Railways: Railtrack administration and the private shareholders, 2001-2005

Standard Note: SN/BT/1076
Last updated: 10 August 2010
Author: Louise Butcher
Section Business and Transport

Railtrack was set up on 1 April 1994 under the *Railways Act 1993* to manage the rail infrastructure (track, stations, etc.). It was sold to the private sector on 20 May 1996. The Labour Government made changes to the operation and supervision of the rail industry in the *Transport Act 2000*, particularly to the regulator's powers over Railtrack's investment plans. Railtrack's main sources of revenue were the charges it levied on train operators for track access and the lease income it received for stations and depots. Until 2001 Railtrack did not receive direct revenue subsidy from the government although it was indirectly dependent on the significant amount of public sector support received by the train and freight operating companies.

Various reasons were put forward for the company's troubles, some dating back to the time it was privatised. For example, privatising an industry that continues to need large subsidies leads to problems; the form of privatisation chosen involved a mass of complicated and antagonistic relationships between Railtrack and its customers and the regulator; and no account appeared to have been taken of the poor state of the railway. Poor management and inadequate direction did not help; nor did the three major fatal rail accidents that occurred on its watch – all attributed to factors under the company's overall control.

Railtrack plc was put into administration on 7 October 2001 and came out of it on 1 October 2002. Network Rail took over many of its responsibilities on 3 October.

This Note provides information about Railtrack and the *Railway Administration Order Rules 2001* (SI 2001/3352). The last sections explain the position of the shareholders and the court case some of the private shareholders brought against the government in July 2005.

A more complete account of Railtrack is given in HC Library standard note SN/BT/1224; its successor, Network Rail, is covered in a further note, SN/BT/2129. Briefings on other rail issues are available on the Railways topical page of the Parliament website.

Contents

1 The Administration Order

Railtrack Group plc was the company in which shareholders had shares. Its main operating subsidiary was Railtrack plc, which was responsible for the management of the national rail infrastructure and it was this company that was placed in administration.

On 7 October 2001 the then Secretary of State for Transport, Stephen Byers, petitioned a High Court judge to put Railtrack plc into 'railway administration' under section 60 of the *Railways Act 1993*.[1] The *Railway Administration Order Rules 2001* (SI 2001/3352) were discussed in the House of Lords and the House of Commons in November 2001.[2] Neither the SRA nor the ORR was consulted beforehand about the Order. The shares were suspended the following morning, 8 October. The previous Friday they had closed at 280 pence a share, valuing the company at £1.46 billion.

In court, the Department for the Environment, Transport and the Regions (DETR)[3] argued that Railtrack should be put into administration because the company was at the time or was likely to be unable to pay its debts under section 60(2) of the 1993 Act; this is the formal test for an Order to be made. To back the claim, reports were submitted from the accountants, Andersons, and the bankers, Schroder Salomon Smith Barney. Both had been asked to investigate Railtrack's finances in August 2001, following a meeting between the Secretary of State and the Railtrack Chairman on 25 July.[4] The view was that Railtrack would have a £700 million deficit by 8 December when it was due to present its half-year results, rising to £1.7 billion in April 2002. The Secretary of State was not prepared to give Railtrack any further financial support.[5] He explained his position as follows:

> The government cannot justify any more additional public money for Railtrack. We provided a substantial package of financial assistance in April, but the company came

---

1 DTLR press notice, "Railtrack placed in administration", 7 October 2001

2 HL Deb 15 November 2001, cc758-762; and: HC Deb 22 November 2001, cc547-560

3 now the Department for Transport

4 details of the meeting set out in: HC Deb 15 October 2001, c954; TLR Committee, *Passenger rail franchising and the future of railway infrastructure* (first report of session 2001-02), HC 239-ii, 8 March 2002, Qq844-850; and *Minutes of meeting between Stephen Byers and John Robinson (Railtrack) on 25 July 2001* [available from HC Library]

5 HC Deb 15 October 2001, c955

to me in July asking for additional public subsidy. They subsequently also requested suspension of the regulatory regime.

Railtrack's costs and poor service penalties are expected to exceed the regulator's October 2000 determination - and the government's April rescue package - by over £2bn over the next five years. This is before taking account of the additional costs relating to Hatfield. In addition, projects, such as the west coast main line, are significantly over budget - the west coast upgrade may now exceed £7bn, compared to the original £2.3bn.

The government will stand behind the rail system and is prepared to spend over £30bn over the next ten years to ensure a substantially improved rail network, but is not prepared to fund the poor performance of individual companies.

