose the fixed penalty regime should reassure Mr. [REDACTED]. The only system of financial penalty that is imposed is that which is imposed by the courts.

Dated: January 2013