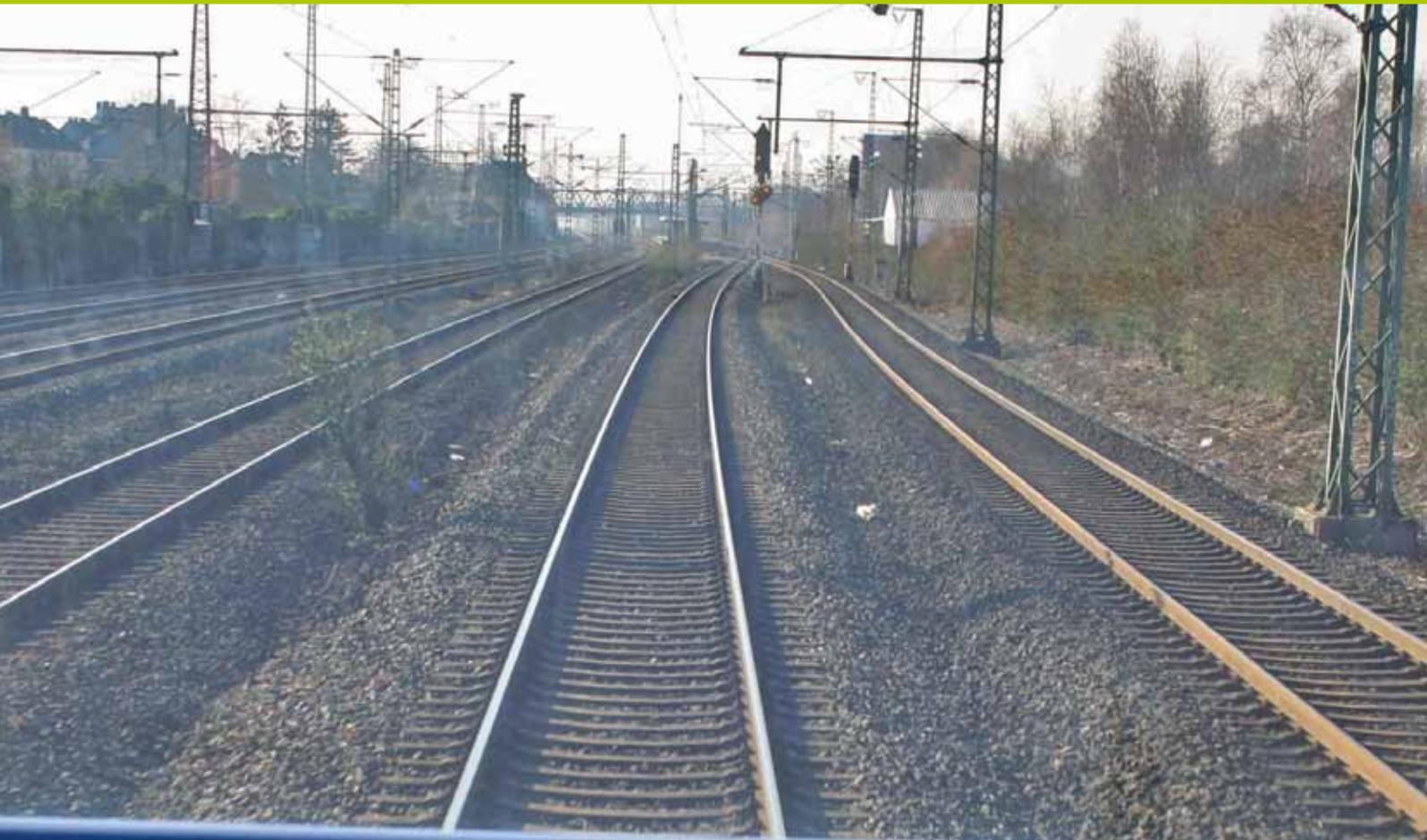


# mopinio

Das mobifair-Magazin

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*Out of control*

## Editorial



*Via a whole range of directives, regulations and other legal instruments, the EU has regulated many aspects of cross-border rail traffic. But who is responsible for monitoring compliance?*