As a result of our action today I intend to put forward a scheme for a new private company without shareholders, which will put proposals to the railway administrator to acquire Railtrack's core business. This will be a private sector company, working in the interests of the whole industry.

From today, Railtrack's rail network operations will be under the control of railway administrators. They, with the financial support of the government, will keep the railway running until the transfer of Railtrack's licensed activities out of administration as a going concern.

Current rail services will continue unaffected and Railtrack staff will continue to be paid and remain employed by the company under the control of the administrators. The administrators are already working closely with the Health and Safety Executive to ensure that whilst in administration Railtrack continues to meet the railway inspectorate's safety requirements.

The decision to petition for Railtrack to be placed into railway administration was taken when it became apparent that the company could not finance its activities on being told that the further significant financial support it had sought from government would not be provided. [6]

After the whole issue of Railtrack and the shareholders' court case (see below) had been settled there was some debate in the House as to the veracity of the government's statements about Railtrack's financial viability in the petition to the High Court.[7] In a debate in late 2005 the Conservative Party laid a motion for debate on the Labour Government's conduct regarding the administration of Railtrack. The Conservative Transport Spokesman at the time, Alan Duncan, charged that the government had deliberately driven Railtrack into administration because they wanted to, in effect, renationalise it for free. The Opposition's central claim was that:

> The Government knew that they were planning to use the railway administration regime for a collateral, and therefore illegal, purpose. They knew that to secure a railway administration order they had to convince a High Court judge that the company was insolvent. They knew that it was not insolvent as long as the rail regulator's jurisdiction was intact. They knew that they could not sever that lifeline without legislation, and that they could not pass such legislation in a short enough period of time, so they decided to present to the Court a case that contained serious and culpable omissions [...] There was definitely a plan to engineer the artificial insolvency

---

6 op cit., "Railtrack placed in administration"

7 questions were initially asked by the Opposition during a debate in late 2001, see: HC Deb 13 November 2001, cc715-771

> of Railtrack without reference to Parliament as a means of re-acquiring the company at no cost to the Government but at the expense of the shareholders. There are no two ways about it.[8]

The government refuted those claims.[9]

2 Role of the administrator

The administrators from Ernst & Young were responsible for the running of Railtrack during this period. According to section 59(1) of the 1993 Act the business should be managed for the "achievement of the purposes" of the Order and in a manner "which protects the respective interests of the members and creditors" during the period of administration.

The purposes of the Order were set out in section 59(2) as:

> …the transfer to another company, or (as respects different parts of its undertaking) to two or more different companies, as a going concern, of so much of the company's undertaking as it is necessary to transfer in order to ensure that the relevant activities may be properly carried out.

The administrator also had to carry out the activities of the company as set out in its network licence pending the transfer. In effect, this imposed an obligation on the special railway administrators to keep the railway network operations running to ensure that the management of the network could be transferred to a new entity.

As so often in railway legislation, various aims are set out, often conflicting, which have to be balanced. The administrator's purpose was to transfer the company as a going concern to another company. The interests of the creditors and shareholders also needed to be protected but were not more or less important than the company being kept as a going concern. In any insolvency case, the interests of the shareholders will rank below that of the creditors.

The Government's intention was that the railways would continue to run normally while in administration. However, delays increased, middle ranking managers left the company, and cost-saving plans were postponed. Initially the Railtrack directors continued to run the network while the administrators concentrated on sorting out the company's future. On 14 December 2001 it was announced that John Armitt would take over as Chief Executive, replacing John Robinson and Steve Marshall.[10]

3 Transfer out of administration

Details of the transfer scheme to a new company or companies are set out in Schedule 7 of the 1993 Act. Paragraph 2(2) states that a scheme shall not take effect unless it is approved by the Secretary of State, who also has the power to modify the scheme before approving it. It was the responsibility of the administrator to suggest the final outcome for Railtrack, but this had to be approved by the Secretary of State. As any successor company would be very dependent on Government money, it would in practice have been extraordinary if discussions were not held at an early stage between the administrator, the Secretary of State and any successor company. Agreement was also needed from shareholders, bondholders

---

8 HC Deb 24 October 2005, cc30-31

9 ibid., cc42-45

10 DTLR, *Statement by Stephen Byers: Appointment of senior management team at Railtrack*, 14 December 2001

and safety regulators. Primary legislation would not be needed to transfer the company out of administration, as it was not needed to put it into administration.

