

Prime Minister

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The legislation is  
ready - secretly - for use  
when needed.

PRIME MINISTER

M/S 24/6

## INDUSTRIAL ACTION ON THE RAILWAYS: LAY-OFF

... My minute attached reports on the further consideration which has now been given to the legal aspects of industrial action on the railways. In this minute, which has been given a more restricted circulation, I report on my discussions with the Secretaries of State for Employment and Transport and the Attorney General about the extent to which legislation on lay-off might be relevant to the rail dispute.

2. Although other variants are theoretically possible, the two main variants of legislation providing for lay-off which have been thought worth serious consideration, and which have already been drafted, on a contingency basis, are as follows:

- i. a Bill providing that in a situation designated by the Secretary of State where industrial action was taking place or likely to take place affecting a substantial number of employers and employees (ie. in practice a national emergency) the Secretary of State could by Order provide that any employer (ie not just the employer whose workers were on strike) could lay off employees whose work was affected to any extent, either directly or indirectly by specified industrial action;
- ii. a Bill providing that in all circumstances (ie not just in a national emergency situation designated by the Secretary of State) an employer whose employees were taking industrial action (but not other employers consequentially affected) could lay off any employees of his own for whom work was affected to any extent by the industrial action.

It has been envisaged that the first variant (the "national emergency" variant) might be introduced in a situation like a miners' strike where, in order to ensure the financial survival of a large number of companies throughout the economy, employers might be permitted to override their contractual and statutory obligations to their employees (white collar workers and other workers covered by guaranteed week agreements) whose work was affected even though they were willing to work. The second variant (the "own employee" variant) is designed to deal on a permanent basis with the situation, encountered in the 1981 Civil Service dispute, where selective industrial action by a few white collar workers can disrupt the work of a large number of their colleagues, thus imposing considerable costs on the employer at little cost to the unions and their members. The employer concerned would be relieved of his contractual and statutory obligations to his own employees.

3. The circumstances in which such legislation might be most relevant to the rail dispute would be if, as occurred earlier this year, the bulk of the BRB's employees - ie. the NUR members - turned up for work but the railways could not operate because of industrial action by ASLEF. As the attached minute shows, this contingency is now thought to be very unlikely. On present evidence the most likely scenario is that from the beginning of the second week NUR and ASLEF will be on strike, and the BRB will be obliged to pay only a small proportion of their employees, (mainly members of the TSSA), and might well want to continue to do so. It would be difficult to justify legislation on "own employee" grounds purely for the purposes of relieving the BRB of their obligation to pay the TSSA's members. It remains for consideration whether at some stage legislation would be justified on "national emergency" grounds in order to enable other employers and not just the BRB to lay off employees whose work was affected as a result of industrial action on the railways. At present it seems unlikely that such a situation would emerge in the early stages of industrial action.

4. The draft Bills already in existence thus provide us with

options which we might want to consider using in suitable circumstances. Although at present such circumstances are not foreseen, we shall need to keep the situation under review.

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5. I am sending copies of this minute to the Secretary of State for Employment, the Attorney General, and Sir Robert Armstrong.

*Jenkins*

PP.

*[ seen by the Chancellor;  
signed in his absence.]*

GEOFFREY HOWE

24 June 1982

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CJV

Prime Minister (2)

01 211 6402

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SECRET AND PERSONAL

Peter Jenkins Esq  
Private Secretary to the  
Chancellor of the Exchequer  
HM Treasury  
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Nat Ind: Coal: P 66.

24 June 1982

Dear Peter,

THE RAILWAYS

At the Prime Minister's meeting on Tuesday, it was agreed that the Chancellor and my Secretary of State should consider further how to finance maximum power station oil burn, should that prove necessary. Mr Lawson's view remains as set out in his letter of 17 June. Perhaps officials could quickly consider any alternative ideas yours might have in mind.

As you know, the Chancellor and Mr Lawson agreed this morning on the principle of compensating the CEGB for the extra costs of maximising Scottish electricity imports from the start of the rail strike. We have therefore asked the CEGB to do this. Our officials will also need to agree the details of this scheme, presumably in a way that combines with any payments for oil-burn.

I am copying this letter to Michael Scholar, Muir Russell, David Wright and Gerry Spence.

Yours ever,

JULIAN WEST  
Private Secretary

Prime Minister

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To note.

The legal position

is just as bad as wefeared. That this has emerged

so late suggests extraordinary

incompetence in the Board if not the

Department.

MS 24/6

PRIME MINISTER

1 must  
sit(with  
the Chancellor.  
MS)

At your meeting on Monday I was asked to explore further, in consultation with the Attorney General, the Secretaries of State for Transport and Employment and Mr Sparrow, the extent of the legal constraints on the British Railways Board's (BRB) room for manoeuvre. You will recall that the point arose in discussion of Annex C to the Secretary of State for Transport's minute to you of 17 June.