*Who carries out checks as to whether the regulations on working time, on safety-related aspects, on the qualifications of train staff are actually complied with? The answer could be so simple: each Member State needs only to set up its own central inspection agency. This whole aspect is however neglected in the EU directives - and inspections are accordingly the exception rather than the rule.*

*The Federal agency responsible for rail transport in Germany is the Eisenbahnbundesamt (EBA). Set up as a supervisory and licensing authority, when it comes to controlling compliance it quickly reaches its limits. Looking for instance at working and driving time controls for train drivers, it has no competence. According to the EBA, responsibility for this lies with the individual Bundesländer. But according to the Bundesländer, the EBA is in certain cases responsible. So who actually controls compliance with driving hours and breaks on a freight train travelling from the Czech border to the German/Dutch border? Who checks whether the train drivers have adequate knowledge of the route and adequate language skills? Whether account is taken of a driver's suitability and qualifications?*

*In freight traffic in particular, rail companies send their trains all over Europe. In an integrated Single Market, the intention is that trains and passengers can cross borders without controls. The EU is doing everything to promote market interoperability and is investing in infrastructures. Passenger rights and the working conditions of rail staff are being / have been harmonised. Harmonised standards for training and certifying qualifications are compiled in Brussels, and their implementation is one of the tasks of the European Railway Agency. The regulations are not without controversy and in the opinion of unions and transport experts not always sufficient; but they do exist.*

*What doesn't exist is a framework for monitoring compliance. Even if agreement can be reached on who is responsible, the question remains of how inspections can take place. Taking freight transport as an example, we see freight trains travelling several times a week from Prague to Rotterdam. Crews change at the Czech border post in Decin, with a new crew taking the train to Emmerich on the German/Dutch border. There are just no checks in the present system on how long individual train drivers have been driving. They might have already been driving before taking over the train in Decin. What is needed is a personalised driver's card, on which driving hours and other data can be recorded (see the article on page xx). Without such, effective controls remain impossible.*

*The EVG is therefore calling for a monitoring campaign in rail transport, not only in the interest of staff, but also of rail safety. Breaches against applicable laws or regulations need to be severely punished. This necessitates the establishment of inspection bodies with appropriate instruments for checking whether regulations have been breached. This is also the intention of mobifair, and it is therefore supporting these demands through research work documenting the necessity.*

*Helmut Diener, Executive Secretary*

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## THE REGULATION ON TRAIN DRIVING LICENCES:

# *details remain unregulated*

.....

The aim of Directive 2007/59/EC of the European Parliament and of the Council of 23 October 2007 on the certification of train drivers operating locomotives and trains on the railway system in the Community is to harmonise the regulations of individual Member States and at the same time to maintain high safety standards within Europe. The German regulation on train driving licences (the *Triebfahrzeugführerschein-Verordnung* or *TfV* transposing the Directive) stipulates the requirements for gaining a train driving licence, while at the same time specifying training requirements and the organisation of driving tests. In addition, the regulation contains rules governing the registers of licences and complementary certificates as well as supervision and control provisions.

Is this really the case? mobifair says „No“. There are still too many gaps to be closed to achieve true European harmonisation. Test regulations are just one example. Subject to national regulations, in Germany these are currently being drawn up in preparation for national implementation. The German railway trade union EVG is in addition calling for an overall plan clearly specifying what needs to be learned (training content) and setting deadlines. This view is shared by mobifair. Training programmes must not be constructed by „rule of the thumb“. Instead they need clear specifications and rules. mobifair regrets to say that its research shows that training programmes can last anything between six and nine months, dependent on attitudes, costs or demand. One requirement for a good training programme is that it covers the full range of subjects (general, train- and network-related skills), allowing participants to gain the complementary „B“ certificate. This requirement justifies a 12-month training programme and, in the view of mobifair, needs to be applied throughout Europe as a minimum standard.

