

Appendix D

West Midlands Railway Executive (WMRE) Powers in Relation to Franchise Agreement

July 2021

Purpose

1. A briefing note to advise the Chair and members of WMRL Board of the powers that WMRE is able to exercise in relation to rail services in the West Midlands area.

Background

2. The current West Midlands Franchise was procured by the Department for Transport (DfT) between 2015 and 2017. Following a competitive tender exercise, the Franchise was awarded to West Midlands Trains Ltd, a subsidiary of a consortium of Abellio, JR East, and Mitsui.
3. WMRE had a prominent role in the procurement of the new contract, including having two members of staff seconded to the DfT's project team. However, WMRE are not – and were never intended to be – co-signatories of the Franchise Agreement. The Agreement is bilateral between DfT and WMT, and is due to expire on 19th September 2021. It will be replaced by a directly awarded National Rail Contract (NRC). This will mirror the Franchise in that it will also be bilateral between DfT and WMT, and will include a role for WMRE in the development and oversight of the contract.
4. Nevertheless, the Separable Business Units defined within the Franchise act as an enabler for WMRE to exercise control over the West Midlands services of the West Midlands Franchise. Exactly how much formal power WMRE is afforded over the West Midlands Separable Business Unit (WMSBU) is at the discretion of the Secretary of State.
5. Since the start of the Franchise in 2017, DfT has in practice afforded WMRE broad autonomy in matters pertaining to the WMSBU. In fact, during periods of annual leave and sickness WMRE have at times even acted on behalf of the Department on Franchise wide issues. These existing practices are not currently codified, but it is the intention that they will be, as one of the year 1 deliverables via a Memorandum of Understanding or side letter to the Collaboration Agreement. This would be the first stage in a process that could conclude with WMRE exercising delegated financial authority over an Annual Business Plan established on the basis of two Separable Business Units.

Separable Business Units

6. The current Franchise Agreement states that the DfT may at any point decide to manage the WMSBU in collaboration with WMRE. To facilitate this, the Franchisee is required to structure the business as two Separable Business Units. The Franchisee has a general obligation to work with WMRE for the purposes of managing the obligations relating to the WMSBU.

7. The Franchise Agreement is rightly silent on the precise nature of the collaborative relationship between the DfT and WMRE. Consequently, from the point of view of the Franchise Agreement WMRE's powers over the WMSBU are as broad as the DfT permit them to be (within the limits of existing legislation). Equally WMRE has taken the initiative in other areas, especially in forming the Grand Railway Collaboration with other operators than just WMT.

