

STRUCK OUT 2

JUDGEMENT DAY



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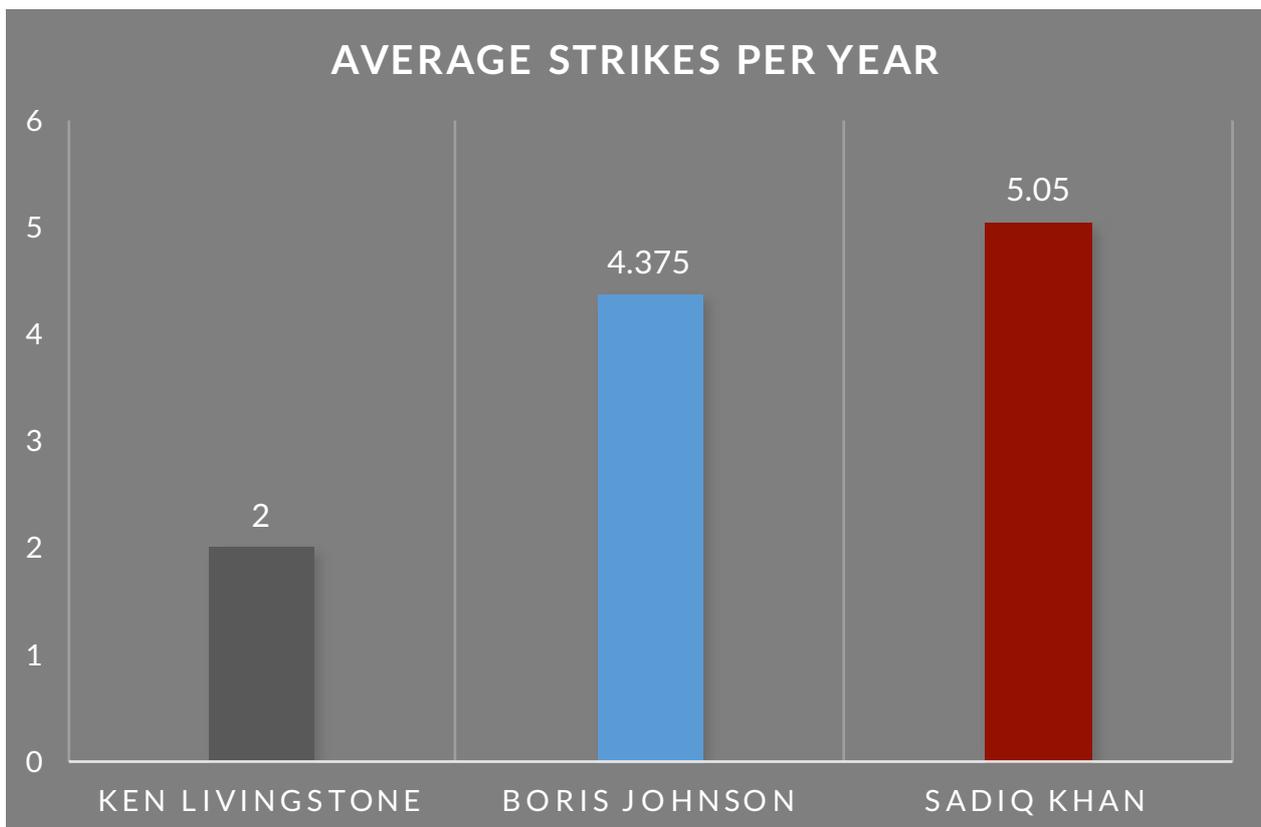
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INTRODUCTION

It is nearly four years since Richard Tracey, my predecessor as the GLA Conservatives' Transport Spokesman, wrote the *Struck Out* report. *Struck Out* considered how best to deal with damaging strike action and whether the status quo was acceptable. This report will consider what has changed in that time and whether *Struck Out's* recommendations are still appropriate in 2017.

BACKGROUND

At the time of writing¹, Sadiq Khan's record on strikes is the worst of the three London Mayors.