Furthermore, there are no clear provisions regarding VET institutions. Training train drivers has become subject to idiotic competition, negatively influencing training quality. Training institutions, up to now providing high-quality training programmes, are now under attack from „low-cost providers“. The latter are not to be underestimated, in particular because such programmes are paid for using state subsidies - the so-called „Bildungsgutscheine“ (VET vouchers) - when unemployed applicants are involved. The result is that institutions are now moving into the market that basically have nothing to do with train driver training. Religious institutions are one

example here, whereby they buy in the actual training from third parties. The purchasers, in this case the railway companies, are able to put pressure on the training institutions with regard to both prices and course duration. The „quality“ of the examination result is ultimately certified by the applicant’s „own“ manager, the person responsible for conducting the examination. This alone is a reason for the EVG and mobifair to call for training programmes to be more strictly controlled and for examinations to be conducted by bodies independent of the railway companies.

### A PROPOS LICENCES

An official government authority must be responsible for issuing and registering train driving licences, and all efforts to suspend the distribution of the new European train driving licences must be stopped. By means of a cost-benefit analysis and an application to the EU, the German Federal Government is currently trying to retain the old provisional licence (the so-called „VDV 753“) for domestic rail operations, basically meaning that there would be two classes of train drivers.

It is virtually impossible to control the current practice of awarding licences. According to mobifair research, it is even possible to order such VDV licences on the Internet (whereby the forms for the complementary certificates are included in the delivery). There is no need to provide evidence of previous experience. As part of the mobifair research, the following test case was used: A journalist ordered a licence. On receipt thereof, he contacted a recruiting agency and was given an assignment without further investigation. He asked whether he needed a complementary certificate for the specific type of rolling

stock to be driven, and was told that he would receive it in connection with the assignment. Though the assignment was never actually performed, it illustrates the existence of such mechanisms. Obviously this case has now been taken up by mobifair.

### A PROPOS SELF-EMPLOYED TRAIN DRIVERS (FREELANCERS)

Freelancers are leveraging the shortage of train drivers on the labour market and are now to be found working throughout the German rail network - and probably throughout Europe. Offering their services for EUR 35 - 50 an hour, their websites list as references the railway companies they have already worked for. They advertise themselves as well trained, able to work everywhere and anywhere, and as having in-depth knowledge of the network and the different rolling stock.

mobifair has sent an official inquiry to the German Federal Government asking whether such dubious forms of employment are compatible with the safety requirements needing to be met by a train driver and whether rail legislation permits the use of freelancers. The official answer is that there is no such thing as „self-employed train drivers“ in rail legislation. There is no statutory provision allowing train drivers to work in a self-employed capacity independent of a railway company and not under the control of the latter. With regard to all safety issues, train drivers are subject to the provisions of the German Railway Act (Allgemeines Eisenbahngesetz), one of which stipulates independent supervision by a rail operations manager. This means on the one hand that there is no statutory provision actually prohibiting the use of self-employed train drivers, as long as there is a guarantee that the work is controlled in exactly the same way as for a train driver employed by a railway company. On the other hand, it also means that a self-employed train driver belongs to the company during his assignment and that he must be assigned and controlled by the latter - i.e. the operations manager of the railway company bears responsibility for checking whether such train drivers fulfil the safety requirements.

### COURT RULINGS ON THIS SUBJECT:

In the case brought before the court in Frankfurt (Oberlandesgericht Frankfurt a.M., ruling of 22.03.2013 (Az: 26 U 43/12) the case at issue was whether train drivers were working for the sued railway company in the context of a service contract (Werkvertrag) or as temporary agency workers. The court ruled that in this concrete case, taking into account the way the contracts were drawn

up and the specific provisions of the German Railway Act, the train drivers were not working under a service contract, but instead in the capacity of temporary agency workers. This in turn meant that the railway company could not claim damages from the drivers, as they were working in and for the company and that the temporary agency supplying them was only legally responsible for selecting the right workers, and not for the proper execution of the transport contract. The ruling that this was a case of temporary agency work was taken on the basis of the specific provisions of the German Railway Act, under which the operations manager of the railway company bears full responsibility for guaranteeing operational safety, and thus for all workers involved, regardless of whether they are actually on the payroll of the railway company. This ruling underlines the tight operational integration of train drivers, in turn a feature of a salaried employee rather than a self-employed worker.