2. A total rail strike by the NUR from midnight on Sunday 27 June still seems probable. The talks which the NUR sought with the BRB on Tuesday morning made no progress; and the further talks later that day with all the parties showed no change in the position of the trade unions. Thus, by the end of this week, ASLEF, which so far has not called for an all-out strike, will need to decide what to do. If they were to decide against participating in a strike called by the NUR, their members would continue to be paid only if they were to report daily for work, which would mean crossing NUR picket lines. Moreover, in the event of a strike the BRB may well decide to withdraw their pay offer. The assessment must therefore be that ASLEF is almost certain to strike from midnight on Sunday if the NUR persist with their strike.

3. However, against the possibility that ASLEF might prefer to leave the NUR in the front line, the BRB have been considering what their tactics should be. The Board is very concerned to avoid being seen by the general public to be paying ASLEF while the NUR is on strike, as the 1919 Guaranteed Week Agreement would require them to do. Their principal concern will therefore be to ensure that ASLEF participate in any strike. But the extent to which the BRB can force ASLEF's hand is circumscribed to some extent by the legal position, which they clearly have examined thoroughly and their assessment of which accords with our own.

4. The legal position is as follows. The BRB's 1919 Guaranteed Week Agreement - which forms part of the contract of employment of NUR and ASLEF members - requires the Board to pay guaranteed standard wages for 8 hours per day and 40 hours per week. Thus, if the BRB were to lay off without pay the members of one trade union because they had no work to do as a result of an all-out strike by other employees, individual railwaymen could sue the BRB for their guaranteed wages. Although the BRB will exploit such opportunities as the Agreement gives to mount an arguable case, the firm legal advice to them is that they would very probably lose such an action. This is also the Attorney General's view.

5. The position in relation to flexible rostering is more complex. The men could work the new rosters but demand to be paid on the basis of the 1919 Agreement ie. for 8 hours even if they were rostered for less, thus effectively nullifying the productivity gains. Alternatively, the men could refuse to work the new rosters. There would then appear to be three options for the BRB, viz:-

- i. Suspend the drivers without pay: the BRB would then be open either to action before the courts for wages due, which they had been advised that they would almost certainly lose; or alternatively, the employees could claim unfair and/or wrongful dismissal, which are discussed below.
- ii. dismiss the drivers without notice: the BRB would then be open either to action in the courts claiming wrongful dismissal, which they could again expect to lose to the extent of being bound to pay the wages outstanding in respect of the due notice period; or possibly also to unfair dismissal proceedings in an Industrial Tribunal as in iii. below; or
- iii. dismiss the drivers with due notice (of up to 12 weeks): this would leave the BRB open to a claim before an Industrial Tribunal for unfair dismissal, which they might succeed in defending on the grounds that their action was reasonable in the circumstances.

A test case in the courts might be brought in quite quickly; but proceedings before an Industrial Tribunal could take some months to resolve.

6. The BRB's assessment is that faced with suspension ASLEF would be much more likely to call an all-out strike than to seek redress through the courts. If the BRB were to dismiss drivers, ASLEF would almost certainly go to law.

7. Against that background the tactics which the Board intend to adopt over the next couple of weeks are as follows. The Board will not want to move immediately to suspend ASLEF members, if they are not directly involved in the strike, because they will want to assess the extent to which the NUR's strike call is being supported; there are signs in some areas that the membership may not be fully behind the NUR leadership in their call for an all-out strike. But if by the end of next week it is clear that the strike is being supported by the majority of NUR members, the Board will want so far as possible to try to force ASLEF to participate in the strike without running the risk of legal action. Withdrawal of the pay offer, or the imposition of flexible rosters, as planned, from 4 July, might be appropriate steps.

8. We should be ready to raise this with the Board if necessary. But in general I think we must leave it to them, in the light of the legal advice which they have, to decide how best to handle the situation over the next couple of weeks. If however, we seem set for a prolonged all-out strike on the railways, there are two points which will need to be considered at some stage.

9. First, the Board are considering whether it would be right at some point to dismiss the entire railway workforce and to offer to re-engage them on the basis of a new contract of employment. This might, for example, offer an opportunity for the Board to withdraw from the 1919 Guaranteed Week Agreement or substantially to modify it. A great deal of further work is required on this, which the Board has in hand. I understand that a major legal consideration relating to the new terms on which the BRB might offer to re-engage staff is the need for them to act reasonably.

10. Secondly, the Board will also need to consider at some stage whether there might be any advantage in concluding a separate deal with the NUR. A condition of such a deal might, for example, be that NUR members were prepared to substitute for ASLEF members in driving trains. There seems to be no legal obstacle, but the Board doubts whether such action would in fact be feasible for practical and safety reasons. I understand that they are preparing a detailed paper for the Secretary of State for Transport. Once he has that, he will want to consider with BRB what ways can be found through the problems.

11. I am sending a copy of this minute to the Home Secretary, the Secretaries of State for Scotland, Energy, Transport, Industry and Employment, the Attorney General, Mr Sparrow and Sir Robert Armstrong.

*J. Kew.*

*{ Seen by The Chancellor;  
Signed in his absence. }*

PP.

GEOFFREY HOWE  
24 June 1982