Ken Livingstone 16 in 8 years, avg 2/year
Boris Johnson 35 in 8 years, avg 4.375/year
Sadiq Khan 4 in 9.5 months, avg 5.05/year

Now, of course, when you have only been Mayor for 9.5 months those statistics can change quite quickly. If, for example, Sadiq manages to avoid any further strikes until 5th April then his record would be marginally better than Boris Johnson's. On the other hand any additional strikes in the next few months would make his record significantly worse.

In some ways it could be seen as unfair to judge Sadiq Khan after less than a year of his Mayoralty. This might be a reasonable point were it not for the fact that he himself has tried to gain political capital from this subject, claiming that "the number of days lost to strikes has reduced by 92 per cent since I became Mayor so our approach is clearly

1. 22nd February 2017

working.”² If that statistic were true on 9th December, it is certainly not true today.

It was not supposed to be this way. On the campaign trail, Sadiq Khan promised “zero strikes” should he become Mayor. The current Mayor has put great store on his ability to reduce industrial action by a policy of closer engagement with the transport unions. Clearly that policy has failed and the reasons why are not that surprising.

There are certainly ways for the Mayor to reduce the likelihood of strike action. He needs to be clear that changes are possible via negotiation but that London will not be blackmailed by strike action or the threat of strike action. Later on in this report I will explain precisely how Sadiq Khan allowed himself to be bullied and blackmailed with regard to strike action on London Underground’s Ticket Office Closures.

Nevertheless this is easier said than done because, unfortunately for Sadiq Khan, the current system encourages strike action and encourages transport unions to become increasingly militant. The transport unions are in a quasi-monopolistic position, knowing that strike action can bring the London Underground network grinding to a halt. Given this, it is clear we need systemic change.

WHAT THAT CHANGE SHOULD LOOK LIKE

In April 2013 Richard Tracey wrote a report entitled *Struck Out*. It explored a number of options for reforming industrial relations and made the case for a version of Binding Pendulum Arbitration (BPA). Binding Pendulum Arbitration has some similarities to the system of Taylor Law used in New York. It would ensure that Tube workers have a way of seeking redress if they reach collective agreement that a decision by their management is unacceptable. However this would happen without putting London commuters in the firing line.

The system that Richard proposed would work as follows:

1. Strike action on the London Underground would be made illegal.
2. If 50%+1 of all eligible union members voted to take a dispute further, they would proceed to binding pendulum arbitration.
3. London Underground and the relevant union would put their cases to an independent arbiter.³ That arbiter could not suggest a compromise but would have to choose between the two positions.

The binary nature of the decision is important. Simply it means that both sides put forward their final offer with the expectation that they can persuade a judge to back them. This means that unlike under the current system where it makes sense for transport unions to make their demands as extreme as possible, it would provide a spur for both parties to be reasonable. For example in a pay dispute, an offer of a 2% increase would clearly be more reasonable than a demand for a 10% increase. So Binding Pendulum Arbitration would encourage transport unions to make smaller demands. In addition the very decision to take the dispute to an arbiter would come with a significant risk so the likelihood is that this would only happen where workers believed they were being asked to accept a decision that was completely unreasonable.

2. <https://www.london.gov.uk/press-releases/mayoral/mayor-labels-southern-chaos-a-total-disgrace>

3. Whilst *Struck Out* did not specify who this arbiter should be, one obvious option would be to appoint a High Court Judge.

SINCE STRUCK OUT WAS PUBLISHED

Since Richard Tracey wrote *Struck Out*, the problems it sought to address have continued to plague Londoners. Since January 2011 London has suffered a further nineteen strikes, with a cumulative cost of over a billion pounds.⁴

In part as a response to this, the Conservative Party made a manifesto commitment to change the law regarding strike ballots. This will mean⁵ that in order for a strike ballot to pass, it will require a minimum 50% turnout and at least 40% support. This will be a step forward and it is likely to lead to fewer strikes, however it is not without its flaws. Any strikes that do happen would be seen as having greater legitimacy and, by having different requirements for turnout and support, the change could create a perverse scenario whereby strike action would be approved by a vote of 41% to 10% but ruled out with a vote of 49% to 0.

As this paper has already discussed, the current Mayor Sadiq Khan was elected following a promise of “zero strikes”. He said:

“Strikes are ultimately a sign of failure. Every day there’s a strike it caused huge misery and inconvenience to Londoners.