The clear position of train drivers organised in the EVG is that there should be no self-employed train drivers. In their view, the problem is not just about the threat to their jobs and the safety risks involved, but also that the longstanding job profile with its specific skill requirements is under threat.

### A PROPOS DRIVER CARDS

The problems associated with training, licences or the use of self-employed train drivers illustrate the need for greater controls. Even if implementation is not functioning without problems, there should at least be an adequate level of controls guaranteeing greater safety and the consistent application of the TfV and other European safety regulations. A special focus needs to be put on interoperable cross-border traffic. There is a great lack of transparency here and there are many loopholes allowing for the circumvention of required qualifications and violations against working time provisions.

mobifair has received tips and has itself conducted research showing that in many cases the necessary requirements just do not exist. These range from missing language skills to severe breaches of working time regulations. There are companies operating in the market in which employees are considered „softies“ when they are not prepared to work shifts of 18 hours or more. We often come across train drivers taking a break, stating that they have been underway for almost three days, and who feel like long-distance lorry drivers waiting for a new cargo for the return trip. In regions close to the border, train drivers are used whose qualifications just cannot



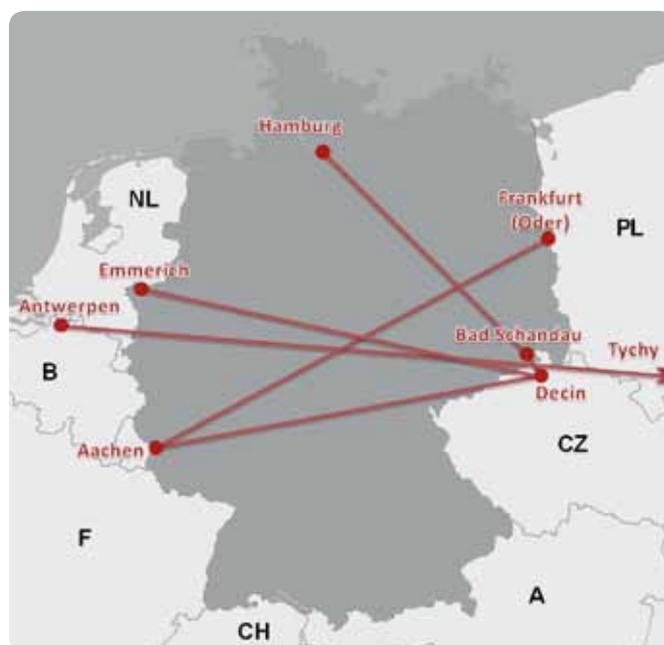
be controlled. Even if we assume that they have a driving licence and a complementary certificate, the questions remain as to whether they also have the necessary knowledge of the route, whether they have taken the required CVET courses, and whether they are generally suitable. But the main question concerns working hours. A trip across Germany requires more hours than allowed. What is very evident is that in most cases it is the lowest-cost providers who are underway. And the way to come up with the cheapest offer on the market is to pay the lowest wages, disregard qualification requirements and to interpret working time regulations very broadly.

The opinion of the EVG is that, to facilitate controls in this „grey market“, a digital driver card needs to be introduced. Such a card would have the personal qualifications of the train driver stored on a chip. Moreover all licence details, working and rest times would have to be recorded. Locomotives need to be fitted with card readers able to check the authorisation to drive the locomotive and to guarantee compliance with statutory working time regulations. Already standard practice in road freight and buses, such practice must also apply to rail traffic.

### CURRENT REGULATIONS

Directive **2005/47/EC** on the Agreement between the Community of European Railways (CER) and the European Transport Workers' Federation (ETF) regulates certain aspects of the working conditions of mobile workers engaged in interoperable cross-border services in the railway sector and has already been transposed into national legislation.

This directive gives legal status to the important agreement reached between the ETF and the CER, setting



down clear provisions on daily rest periods at home, daily working time, rest periods away from home, breaks, weekly rest periods and driving hours.

