Rother Valley Railway – Public Inquiry

Revised Technical Note on application of section 68 of the Railway Clauses Consolidation Act 1845

1. In common with other TWAOs that authorise railway infrastructure, article 3 of the draft order (application of other railway legislation, etc.) applies various provisions of the Railway Clauses Consolidation Act 1845, including the following:
   - section 68 (accommodation works by company);
   - section 71 (additional accommodation works by owners), except for the words "or directed by such justices to be made by the company" and "or, in case of difference, as shall be authorised by two justices";
   - sections 72 and 73 (supplementary provisions relating to accommodation works);

2. These provisions follow paragraph 2 (Incorporation of Railways Clauses Acts) of the Transport and Works (Model Clauses for Railways and Tramways) Order 2006. See also, by way of example, article 3 of the Network Rail (East West Rail) (Bicester to Bedford Improvements) Order 2020 (S.I. 2020/114).

3. Section 68 (accommodation works by company) requires the railway undertaker to make and maintain such accommodation works as "shall be necessary" for the mitigation of severance. The nature of such works is not limited to level crossings. The requirement is based on need, but is subject to qualifications that the company shall not be required to provide accommodation works where this would prevent or obstruct the working or using of the railway, or in circumstances where the owners and occupiers of the lands have agreed to receive compensation instead. Where the undertaker is not required to provide accommodation works because to do so would obstruct the operation of the railway, compensation would apply.

4. If the Secretary of State determined to make the Order *without* allowing for accommodation crossings, the landowners' remedy would be compensation, unless the amount of such compensation could be reduced by the provision of an alternative means of crossing. The landowner is required to mitigate its losses (and hence reduce the amount of the compensation) as far as reasonably practicable and this might, for example, include making land available for ramps or for infrastructure associated with the crossing.

5. Section 71 (Power to owners of land to make additional accommodation works) provides a power to owners or occupiers of lands who consider the accommodation works provided by the company to be inadequate to make further accommodation works either agreed with the company, or, in case of difference, to be authorised by two justices. Section 72 (such works to be constructed under the superintendence of the company's engineer) provides for oversight by the railway undertaker whilst section 73 (accommodation works not to be required after five years) places a time limit on the period during which the undertaker can be compelled to provide such works.

6. As referred to in paragraph 20 of the ORR's supplementary Statement of Case (): "*Many crossings similar to those that might be required by RVR exist on other heritage railways, and on the mainline network, and these can be constructed and used in a tolerably safe manner. Many of those current crossings have little or no advice for users beyond signage warning them to look both ways before crossing; it is features such as this that lead to the incidents and accidents that do occur. RVR's documentation does now give commitments to providing appropriate instructions and advice to users and visual signals to approaching train crew of gate position as well as the measures*

indicated in paragraph 19 above."

7. The location, number and type of accommodation provision is based on need and will therefore be kept to the minimum required to satisfy that need and what, if any, alternatives may be reasonably practicable. All such considerations will, of necessity, involve both the landowners and the ORR, who will have to “sign off” on such crossings before they can be operated and can, through this process, ensure that the crossings are fit for purpose.

8. The ORR cannot prevent the construction of a crossing over the railway. The railway undertaker has a duty under section 3 (general duties of employers and self-employed to persons other than their employees) of the Health and Safety at Work Act 1974 (see Appendix 1) to conduct that undertaking in such a way as to ensure, so far as reasonably practicable, that persons not in its employment who may be affected by it are not exposed to risks to their health and safety.

9. If the ORR is not convinced that the proposed crossing can be operated tolerably safely, it will issue a Prohibition Notice under section 22 (prohibition notices) of the Health and Safety at Work Act 1974 (see Appendix 2) to prevent the operation of the railway over that crossing until remedial action has been taken.

10. Before resorting to a prohibition notice, ORR would seek to work with the undertaker to change or improve the crossing arrangements - which might entail operating it with lower train speeds or an on-site crossing-keeper or agreed gate locking arrangements, for example. A responsible heritage railway undertaker is unlikely to be subject to a prohibition notice.

11. The qualification in section 68 recognises that the railway in question has the benefit of statutory authority and that, if it transpires that a crossing could not be provided without preventing the railway from operating, financial compensation to the landowner would be the appropriate remedy.

12. The above is considered to be an extreme case. Although the applicant has not had the benefit of access to the relevant land for survey purposes due to the "in-principle" opposition of the landowners to the scheme, it is nevertheless considered most unlikely that the parties would be incapable to reaching workable accommodation arrangements for crossings of the railway, albeit that the reinstatement will involve an element of lost efficiency for the farming business and consequential financial, as well as practical, mitigation to place the landowners in the same position as they would be but for the presence of the railway.

Winckworth Sherwood LLP
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Appendix 1

3 General duties of employers and self-employed to persons other than their employees.

(1) It shall be the duty of every employer to conduct his undertaking in such a way as to ensure, so far as is reasonably practicable, that persons not in his employment who may be affected thereby are not thereby exposed to risks to their health or safety.

(2) It shall be the duty of every self-employed person who conducts an undertaking of a prescribed description to conduct the undertaking in such a way as to ensure, so far as is reasonably practicable, that he and other persons (not being his employees) who may be affected thereby are not thereby exposed to risks to their health or safety.

(2A) A description of undertaking included in regulations under subsection (2) may be framed by reference to— (a) the type of activities carried out by the undertaking, where those activities are carried out or any other feature of the undertaking; (b) whether persons who may be affected by the conduct of the undertaking, other than the self-employed person (or his employees), may thereby be exposed to risks to their health or safety.

(3) In such cases as may be prescribed, it shall be the duty of every employer and every self-employed person, in the prescribed circumstances and in the prescribed manner, to give to persons (not being his employees) who may be affected by the way in which he conducts his undertaking the prescribed information about such aspects of the way in which he conducts his undertaking as might affect their health or safety

Appendix 2

22 Prohibition notices.

(1) This section applies to any activities which are being or are likely to be carried on by or under the control of any person, being activities to or in relation to which any of the relevant statutory provisions apply or will, if the activities are so carried on, apply.

(2) If as regards any activities to which this section applies an inspector is of the opinion that, as carried on or likely to be carried on by or under the control of the person in question, the activities involve or, as the case may be, will involve a risk of serious personal injury, the inspector may serve on that person a notice (in this Part referred to as “a prohibition notice”).

(3) A prohibition notice shall— (a) state that the inspector is of the said opinion; (b) specify the matters which in his opinion give or, as the case may be, will give rise to the said risk; (c) where in his opinion any of those matters involves or, as the case may be, will involve a contravention of any of the relevant statutory provisions, state that he is of that opinion, specify the provision or provisions as to which he is of that opinion, and give particulars of the reasons why he is of that opinion; and (d) direct that the activities to which the notice relates shall not be carried on by or under the control of the person on whom the notice is served unless the matters specified in the notice in pursuance of paragraph (b) above and any associated contraventions of provisions so specified in pursuance of paragraph (c) above have been remedied.

(4) A direction contained in a prohibition notice in pursuance of subsection (3)(d) above shall take effect— (a) at the end of the period specified in the notice; or (b) if the notice so declares, immediately.