“As mayor what I’d do is roll up my sleeves and make sure that I’m talking to everyone who runs public transport to make sure there are zero days of strikes. 16 was too many and 35 is a disgrace,”

Although the Labour Party has always been intimately connected to trades unions, it was not surprising to read the then Mayoral candidate’s words. Strike action is as deeply unpopular in London as elsewhere and any Labour candidate would have had to at least pay lip service to having a plan to reduce strike action. Unfortunately, as we have seen, Sadiq Khan’s plan has not survived contact with reality.

More recently there have been other suggested changes regarding strike legislation from backbench MPs and the Secretary of State for Transport, Chris Grayling, has stated that fresh legislation may be necessary. Although there have been some interesting ideas, they all legitimise strike action as a valid tactic rather than find a different avenue by which union members can seek redress. When there is a dispute between the politicians or private companies that run a transport network or franchise and transport unions, there is no reason why the rules of engagement should allow commuters to be used as cannon fodder.

4. Although there is a significant range of estimates of the cost of strike action on the London Underground, the Federation of Small Businesses has estimated a daily cost of £300 million. <http://www.standard.co.uk/news/transport/tube-strike-2017-walkout-disaster-could-cost-london-economy-300m-a3435951.html>

5. Although the Trade Union Act 2016 has been law since May 2016, it is not yet in force. <http://www2.cipd.co.uk/pm/peoplemanagement/b/weblog/archive/2016/10/10/how-the-trade-union-act-2016-will-change-the-rules-on-industrial-action.aspx>

CASE STUDY: SOUTHERN

It is far from the case that the prolonged strike campaign by the RMT and ASLEF is the only reason for the problems on Southern. As Gareth Bacon AM has noted, the “issues are: driver shortage, rolling stock issues, London Bridge improvement works, ongoing signalling issues, reactionary delay, dwell time and the guards dispute.”⁶ A piece on the London Reconnections website looks at all of these issues in detail.⁷

However it is undeniable that prolonged strike action has been a major factor and so it is worth considering the extent to which this dispute would have progressed very differently if strikes had been outlawed and Binding Pendulum Arbitration had been in place instead.

First we should consider the crux of the disagreement. GTR, which runs Southern, wishes to move from the current system, in which guards open and close the doors of their trains, to Driver only operation (DOO), whereby the driver performs those duties from his cab. GTR does not want to remove the second person from their trains, but wants that person to have a more customer-facing role. However in the event of the guard being late or not turning up to work, Southern trains would be able to operate with just the driver on board. The unions have claimed that their primary concern is safety and that they are striking to protect passengers. Although ASLEF have now reached an agreement with GTR, the RMT continue to strike.

The first 24-hour strike in this dispute was on the 26th April 2016, so at the time of writing Southern Rail passengers have suffered nearly ten months of massive disruption. If BPA had been in place then there would have been no strikes. Instead the following might have happened:

1. The RMT and ASLEF leadership would have had to start by considering their own case. Was it genuinely stronger than that of GTR? Would an independent arbiter be likely to find in their favour? Was applying for arbitration worth the risk?
2. If they decided it was then the RMT and ASLEF would both need to persuade more than fifty percent of affected members to vote to support their choice.
3. If they passed that hurdle then both unions would have to take their case (or respective cases) to the arbiter. He or she would assess their case – and that of GTR – and make a final decision over which case to support. Given that independent experts have confirmed that DOO is no less safe than the status quo and possibly safer, it would appear that the prima facie most likely decision would be to support GTR’s position.

In these circumstances, passengers would not have faced ten months of strike action and it is possible that negotiation would have been more straightforward without the threat of strike action hanging overhead.

Of course, this example does not mean that the franchise holder or management will always be in the right. It does not mean that the unions will always lose. Rather it would ensure that action beyond negotiation was genuinely a last resort and it would ensure that ordinary commuters would not become collateral damage in a disagreement between an operator and their staff.

6. <http://www.mayorwatch.co.uk/southern-rail-takeover-could-pose-more-problems-than-solutions/>

7. <http://www.londonreconnections.com/2016/railway-roulette/>

CASE STUDY: LONDON UNDERGROUND TICKET OFFICE CLOSURES

In many ways the recent strike action over ticket office closures was an oddity as it involved a subject that had been closed. Boris Johnson took the decision to close London Underground ticket offices as part of London Underground's 'Fit for the Future' programme in 2014.⁸ The programme was a key feature of Tube modernisation. The report found that changes in customer behaviour meant people would prefer visible station staff over ticket offices.

