

Franchise Derogation – Force Majeure relating to weather events of 28 February-2 March 2018			
Date of change	Reason for Change	Clauses Changed	End Date of Change
10 May 2018	Performance failures arising from weather related events of 28 February-2 March 2018		

Weather events 28 February-2 March 2018: ScotRail request for force majeure

Thank you for your letter of 19 March, requesting that Transport Scotland grant relief from performance failures under the Franchise Agreement due to the occurrence of Force Majeure Events that arose from the weather events of 28 February – 2 March 2018.

Formally, in your letter you advised:

“ASR claims relief/derogation for all non-compliances with the Franchise Agreement arising from the above Force Majeure Event, including without limitation:-

- *in respect of all resultant failures to comply with the SLC and the adoption of Emergency Timetables on the applicable dates;*
- *in respect of any SQUIRE failures arising and*
- *agreement that all PPM failures incurred on the above dates are excluded for the purpose of calculating results against the performance Benchmarks under Schedule 7.1 of the Franchise Agreement (Train Operating Performance).”*

After consideration of your claim, we are advising the following:

1. We are not in a position to grant relief/derogation from non-compliances in respect of Schedule 7.3 (*SQUIRE*). Paragraph 3.2 of Schedule 10.4 of the Franchise Agreement makes it clear that Force Majeure Event relief does not apply to the Franchisee’s obligations in Schedule 7.3 (*SQUIRE*).
2. Similarly we are not in a position to grant relief/derogation from non-compliances in respect of Schedule 7.2 (*KPIs and Journey Time Metric*). Paragraph 3.2 Schedule 10.4 of the Franchise Agreement makes it clear that Force Majeure Event relief does not apply to the Franchisee’s obligations in Schedule 7.2 (*KPIs and Journey Time Metric*).
3. Transport Scotland will grant your claim to the extent that all PPM failures incurred on 28 February 2018 and on 1 March 2018 will be excluded for the purposes of calculating results against performance Benchmarks under Schedule 7.1 of the Franchise Agreement (*Train Operating Performance*). This will be actioned by deleting all trains from the record for those two days, both those planned to run and those which met PPM.

This decision is given subject to the following conditions:

- That it sets no precedent for the award of relief in respect of a Force Majeure Events. Each and every occurrence and subsequent claim will be considered on the basis of the evidence submitted in support of any claim.
 - That the adjustment to PPM for those days sets no precedent for this being done in future; and
 - That ScotRail undertake and provide to us, revised calculations which show clearly both how PPM for those days and the period as a whole would stand, both with and without the correction for those two days.
4. Transport Scotland will not grant your claim that PPM failures incurred on Friday 2 March be excluded for the purposes of calculating results against the performance Benchmarks under Schedule 7.1 of the Franchise Agreement (*Train Operating Performance*). This is because a limited agreed timetable was in place by 2200 hrs the evening before, and there was an amber weather warning in place at that stage (so passengers had 'fair warning' of what would run on the Friday and under what conditions).
 5. Transport Scotland is not prepared to grant your request for a blanket "relief/derogation for all non-compliances with the Franchise Agreement arising from the above Force Majeure Event, including without limitation, in respect of all resultant failures to comply with the SLC and the adoption of Emergency Timetables on the applicable dates". Paragraph 3.1 of Schedule 10.4 of the Franchise Agreement makes it clear that "the Franchisee shall not be responsible for any failure to perform any of its obligations under this Agreement, nor shall there be any contravention of this Agreement **if and to the extent that such failure is caused by any Force Majeure Event**". In our view, the onus is on you to ask for any relief on a specific item-by-item basis, providing sufficient supporting information to justify each claim.