In October 2001 the Secretary of State published guidance on the principal issues he would need to be satisfied on before he would agree a transfer scheme. It had no legal basis and there was no need for the administrators to heed it but the aim was to save time and work for everyone involved. The Secretary of State said the guidelines could be revised. The guidelines were set out as follows:

> My principal objective, in determining whether or not to approve a proposed transfer scheme, is to ensure that the operation of the network will, after the proposed transfer, be undertaken efficiently, safely and economically.
>
> I also intend to ensure that I am satisfied on the following issues.
>
> **1. Efficiency and Viability**
>
> The technical expertise of the proposed transferee to operate, maintain, renew and enhance the railway network. This will include:
>
> presenting proposals for focussed and effective management (particularly in relation to contract management and planning, and a willingness to facilitate enhancement by special purpose vehicles or alternative structures for financing enhancements and developments which separate enhancement and development risk from operation, maintenance and renewal), and
>
> demonstrating that employees with appropriate skills will be retained and, where applicable, recruited;
>
> A proper understanding of the projected liabilities of the transferee and the performance risks it faces;
>
> A proper understanding of Railtrack PLC's network operating licence and a demonstrable intention and ability to comply with it;
>
> A proper understanding of the Government's strategic plans for the railway industry and a demonstrable commitment to them (including the 10 Year Plan and the SRA's Strategic Agenda);
>
> A coherent and cost-effective business plan for -
>
> ascertaining the condition of the network assets and life cycle cost minimisation,
>
> implementing output based contracts for maintenance and renewal,
>
> facilitating the successful implementation of special purpose vehicles (or equivalent arrangements) delivering large scale enhancements and renewals, and
>
> the maintenance of an assets register, including a description of process and timetable.
>
> Proposals for ascertaining the cost structure of the network business and the control systems to be implemented at both central and regional levels and how successful reporting mechanics are to be achieved.
>
> A cohesive, achievable and cost-effective strategy for dealing with those renewals and small enhancements that are not to be delivered by special purpose vehicles (or equivalents).

2. Safety

An ability to run the network safely, with a clearly defined safety policy;

Evidence that the Heath and Safety Executive has confidence in the proposed transferee and that the relevant Safety Case will be in place immediately following the transfer.

3. Key Relationships

Proposals for creating, at regional level, relationships with railway passenger and freight service operators and other stakeholders.

Evidence of support from employees and their representatives;

Evidence of the confidence of relevant stakeholders in the industry, for instance railway passenger and freight service operators and suppliers of finance.

4. Financial viability and value for money

A demonstrated ability to finance the activities of the proposed transferee in a cost-effective manner (including its proposed treatment of existing and future, short and long term finance creditors, and a demonstration that it will have a sufficiently high, investment grade, credit rating to raise the necessary finance for its activities).

A coherent plan for the treatment of existing trade and other creditors.

A demonstration that its approach would ensure that effective maintenance and renewal takes place at the lowest practical cost.

Proposals for the transfer of liabilities which relate to the operation, maintenance, renewal and development of the parts of the network that are to be transferred.

In addition and to achieve my overall objective, I will have regard to the extent and nature of Government support that will be required to operate the network after the proposed transfer and the value for money that this would represent for Government. I will expect any proposal for a transfer to address very clearly the basis, extent and nature of support that will be required from the Government. [11]

On 1 October 2002 a High Court judge released Railtrack from administration. On 3 October Network Rail took over the running of the country's rail infrastructure. It had offered £500 million to Railtrack Group, including a £300m Government subsidy.[12] It also took on more than £7.5 billion debt and unquantified liabilities, including any potential criminal or civil liability arising from past accidents.[13]

4 Shareholders

Railtrack had about 256,000 shareholders holding approximately 520 million shares. According to the annual report, 82 per cent of the shares were held by institutional shareholders at 1 May 2002 (compared with 42 per cent on 20 May 1996). Many of the

[11] DTLR press notice, "Byers publishes Railtrack transfer scheme guidelines", 31 October 2001 [PN 470/01]
[12] HC Deb 25 March 2002, cc581-82
[13] HC Deb 17 July 2002, c327W

remainder were held by small shareholders who bought shares at privatisation or were employees of the company.[14]

The Secretary of State made it clear that shareholders should have realised that a company in dire financial straits, dependent on ever increasing Government subsidies, could have that support withdrawn. As such he indicated that, as previously set out in the April 2002 'statement of principles' agreed between the Government and Railtrack,[15] there would be no compensation for shareholders:

> At the time of the April agreement, the Government felt that we should make it clear that our role should be to support the railway network but that we should not be seen as acting as guarantor of individual companies or their shareholders. We therefore agreed with Railtrack a statement of principles. The first point in the statement reads as follows:
>
> "The Government stands behind the rail system but not individual rail companies and their shareholders who need to be fully aware of the projected liabilities of the companies in which they invest and the performance risks they face".
>
> To ensure that that statement had wide circulation in the City, it was released through the stock exchange news service.
>
> The directors of Railtrack have now said that they want £3.60 a share. On our calculations, that would require the transfer of up to £1.5 billion of new money from the taxpayer direct to Railtrack shareholders. We believe that it would be wrong to make new money available, and we will not do it.[16]

Railtrack Group plc and Railtrack plc severed all ties on 12 February 2002. Railtrack Group, under the chairmanship of a lawyer, Geoffrey Howe, devoted itself to fight for shareholder compensation. Commenting on the separation, Railtrack Group chairman John Robinson said:

> Railtrack Group has assembled a small team whose sole aim is to achieve a fair value settlement for Railtrack's 250,000 shareholders, many of whom are employees, who have seen their assets wrongly confiscated.
>
> Joint legal action, in conjunction with our shareholders, against the Government's decision to put Railtrack PLC into Administration is one of the avenues we will be pursuing as well as deriving the best value for the assets held directly in the Group; namely the Channel Tunnel Rail Link and our property development portfolio.[17]

The value of Railtrack shares depended on the value of assets held by Railtrack Group. When the company went into administration the non-regulated parts of Railtrack Group's activities (i.e. those not in administration) included: the property portfolio (excluding that essential to the operation of the railway) and other non-regulated businesses such as telecoms; £370 million in cash at HSBC; and the concession to run phase 1 of the Channel Tunnel Rail Link (CTRL).

Most of the assets of the company were held in Railtrack plc. The financial consequences for shareholders in Railtrack Group plc therefore depended on the terms of any scheme

---

14 *Railtrack Annual Report and Accounts, Year Ended 31 March 2002*, October 2002, p69
15 HC Deb 2 April 2001, c8W
16 HC Deb 15 October 2001, c955
17 Railtrack press notice, "Split of Railtrack Group and Railtrack plc Boards", 13 February 2002

proposed by the Joint Special Railway Administrators for the transfer of Railtrack plc business and assets out of administration as a going concern. If there was a surplus value, net of liabilities, this would be made available to Railtrack Group plc and its shareholders.[18]

Railtrack and pressure groups claimed they were due 360 pence a share, or at least the 280 pence that the shares were worth when the company was put into administration. Subsequent estimations were that they would receive between approximately 252 and 260 pence a share,[19] or between 245 and 255 pence per share, to be paid in instalments.[20] In the end, 262.5 pence per share was paid out in five instalments.[21] The final package was based on the share capital of Railtrack plc (disposed to Network Rail for £500 million); interests in the CTRL (disposed to London & Continental Railways and Network Rail for £375 million); the amount recoverable from Railtrack plc (about £350 million); and property and other assets and liabilities including deal expenses (net book value of £87 million).[22] Shareholders in Railtrack Group voted for voluntary liquidation on 18 October 2002[23] and various shareholders action groups were set up to take legal advice on the company's fate.

5 Court case

Railtrack Private Shareholders[24] issued a writ in the High Court against the Government on 2 December 2003. The Government responded in March 2004. The trial on liability started in the Chancery Division of the High Court on 27 June 2005. The details were set out in the Particulars of Claim, a legal document running to some 67 pages.[25] It was intended to demonstrate that the Secretary of State and the Department for Transport acted in bad faith and abused the power vested in them as public officers. The Government's costs that the shareholders could be liable for are limited by the "cost-capping" agreement, made following hearing in the High Court on 19-20 April 2005.[26]

5.1 The charges

The shareholders alleged "misfeasance" - that the Government and the then Secretary of State for Transport, Stephen Byers, acted within the law but in bad faith - and a breach of human rights for confiscation of assets. The Government had always said that the firm was not capable of running the railways and was insolvent without its support. The critical question in the case was whether Railtrack simply ran out of money or whether the Government plotted its downfall.