It made the argument that with the increasing use of contactless bank cards and Oyster PAYG, alongside improved capabilities for automated ticket machines, there was no longer a need for manned ticket offices. Instead staff could be released to platforms and ticket halls and offer on the spot help as required. The space that had been taken by ticket offices could be used for more ticket machines, or profitable retail space.

This would save TfL £50million a year, and potentially more if the retail space could be commercially utilised. The majority of these savings would come from reducing the TfL workforce by 950 ticket office staff. TfL put the plan in motion and offered a generous voluntary redundancy package. It quickly became oversubscribed, with 450 staff members rushing to apply in the first weeks.

Although there was strike action at the time, by 2016 the matter was effectively closed. Unfortunately the then Mayoral candidate Sadiq Khan promised to hold a review into ticket office closures should he become Mayor. This reopened the issue and gave the RMT and the TSSA hope that the policy could be reversed. Although the independent review by London TravelWatch⁹ found that the closures were reasonable, the very fact that the review had put the closures back on the table soon meant fresh strike action.

The consequence of this was that the Mayor caved in and agreed to reinstate 325 jobs.¹⁰ This will mean an annual cost of tens of millions of pounds of taxpayers' and farepayers' money. It also means that the transport unions will be emboldened to strike more frequently as they know that the current Mayor of London will be willing to cave in to their demands.

If Binding Pendulum Arbitration had been in place then the following would have been likely to happen:

1. The RMT and the TSSA would have had to decide whether their case that ticket office closures were unsafe held water.
2. If they believed that it did they would have to persuade 50%+1 of affected union members to vote to move to BPA.
3. TfL would have had to be certain that the reduction in jobs was reasonable. If they felt that a reduction of 800 jobs rather than 950 was easier to defend then that would have been more likely to have been their decision.
4. If they passed that hurdle then they would need to persuade an independent arbiter of the validity of their argument. Given that we know that an independent review found that the closures were safe and reasonable, the decision would almost

8. The report was here: <http://content.tfl.gov.uk/fit-for-the-future-easy-read.pdf> However TfL has chosen to delete it for reasons unknown. You can find a cached version here: <http://webcache.googleusercontent.com/search?q=cache:P-bQm5kOcRQJ:www.tfl.gov.uk/cdn/static/cms/documents/fit-for-the-future.pdf+&cd=2&hl=en&ct=clnk&gl=uk>

9. <http://www.londontravelwatch.org.uk/ticketofficereview>

10. <http://www.bbc.co.uk/news/uk-england-london-38861415>

certainly have gone against them.

5. There would have been no argument for Sadiq Khan to promise an independent review and re-open the case since an independent arbiter would have made the decision and the subject would have been closed.¹¹

CONCLUSION

The case for the Government to introduce legislation to enable Parliament to make the recommendations in *Struck Out* into law is, if anything, stronger today than it was when the report was first released. In the original report the recommendation was to introduce this change on the London Underground. The issues with regard to Southern Rail have underlined why this policy is needed on all of the mainline rail network as well. This is the only way to ensure the systemic change that would improve industrial relations, enhance the value of reasonable trade unions, stop commuters being treated as cannon fodder and help this Mayor and his successors to achieve “zero strikes” from now on.

RECOMMENDATIONS

RECOMMENDATION #1 - Strike action on the London Underground and mainline rail would be made illegal.

RECOMMENDATION #2 - If 50%+1 of all eligible union members voted to take a dispute further, they would proceed to binding pendulum arbitration.

RECOMMENDATION #3 - London Underground/the Franchisee and the relevant union would put their cases to an independent arbiter. That arbiter could not suggest a compromise but would have to choose between the two positions.

11. There is a possibility of militant unions seeking to achieve multiple judgements on an issue that is substantially the same by asking slightly different questions. In order to guard against this, the process would work in the same way as a Judicial Review with the arbiter being able to refuse a request for BPA that was too similar to one already considered.



FEEDBACK

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