

MINIMUM SERVICE LEVELS IN PASSENGER RAIL – DO YOU STILL HAVE THE RIGHT TO STRIKE?

Introduction

In January 2023 TSSA published a Reps Bulletin on the Conservative Government's Strikes (Minimum Service Level) Bill. Under the title of "The Government wants to remove your right to strike", the Bulletin looked at the implications for workers in the six sectors that Minimum Service Levels (MSL) were being proposed to apply to:

- Transport
- Health
- Fire and Rescue
- Education
- Border Security
- Decommissioning of nuclear installations and management of radioactive waste and spent fuel.

In this Bulletin, TSSA intends to brief reps and members on the implications of MSLs before describing some of the processes that are required by the Code of Practice and guidance documents. We are also planning briefings and training for reps and organisers.

We also want to be clear that TSSA, in common with other unions, has been taking legal advice about MSLs and the processes that are proposed.

What is the latest position on MSLs?

Despite a lot of opposition and protest from Labour, the trade unions and other groups, as well as the expression of serious misgivings by Parliament's Regulatory Policy Committee, the Equalities and Human Rights Commission (EHRC) and the UN's International Labour Organisation (ILO), the Conservative Government was able to use its large majority in the House of Commons to get the Bill through its law making process in July 2023.

Since the Strikes (Minimum Service Level) Act achieved Royal Assent, the Government has actively been consulting on aspects of the legislation. This has included guidance on Work Notices and a Code of Practice on Reasonable Steps for Trade Unions, an obligation under the legislation.

They have also produced detailed Regulations for some of the sectors covered by the Act. In November 2023 the Government published The Strikes (Minimum Service Levels: Passenger Railway Services) Regulations 2023 which became law from 8th December 2023. Regulations have not so far been published for any other part of the Transport Sector.

What has TSSA been doing?

TSSA has been active in opposing the MSL legislation, including by giving verbal evidence to the Transport Select Committee in April 2023, meeting with the Department for Transport on the introduction of Regulations, and participating in consultations and protests as well as the TUC's working group.

What has Labour and other opposition parties been saying about MSLs?

Opposition parties have opposed the introduction of the MSL legislation.

Labour has been completely opposed to MSLs, leading the opposition to these measures in both the House of Commons and in the House of Lords. They have also committed to repeal the legislation should they win the next General Election.

Labour forms the Welsh Government whilst the SNP control the Scottish Government, and both have gone on the record to state their opposition to the MSL laws. Both have also confirmed that they will not use the legislation.

What are the implications of MSLs?

From the start it is worth remembering that if a union falls foul of the MSL arrangements it could face:

- severe fines (increased to up to £1m for larger unions)
- lose its statutory protection from liability in tort, meaning that employees would lose their automatic protection from unfair dismissal.

For an employee named on a Work Notice but who subsequently refused to cross the picket line, the outcome would be the loss of their employment protections and the real possibility of dismissal.

How does the Strikes (Minimum Service Levels: Passenger Railway Services) Regulations work?

The Passenger Rail Regulations apply MSLs in three ways:

- Category A: Heavy Rail Train Operation Services. This covers the carriage of passengers by railway (or refuelling of trains) undertaken by TOCs across England, Scotland or Wales and whether provided on the basis of:
 - franchise from the DfT, Welsh or Scottish Government
 - an operator of last resort
 - a transport authority (eg, Merseyrail)
 - agreement with TfL (eg, London Overground, Elizabeth Line)

The Minimum Services Level is set at 40% of timetabled services (the timetable is defined as that most recently published).

- Category B: Infrastructure Services. This applies to infrastructure managers that provide a network of services as well as those people who deliver all those network services on behalf of the infrastructure manager. Network Rail is captured as are a number of specific groups of workers who provide services such as day to day operational or electrical control, reactive maintenance (of track, signalling, telecoms) or incident response.

The Minimum Service Level means that defined Priority Routes¹ have to be open for traffic between 0600 and 2200 on a strike day.

- Category C: Light Rail Services. This applies the requirements of 40% of timetabled services and the provision of infrastructure services to specifically named light railways and tram systems, including London Underground, Tyne and Wear Metro and Docklands Light Railway.

What are the implications of the MSLs for TSSA members?

What is clear is that some TSSA members, especially in “infrastructure services” like Control, Signalling or involvement with incident response are likely to lose their right to strike between the hours the network has to remain open.

TSSA will obviously be seeking to resist that and is the reason why we have been very active in opposing the measures and ensuring that our points of view are put across to the Government, MPs and the Civil Service officials who work in the Department for Transport.

In common with others, we believe the introduction of MSLs is a breach of human rights and civil liberties in a country that prides itself on democracy.

We also see it as yet another anti trade union attack on workers by a Conservative Government that has sought to cut back on the right to protest² across society in a series of laws that it has used its large majority in the House of Commons to push through.

Which parts of rail are excluded?

Freight operators, international rail services and heritage rail are all excluded from MSLs although the Priority Route Map applies to a five mile radius that includes loops, sidings or lines which connect the Routes to stabling facilities, rolling stock depots, etc.