Had the shareholders won, a second trial would have had to take place to determine damages. RPSAG argued that specialist economists and accountants had valued the railway operating company at several times the £500 million at which it was sold back to the Government. Had Railtrack been formally and properly nationalised in 2001, shareholders may have received 800 to 1,000 pence per share (the average of the previous three years' share price). Only those named in the final Schedule of Claimants would have been entitled to receive the benefit of any judgment resulting from the case. Those who were not

---

18 HC Deb 21 November 2001, c362W
19 RT Group plc press notice, "Return of cash to shareholders", 20 September 2002
20 RT Group plc, *Notice of Extraordinary General Meeting*, July 2002, p4
21 RT Group plc, *Letter from the Joint Liquidators of RT Group PLC*, 12 February 2010
22 op cit., *Notice of Extraordinary General Meeting*, p4
23 more information available on the RT Group plc website
24 represented by the Railtrack Private Shareholders Action Group (RPSAG)
25 RPSAG, *Particulars of Claim*, 2 December 2003
26 RPSAG, *Claimant's Witness Statement for the "cost-capping" hearing in the High Court*, 19-20 April 2005

participating would not have been entitled to share in any award by the Court. RPSAG's view was that anyone who was holding shares on 7 October 2001 had a claim against the Government, even if they had since sold them and/or received money from the liquidators.

5.2 Views given during court proceedings

The defence given by the Government was that the failure of Railtrack was down to management incompetence, not to its own misfeasance:

> The claim by Railtrack shareholders that they were robbed of their investments by a malicious Transport Secretary is "wholly groundless and perfectly absurd", the High Court was told yesterday.
>
> The shareholders allege that the Government was guilty of "misfeasance in public office" and acted with "targeted malice" towards shareholders to deprive them of their property when it put Railtrack into administration in October 2001.
>
> However, Jonathan Sumption, QC, opened his defence of the Government by saying that the claims at the centre of the 49,000 small shareholders' case were false and misconceived.
>
> "A company whose financial situation is such that it can only survive if it raises very large sums of money to which it is not entitled is bust," Mr Sumption said, in the seventh day of the case.
>
> He argued that that was the financial position of Railtrack for some time before it was put into administration.
>
> Mr Sumption said that the claim by Keith Rowley, QC, for the claimants, that the "sins" of Railtrack should not be visited on his clients was "one of the more remarkable" of Mr Rowley's assertions.
>
> "There is every reason why the sins of Railtrack should be visited on his clients," Mr Sumption said. "The prime risk that shareholders take is that the management of a company will mismanage it."
>
> He added: "In our submission, the description of Railtrack as a basket case is a mild word to describe the condition of Railtrack as revealed to my clients." Mr Sumption said that Railtrack's financial problems were a result of "the inefficiency and incompetence" of its management.
>
> "It was not the Government's duty to save Railtrack from going bust," Mr Sumption said. "The Government had made its position perfectly clear. The Government stands behind the railway system, but not behind individual companies and shareholders."
>
> Earlier, Mr Rowley said that Stephen Byers, within days of becoming Transport Secretary in June 2001, had been advised of the costly options of getting Railtrack back under government control. However, the 0Secretary of State realised that the same result could be achieved "by the much simpler and cheaper route" of putting the company into administration.
>
> Mr Rowley said that Mr Byers was "acting in bad faith for improper purposes". He added: "Mr Byers was looking to remove an asset without making payment for it. That is an intention to injure." [27]

The former Secretary of State for Transport, Mr Byers, gave his view in a witness statement:

> In his witness statement Mr Byers said he had decided to seek to put Railtrack into administration not in pursuit of renationalisation but because by October he had decided that "enough was enough; that Railtrack was part of the problem with the railway network and was incapable of providing a solution and that a new approach was needed. We had no intention of expropriating assets of Railtrack Group or Railtrack or of injuring shareholders - we were simply concerned to keep the rail network running and the infra structure in place once it became clear Railtrack could not do so itself".
>
> Mr Byers said he would have preferred Railtrack to solve its own problems and to establish itself without further recourse to taxpayers' cash. "Unfortunately it was not able to do this and I had to decide whether to provide further public funding to permit Railtrack to limp on or to recognise that Railtrack was a lost cause and to decide against providing further funding and deal with the situation that flowed from that decision. I chose the latter course." [28]

He was later forced to admit in court, however, that he had lied to Parliament:

> On Thursday afternoon, Rowley turned to Byers' evidence before a hearing of the transport select committee in November 2001, a month after Railtrack had been put into administration. MPs had wanted to examine the government's version of events - that administration for Railtrack had only begun to be looked at after a meeting on July 25 at which John Robinson, Railtrack's chairman, had told Byers the company was in considerable financial difficulty and would need to be bailed out.
>
> Chris Grayling, Conservative MP for Epsom and Ewell, had asked the fatal question.
>
> Was there, Grayling wanted to know, any discussion "theoretical or otherwise" about a change in Railtrack's status before that July meeting? Byers' answer then had been simple: "Not that I am aware of."
>
> As Rowley set the scene, everyone in court could see his next question coming. It was obvious; for the previous fortnight the court had done little but crawl through scores of documents in which civil servants and advisers had discussed all kinds of options for Railtrack, including administration, well before the July 25 meeting. The torpedo was in the water, and Byers could see it running straight for him.
>
> Rowley: That answer was untrue, was it not, Mr Byers?
>
> Byers: It is true to say there was work going on, so, yes, that was untrue.
>
> Rowley: That was untrue?
>
> Byers: It was.
>
> Rowley twisted the knife. He ran through examples of how officials had been working on the future of Railtrack, putting each in turn to the witness. Yes, a now clearly flustered Byers had to answer, confirming at every step Rowley's point.
>
> Rowley: It (the answer to the select committee) was deliberately not an accurate statement, was it not, Mr Byers?

---

[27] "Railtrack failed 'because of management incompetence'", *The Times*, 6 July 2005

[28] "Railtrack: I put the public interest first, says Byers", *The Guardian*, 13 July 2005

> Byers: It was such a long time ago, I cannot remember, but it is not a truthful statement and I apologise for that. I cannot remember the motives behind it.[29]

Many of the press reports at the time focused of the role of the Treasury, revealed in many of the documents that were released during proceedings, and whether it had deliberately steered Railtrack towards administration.[30] For example, *The Daily Telegraph* reported:

> The Treasury was at the centre of plans to force Railtrack into administration in October 2001, the High Court heard yesterday. A senior adviser to the Chancellor, Gordon Brown, was shown to be the driving force behind plans to restructure the rail industry - coining the code name Project Ariel - as early as July that year. Shriti Vadera, a former Warburg banker, sent an e-mail to Treasury colleagues on July 26 that said: "If we are to use the insolvency route to restructuring RT it does not work for us politically to be seen to be reacting to a privatisation going wrong which everyone said was going wrong ages ago but we were too pig-headed to listen. "I was thinking we need a trigger to insolvency that we decisively pull." Keith Rowley, QC, on the third day of the hearing, said the e-mail showed that the Government was "looking to use insolvency as the route" to acquire Railtrack's assets without compensating its shareholders. [31]

The *Financial Times* reported:

> If Railtrack hoped for sympathetic government help in finding a pot of gold at the end of Project Rainbow, it was to be disappointed. The e-mails suggest Labour had little love for the company, born of a 1996 flotation under the previous Conservative administration. Oliver Robbins, a Treasury official, reflected the Whitehall view when he wrote in March: "RT (Railtrack) are a deeply unpopular organisation, doing what is widely regarded as a bad job."
>
> The prime minister and chancellor differed sharply in their initial views on how to deal with this "deeply unpopular" dilemma. Tony Blair erred towards protecting investors. On a document laying out the options in early August, he scribbled: "None of these are easy. Instinctively, I prefer the takeover."
>
> Mr Brown's instincts did not concur. He had set down "10 questions" that any Railtrack proposal must answer, not least the "future debt not to score on the PSNB (public sector net borrowing requirement)". An e-mail from the transport department in September explained why the chancellor was adamant: "Senior officials at the Treasury have made clear that the global situation means that the public finances are deteriorating day by day."
>
> The Treasury gave little credence to assurances from the Office for National Statistics that Renewco would not affect these public finances. A Treasury official warned on September 14 of the risk "the ONS change their mind and it all ends in tears. This is likely to happen with Renewco".

---

29 "Once upon a train…", *The Sunday Times*, 17 July 2005; Mr Byers apologised to the House in a personal statement, see: HC Deb 17 October 2005, c639; but Chris Grayling who had asked the original question at the Select Committee hearing did not accept the apology and the matter was referred to the Standards and Privileges Committee; Mr Byers made a further statement of apology following the publication of the Committee's report, see: Standards and Privileges Committee, *Mr Stephen Byers (Matter referred on 19 October 2005)* (sixth report of session 2005-06), HC 854, 31 January 2006; and: HC Deb 1 February 2006, c319

30 after the case was concluded the Conservatives held an Opposition Day debate on the collapse of Railtrack, with particular focus on the role of the then Chancellor, Gordon Brown, the Treasury and the other relevant Government departments, see HC Deb 24 October 2005, cc21-88

31 "Treasury 'was at centre of plan to force Railtrack into insolvency'", *The Daily Telegraph*, 30 June 2005