Existing Powers

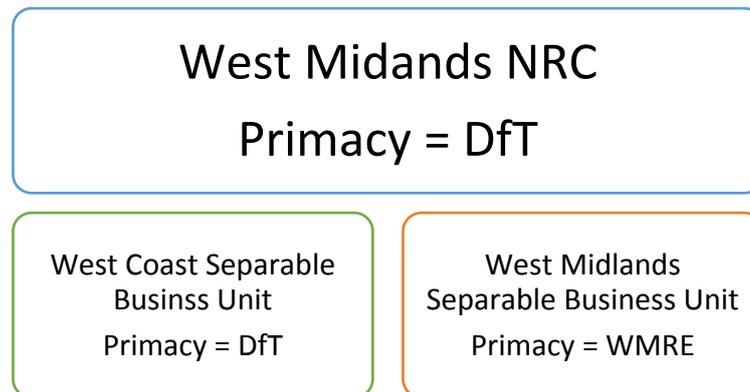
8. WMRE's powers fall into two categories those that are written into the Franchise Agreement/ NRC and Collaboration Agreement ('hard' powers) and those that flow from the practical approach that the parties have taken to managing their operator ('soft'). The 'hard' powers include:
 - a. The ability to propose changes to fares;
 - b. The ability to propose changes to passenger services;
 - c. Day to day contract and commercial management of the WMSBU;
 - d. Ownership of the 'West Midlands Railway' brand;
 - e. Developing and implementing cost neutral or cost reducing changes on the WMSBU; and
 - f. making recommendations and providing guidance to the Secretary of State on the carrying out of Secretary of State duties and decision on other Reserved Matters¹
9. WMRE's 'soft' powers are far more extensive. They include (in no particular order):
 - a. Train service specification – Through the Grand Railway Collaboration (GRC) WMRE is coordinating all train operators' planning on future timetables serving the West Midlands.
 - b. Timetable changes - WMRE is empowered to decide on timetable change requests from WMT where they affect the WMSBU;
 - c. Operational performance – Monitoring and challenging day to day punctuality and reliability in the WMSBU;
 - d. Service Quality Regime (SQR) – WMRE monitor and apply the SQR in the WMSBU area;
 - e. Performance Sums - Prior to pandemic and the transfer of cost risk to the DfT, WMRE had discretion on how performance sums payable by WMT for poor operational, National Rail Passenger Survey and SQR performance in the WMSBU were spent;
 - f. Stations – Including strategy on station staffing and presentation in the WMSBU;
 - g. Ticketing – TfWM's Swift product is the preferred means of delivering contactless PAYG on rail in the West Midlands;
 - h. Fares – WMRE are authorised to develop a fares reform proposition for the region on behalf of DfT;
 - i. Committed Obligations monitoring – WMRE monitor, evaluate and sign off as complete Committed Obligations affecting the WMSBU;
 - j. Committed Obligations investigation – WMRE are lead investigators for Committed Obligations in the WMSBU that are not delivered to the contract;

¹ The Reserved Matters are defined as; decisions increasing net costs or net future costs to the SoS, determination of events of Franchise default, the content of the Rail Investment Strategy and Statement of Funds Available, and any other specific actions that may be required under the Railways Act 2005.

- k. Contract changes – WMRE negotiate requests to amend the contract where it affects the WMSBU;
- l. Infrastructure – Members of and contributors to the Programme Board, which helped secure £71m for the new and refurbished stations
- m. Ministerial and stakeholder correspondence – WMRE handle all correspondence where it pertains to the WMSBU;
- n. 2022 Commonwealth Games – WMRE is responsible for coordinating the rail industry’s response to the Games on behalf of DfT; and
- o. Community – WMRE decides which schemes WMT takes forward in the WMSBU as part of its Customers and Communities Improvement (CCIF) and Minor Works Funds.

Future Aspirations

- 10. In year 1 of the renewed Collaboration Agreement (Sept 21 – Mar 22) the ‘soft’ powers outlined above will be formalised via the new Joint Board that is being created to oversee the delivery of the West Midlands National Rail Contract (NRC). Although the mechanism for this is yet to be defined, it is likely that these soft powers will be codified through a Memorandum of Understanding or side letter to the Collaboration Agreement.
- 11. From year 2, WMRE and DfT will intend to develop the newly formalised arrangements to the Annual Business Planning process. This will result in an approach to contract management that resembles the model below:



- 12. Managing the contract in accordance with the model above will further both parties’ understanding of the opportunities, risks and efficiencies that could arise from the application of the model to the annual business planning process enshrined in the NRC. Should the evidence support it, in year 3 WMT will be instructed to construct their Annual Business Plan around these principles, including through the inclusion in their Performance Based Fee of KPIs for each Separable Business Unit, although it should be noted there will be a cost to this.
- 13. In parallel with the evidence gathering referenced in para 12, WMRE and DfT will develop proposals that would allow WMRE a measure of delegated financial authority over the WMSBU. The legal issues, practicalities and ministerial appetite for application of such authority would need to be worked through, and will also need to be aligned with the emerging industry structure of partnership working between GBR and its key stakeholder.

14. The other workstream will be to continue to develop more influence for WMRE in the key decisions made by other operators that serve the West Midlands, building on the work of the GRC.