Directive **2001/16/EC** on the interoperability of the trans-European conventional rail system, whereby interoperability is defined as „the ability of the trans-European conventional rail system to allow the safe and uninterrupted movement of trains which accomplish the required levels of performance for these lines. This ability rests on all the regulatory, technical and operational conditions which must be met in order to satisfy the essential requirements.“ This directive regulates inter alia „the professional qualifications and health and safety conditions of the staff who contribute to its operation.“ To ensure interoperability, so-called „technical specifications for interoperability“ (TSIs) are to be compiled. These TSIs

have legal character, are set by the European Commission and apply to rail transport throughout Europe. They define the specifications by which each subsystem or part subsystem is covered in order to meet the essential requirements and ensure the interoperability of the trans-European conventional rail system. The 203-page TSI for the subsystem “operation and traffic management” constitutes the link to the directive.

Directive **2004/49/EC** on railway safety similarly stipulates unrestricted application of health and safety regulations to railway staff, pointing to the importance of driving and rest times for maintaining safety standards on the rail network. Its Annex V describes the „Principal

content of accident and incident investigation reports“, with Item 3.6 referring specifically to the man-machine-organisation interface: “working time applied to the staff involved, ....., design of equipment with impact on the man-machine interface“. In the opinion of mobifair, this can all be achieved through the use of a driver card.

Taking as a basis the above-mentioned TSI belonging to Directive 2001/16/EC as well as Directive 2004/49/EC, we find that the TSI defines requirements with regard to rail operations and processes, which network operators and rail companies need to fulfil – as a fundamental requirement – when applying for a safety certificate under Directive 2004/49/EC.

#### The TSI also calls for a driver card: 4.2.3.5 Data recording

Data pertaining to the running of a train must be recorded and retained for the purposes of:

- Supporting systematic safety monitoring as a means of preventing incidents and accidents.
- Identifying driver, train and infrastructure performance in the period leading up to and (if appropriate) immediately after an incident or accident, to enable the identification of causes related to train driving or train equipment, and supporting the case for new or changed measures to prevent recurrence.
- To record information relating to the performance of both the locomotive/traction unit and the person driving, including working time.

It must be possible to match recorded data to:

- the date and time of the recording
- the precise geographic location of the event being recorded (distance in kilometres from a recognisable location)
- the train identification
- the identity of the driver

As a minimum, the Railway Undertaking must record the following data:

- the passing of stop signals or of an LZB or ETCS stop marker without adequate permission
- application of the emergency brake
- speed at which the train is running
- any isolation or overriding of the on-board train control (signalling) systems
- operation of the audible warning device (horn)
- operation of door controls (release, closure)
- detection by on-board hot axle box detectors, if fitted
- identity of the cab for which data is being recorded to be checked
- data in order to record working time.

The German transposition plan accurately lists all requirements found in the TSI and the deadline for their implementation. It also lists such requirements as „on-board recordings, working time and driving time“. The deadline set for implementation is „by 2020“, though there is a remark saying that that „new technology will be necessary, insofar as no longer needed due to a revision of the TSI“. This addendum raises fears that the obligation to introduce more stringent control mechanisms may initially be put on ice.

In the view of mobifair and in support of the corresponding EVG demand, the speedy introduction of a driver card is a sine qua non. Without it, it is practically impossible to control working time and licences in cross-border rail

traffic. Yet such a lack of controls represents a considerable risk factor for rail traffic. The German Minister of Transport needs to take action in this respect.

The ETF also needs to remain on its guard, as there would seem to be efforts on the part of the CER to do away with the driver card, arguing that the costs of fitting locomotives with the necessary equipment would be too high. We must not allow such an important safety provision to be sacrificed. It is the only credible way of monitoring the working hours of train drivers, thereby allowing directives, laws and agreements to be properly implemented. The European Commission is called upon to resist any such calls.



**Appeal to all readers**

**PLEASE COMMUNICATE ANY INFORMATION ON DUBIOUS JOURNEYS OR ASSIGNMENTS TO MOBIFAIR: +49 69/27139966 OR INFO@MOBIFAIR.EU**

## The Swiss model

.....  
 Via the Swiss rail supervisory agency, Switzerland has a wide-ranging monitoring system. Though its focus is primarily on health and safety, and thus on compliance with statutory working time, this agency is also able to prevent wage and social dumping and ensures rail safety.