> The e-mail trail suggests the Treasury wanted to avoid this risk by putting Railtrack into administration. A message on September 17 from Shriti Vadera, one of Mr Brown's economic advisers, stated bluntly: "I don't think we can sign Renewco it's the kiss of depth (sic) for the administration option."
>
> Mr Brown seems to have applied such a kiss to any thoughts of compensating the 250,000 small shareholders, termed "grannies (who will) lose their blouses" by one of his officials. Mr Blair worried about the political fallout from being perceived to have abandoned the grannies. "PM nervous about not bailing out shareholders," an e-mail from Ms Vadera on September 4 reads, while a note of a meeting later that month asks: "What can we do with grannies compensation? eg travel pass? (This is No 10!!!!)"
>
> The Treasury had no such qualms. As early as August, Ms Vadera insisted in an e-mail: "It would be politically dreadful to be paying off Ariel shareholders and I see absolutely no reason we should want to." But Mr Brown was also anxious that the treatment of Railtrack should not scare the City from investing in government initiatives such as public private partnerships.
>
> A draft of Mr Byers' announcement of Railtrack's demise in October contains the assertion that any company dealing with the state runs the risk of losing the confidence of the government. "PLEASE remove this," one unnamed official wrote. "This wholly undermines PPPs . . . no market can take us seriously if they think creditworthiness de-pends on political will and confidence." Mr Brown must now hope the case does not revive such City concerns. [32]

Following an investigation, the *Scotland on Sunday* reported:

> …the pressure may also be on the Treasury and No 10 to explain their roles in urging Byers to seize back Railtrack with scant regard for shareholders. Blair personally made the decision to "extinguish" the rail regulator to stop him from throwing a financial lifeline to Railtrack. But what became clear during this case - and especially during Byers' testimony - is that the guiding hand in the Railtrack affair was Brown.
>
> The correspondence of Vadera and senior government figures reveals that Brown, while pushing for "renationalisation", also fiercely opposed shareholder compensation. Byers himself revealed in court the existence of the "Chancellor's 10 commandments": conditions that had to be met if the Treasury was to approve Railtrack's transformation into a non-equity company limited by guarantee, the entity that eventually became Network Rail, the present operator of the rail network.
>
> In another piece of manipulation, Brown was adamant that the company's GBP 21bn of debt would remain off the Treasury's balance sheet; and that's how it turned out. Network Rail, though it has no shareholders and relies entirely on taxpayer subsidy, is still not classified as a public company, something about which the independent National Audit Office (NAO) is said to be concerned.
>
> "The charge levelled against this government, for which there is a rising mountain of evidence, paints a picture of the gravest deception ever to have been perpetuated by ministers," says the Conservatives' Alan Duncan.[33]

The former Department of Transport civil servant Martin Sixsmith gave a personal view of how the events had taken place in Whitehall in *The Sunday Times*. He gave a view on the importance of the date of the announcement:

---

[32] "Treasury exposed as grannies crack the code", *Financial Times*, 2 July 2005

> Why was the date that the decision was taken to close down Railtrack so important? Because, if there was a delay in making the announcement, the government could have broken one of the key rules of the City: if you know you are sending a firm down the tubes, you have to announce it straight away. Otherwise you would be creating a "false market", allowing investors to buy shares in a company you know is about to become worthless. Think about all those people who may have put their money into Railtrack between the time that Byers decided to nix it and the day it was actually nixed.
>
> If there was a delay, that might explain why the whole decision-making process had been shrouded in such unprecedented secrecy. Before the announcement Byers, Moore, Vadera, Dan Corry and Alastair Campbell had kept the whole thing under wraps. Few if any civil servants were allowed anywhere near it. The official explanation was that the project involved market sensitive information and civil servants just couldn't be trusted not to leak it.
>
> But was the real reason, perhaps, that the civil service might have told them they were doing something in bad faith? This is a crucial issue for the court to decide.
>
> On top of everything there was the political endgame, the popularity that the politicians would win themselves for axeing an organisation that made the trains not run on time and which commuters loved to hate. Compared with that, you might ask, what did it matter about a few shareholders? [34]

5.3 The judgement

On 14 October 2005 the presiding Judge, Mr Justice Lindsay, dismissed the case against the Government.[35] The *Financial Times* reported:

> …in his judgment, Mr Justice Lindsay said Mr Byers had acknowledged telling an untruth but it was up to the House of Commons to determine if the former minister was a liar. The judge added: "Of course, that he had lied to the House of Commons, should the House so find, would not, of itself, indicate he had lied to me.
>
> "His (Mr Byers') demeanour throughout - no doubt the claimants would say that this was yet more successful dissembling - was of a witness confident in the rightness of his case. The only time his answers descended to unreason was in this answer, in re-examination, as to his reasons for the admitted untruth in parliament. His explanation as then given seemed to me little above gibberish, but it will be for parliament to assess what he meant."
>
> After those factual findings, the judge had little difficulty in dismissing the misfeasance claim. "Mr Byers is accused of engineering a situation in which he could present evidence that Railtrack was, or was unlikely to be able to pay its debts as they fell due. But that needed no engineering. Mr Robinson's heartfelt evidence that the government created Railtrack's insolvency is not acceptable."
>
> The judge was unable to find improper or dishonest intent. "There is no sufficient material . . . to infer that Mr Byers, to whom were available good policy grounds for

---

33 "Revealed: how Brown drove Railtrack onto the buffers", *Scotland on Sunday*, 24 July 2007

34 "When they spun Railtrack into oblivion", *The Sunday Times*, 3 July 2005; following the decision Mr Sixsmith followed this up with another article on the role of the Chancellor: "The man who ate Railtrack", *The Sunday Times*, 16 October 2005

35 *Weir and others v Secretary of State for Transport and another - [2005] All ER (D) 160 (Oct)*, 14 October 2005

> acting as he did, should . . . have acted with a specific intent to impair the financial interests of group shareholders," he said.[36]

Writing in *The Guardian* following the judgement, Mr Byers said:

> The principle at stake here is the extent to which restrictions should be placed on the power of government ministers to act in the public interest. Is it the case that, for example, the sectional interests of shareholders in a monopoly public service should limit the ability of a minister to act in order to benefit the population at large?
>
> This raises serious questions about accountability in a democracy. On this occasion the high court has taken the right decision. But there is no guarantee that this will always be the case. My concern is the impact that the threat of an action for misfeasance in public office will have on decision-making in government. Ministers will be acutely aware that the legal process can be used to pursue political objectives. The danger must be that in the future, when a cabinet minister comes to weigh up the arguments for and against taking a major public policy decision that they know will be politically controversial, the threat of being subject to an action for misfeasance will tilt the balance in favour of simply leaving things as they are.
>
> Many commentators already say we have a risk-averse government as far as action on the domestic policy front is concerned; that as time has gone on in office it has become more of an administration running the existing state of affairs than a government with the political edge and the motivation to take those difficult decisions that will change our country for the good.
>
> History teaches us that those who have control and influence do not give them up easily. They now have a new weapon in their armoury - the bringing of an action for misfeasance in public office.
>
> Yesterday the high court upheld the primacy of our democratic system and the accountability of ministers to the population at large. I just hope that in the future this remains the case.[37]

In a statement RPSAG said:

> We are both disappointed and perplexed by today's Judgment. Anybody who sat through the trial will find the Judge's conclusions bizarre.
>
> He seems to have attributed to a number of documents the least likely interpretation. In doing so he has reached a decision which we cannot accept as right.
>
> For instance, his definition of what constitutes a liar, as regards Mr Byers, is confused in the extreme. Apparently admitting lying to Parliament does not make you a proven liar. Nor does the Judge consider the Government teams' various reference to our members as "grannies" to be dismissive or derogatory. He considers it almost a term of endearment.
>
> This Judgment gives the Government carte blanche to act as they please in future, without fear of judicial scrutiny.
>
> Our 50,000 members will be extremely unhappy with the content of the Judgment. We will consider whether there are grounds to appeal. We are proud of our members and of the achievements of our team.

---

[36] "Bruised former shareholders consider appeal", *Financial Times*, 15-16 October 2005

[37] "Democracy upheld", *The Guardian,* 15 October 2005

> We now look to Parliament to investigate why Mr Byers lied to it, and why he feels that there are many reasons why a minister may wish to do so.[38]

On 21 October RPSAG announced that it would not appeal the decision. Andrew Chalklen, Chairman, RPSAG, said:

> The rightness of our case has been proved but this judge's ruling does not allow strong grounds for appeal. This case hinged on the credibility of Stephen Byers. We felt that the evidence and cross examination by our barrister comprehensively destroyed that credibility. The judge did not agree. We remain convinced of the strength of our arguments and disagree strongly with this judge's findings.
>
> On the basis of our legal advice, we cannot justify continuing this action. We are very proud of what this Group has achieved. We have taken on an overbearing Government that has behaved disgracefully throughout this whole affair. The evidence quite clearly shows us that it engineered the administration of Railtrack for political purposes.[39]

[38] RPSAG press notice, 14 October 2005
[39] RPSAG press notice, 21 October 2005