In guidance on the Passenger Rail Regulation issued just before Christmas 2023, the DfT explicitly removed Station Services (defined as “duties performed by staff at

¹ A map and description of routes can be found at:

<https://www.gov.uk/government/consultations/minimum-service-levels-for-passenger-rail-during-strike-action/outcome/minimum-service-levels-for-passenger-rail-government-response-and-policy-approach>

² See Reps Bulletins GEN/020/June 2021 “Are we losing the right to protest?” and GEN/021/Jan 2023 “Threat to right to protest”.

stations”) from being part of MSLs.³

Could legislation be produced for other parts of the Transport Sector?

We believe it could. The Strikes (MSL) Act 2023 lists Transport Services as amongst the six sectors but Regulations under the Act have only been published for Passenger Rail. The Government could, therefore, chose to produce other Regulations that would apply to additional parts of the Transport Sector – such as Rail Freight or Passenger Bus Services. Rail Freight has been specifically excluded at the moment and nothing has been proposed for Bus Services but it is clear that the Government has given itself the power to be able to produce further Regulations in response to industrial action.

How will the law operate?

For an employer that (1) adopts a MSL and (2) plans to use it, the process that has to be adopted is:

- Union advises employer of outcome of industrial action ballot and issues strike notice (14 days before action begins)
- Employer consults with the union about the content of the work notice in terms of:
 - the number of persons to be identified and
 - the work to be specified in the notice.

The employer has to have regard to the union's views before preparing the work notice which will both name individuals required to work and the work they should do.

- Work notice is issued to the union by the employer 7 days before strike action begins (unless a later date is agreed).
- Subject to consultation with the union, the work notice can be amended by the company up to the end of the fourth day before action begins.
- Upon receipt of the work notice, the union then has to take a series of so called “reasonable steps” that are listed in the Code of Practice.⁴

What actions do the reasonable steps require from the union?

The requirement is as follows:

Step 1: identification of members:

- Upon receipt of a work notice, a union must identify its members on a work notice (the union's information is not shared with the employer)

³See Pages 27 and 58:

<https://assets.publishing.service.gov.uk/media/658081efed3c34000d3bfaf9/strikes-minimum-service-levels-passenger-railway-services-regulations-2023-guidance-on-the-regulations.pdf>

⁴ <https://www.gov.uk/government/publications/reasonable-steps-to-be-taken-by-a-trade-union-code-of-practice/code-of-practice-issued-by-the-secretary-of-state-under-section-203-of-the-trade-union-and-labour-relations-consolidation-act-1992-on-reasonable-ste>

- It should be able to communicate with members quickly (bearing in mind the time before the strike begins and the effect of any amendments (in an even shorter timescale) that may change the names of those people required to work). Email addresses can be used – but need to be correct.
- Identify the best placed person in the union to receive the work notice – and who could check membership data
- Legal action is possible where the union is unable to identify small numbers of members who are then missed from subsequent steps.

Step 2: encouraging individual members to comply with a work notice:

- The union should then issue the Compliance Notice (Appendix A in the Code of Practice) to each individual member required to work during the strike.
- It has to be individually addressed and be sent before the strike begins, preferably electronically but first class post is acceptable. If the union is aware that someone may not receive the notice before the strike date, they should send it by first class post.
- The union has to ensure members on the work notice are not encouraged to take strike action by literature that the union may issue to those going on strike.
- Variations to the work notice may require this process to be repeated although a union could wait until the fourth day before issuing the Compliance Notice.
- NOTE: The original Code of Practice has been changed to remove the additional Information Notice step following consultation responses. This was designed to be a communication to all members, but the Government has now replaced it with a suggestion that the union communicates with all members.

Step 3: picketing:

- The union should instruct the picketing supervisor (if present) or another union official or member to use reasonable endeavours to ensure that picketers avoid, so far as reasonably practicable, trying to persuade members who are identified in a work notice not to cross the picket line at times when they are required by the work notice to work.
- Union members who have been identified in a work notice can take steps to show the picket that they have been identified in a work notice.
- The union does not have to advise the picket supervisor of the names of those on the work notice. Neither does the picket supervisor or others on the picket line have to ask a person if they are on the work notice.

- The picketing members can induce members to strike provided those members have not identified themselves as on the work notice.

Step 4: assurance:

- Once a work notice is received by the union, the union should ensure that they do not do other things which undermine the steps they take to meet the reasonable steps requirement.
- Actions taken to undermine the steps could include for example, communicating with members whom the union knows are identified in a work notice to induce them to strike. Where the trade union becomes aware of such actions, it should take swift action to correct any misleading inducements.
- Actions which undermine these steps may risk trade unions losing their statutory protection from liability in tort and employees losing their automatic protection from unfair dismissal.

Reps Action

It is recommended that reps should familiarise themselves with the contents of this Bulletin.

Acknowledgements and further reading

Documents used in the production of this leaflet appear in the footnotes. The Act can be found at:

The Strikes (Minimum Service Levels) Act:

<https://www.legislation.gov.uk/ukpga/2023/39/enacted>