SEV, the Swiss rail transport union, has been calling for increased controls since market deregulation. Their necessity was clearly seen in 2004, a year in which cross-border traffic increased for the first time for a long time on account mainly of cooperation agreements with foreign rail operators and the establishment of new subsidiaries. Expectations that this development would lead to the emergence of major wage and social dumping effects turned out to be true. Breaches against working time regulations at the Swiss subsidiary of the German company, TX Logistik, revealed by the SEV led to investigations by the Swiss rail supervisory agency, the Bundesamt für Verkehr (BAV). The breaches turned out to be so serious that the agency handed the case over to the public prosecutor - the first time the BAV had ever gone so far. The case ended with the company being convicted to a fine of SFR 2000. Though this might not seem much, the ruling had a signal effect. Moreover, it proved two

things: Firstly that, in the deregulated rail sector, there are companies willing to do everything to gain an edge over their competitors at the expense of staff health and safety; and secondly that this can be prevented through effective regulations and controls.

Although the BAV subsequently intensified its controls in this field, a second case in 2006 underlined the continuing importance of the subject. A BAV investigation triggered by a fatal accident at a rail construction site operated by the BLS AG, the second-biggest Swiss rail operator (after the SBB) and in which the Swiss State has a majority holding, revealed that the BLS AG construction department had intentionally compiled a number of duty rosters in disregard of the regulations. Over a 4-week period several dozen breaches of the Working Time Act (Arbeitszeitgesetz) were identified. According to the BAV, their extent could in no way be considered a minor offence.

Together with the dimensions of such proven breaches, the unceasing engagement of the SEV in public relations and politics ultimately led to the subject of „safety in rail freight transport“ becoming a top-priority political issue in Switzerland. Permanent union pressure since 2006

was behind the noticeable expansion of BAV monitoring activities in the field of rail freight transport, and since 2007 the agency is now required to publish an annual report on rail safety.

## Billions of Euros - for what?

**The Fourth Railway Package of the EU Transport DG provides for major changes in Europe's rail system, including greater competition among railway undertakings for passengers and freight and complete market opening for rail passenger services in the Member States.**

The target is for long-distance public transport in the Member States to be open to competition by 2019. The Commission criticises that as yet only the UK, Sweden and to a certain extent Germany, Italy, Austria, the Netherlands and the Czech Republic have transposed the corresponding requirements. The EU would also like to do away with the possibility of directly awarding public service contracts (PSCs) for local public transport services, instead requiring all services to be subject to competitive tender.

The licencing procedure for rolling stock is to be harmonised, with in future an EU-wide licence replacing the old system of national licences. Common technical standards are to facilitate the use of rolling stock in cross-border operations.

The separation of rail networks and operations remains on the agenda of Siim Kallas, the EU Commissioner for Transport, who sees the provision of infrastructure management and transport services in the hands of a single company as discriminating against third-party operators. Holding structures, as found in Germany or Austria, are however deemed acceptable when certain requirements are met.

Also included in the Package is the demand for employee interests to be protected. The rights of employees are to be protected by special measures, in particular when awarding service contracts to companies.

Looking specifically at Germany, the transport union EVG fears that the implementation of the Fourth Railway Package will lead to „major disadvantages for the rail sector, and especially for employees“. Turning to Austria, experts attending a meeting on the subject spoke of „a dangerous threat“. The main criticism is directed at the separation of network management and rail operations. The EVG is also demanding that „optional“ requirements for protecting staff must be converted into „mandatory“ requirements, stating that these must not be left to the discretion of companies.

Rail experts hold the opinion that implementing the Railway Package will cost EU Member States billions of euros. As already clearly seen with the examples of how railways have developed in the deregulated markets in the UK and Sweden, costs are set to explode should the EU Commission's proposals be put into practice. Overall public transport coverage is under threat, with competition only interested in taking on those lines bringing the greatest profit.

