

**THE OFFICE OF RAIL REGULATION**  
**MINUTES OF THE 115<sup>TH</sup> BOARD MEETING**  
**09:00-15:30, TUESDAY 19 MAY 2015**  
**ONE KEMBLE STREET, LONDON, WC2B 4AN**

**Present:**

**Non-executive directors:** Anna Walker (chair), Tracey Barlow, Mark Fairbairn, Bob Holland, Michael Luger, Stephen Glaister

**Executive directors:** Richard Price (Chief Executive), Alan Price (Director of Railway Planning and Performance), Ian Prosser (Director, Railway Safety), Joanna Whittington (Director Railway Markets and Economics),

**In attendance, all items:** Peter Antolik (Highways Director), Gill Bull (Assistant Board Secretary), Juliet Lazarus (Director, Legal Services), Tess Sanford (Board Secretary), Tom Taylor (Director of Corporation Operations), Rachael Durrett (External Affairs), Dan Brown (Director, Strategy & Policy), John Larkinson (Director, Economic Regulation)

**ORR staff in attendance, specific items:** Item 6: Carl Hetherington, Gordon Cole, Colin Hudman, Constantinos Regas; Item 9: Lucy Doubleday; Item 11: David Chapman; Item 13: John Gillespie, Clare Dickinson, Sharon Mahwood; Item 1x: Agnès Bonnet, Elizabeth Thornhill; Item 17: Giles Buckenham, Paul Wilkinson; Item 20: Rob Plaskitt, Ian Williams, David Reed

**CMA visitors:** Lord Currie (Chair), Alex Chisholm (CEO), Andrea Coscelli and Michael Grenfell.

**ITEM 1            APOLOGIES FOR ABSENCE**

- 1            Justin McCracken had sent apologies because of a pre-existing commitment

**ITEM 2            DECLARATIONS OF INTEREST**

- 2            These would be dealt with as they arise in the meeting.

**ITEM 3            APPROVAL OF DRAFT MINUTES**

- 3            There would be some executive corrections to the minutes. The board had no comments on the minutes as circulated.

**ITEM 4            ACTIONS OUTSTANDING NOT TAKEN ELSEWHERE ON THE AGENDA**

- 4            The report was noted.

**ITEM 5            MONTHLY SAFETY REPORT**

- 5            Ian Prosser drew out some headlines from his report, noting that the issues he had raised around sustainability would be discussed in the context of the NR business plan later on the agenda.
- 6            He described the measures the inspectorate had put in place before deciding not to revoke the safety certification for West Coast Railways (WCR). The company had been asked to resubmit their authorisation for safety certification following internal changes. WCR would be kept under close supervision until the team were satisfied with the improvements. ORR had published its letter and a press statement. Ian reminded us that this was a

- significant size of operation – bigger than some open access operators - running up to 500 trains a year.
- 7 Ian reported that 25 PHRTA<sup>1</sup> incidents for the year was the lowest on record – but 16 of these had been derailments which was the highest for five years. The derailments had been either freight trains or on-track machines. He thought this reflected the continuing high number of track twist and repeat track twist faults. The overall number was 3% down, but the number requiring immediate intervention continued to rise. The inspectorate had increased its activity in this area. The overall picture was one where renewals were being deferred and the maintenance of existing track was requiring more resources. There was a risk that NR's teams could not keep up with the work.
- 8 Mark Fairbairn reminded us of the work done with the freight industry to explore how the loading in wagons could test the tolerances of the track and the work they were doing to identify and reduce this combined risk.
- 9 Ian reported on the RSSB's work on SPADs, where it was clear that there was no simple solution until automatic train protection is in place across the network. There was research also in hand on the human failure aspect.
- 10 Stephen Glaister asked why, if twist faults were coming down slowly, were derailments going up? He was not clear where the evidence pointed. Ian said that the inspectors and NR were putting significant effort into understanding how the faults occur but the main concern is around switches and crossings and track geometry (which includes drainage, earthworks, etc). Stephen asked about hard evidence that the indicators are going the wrong way. Ian said that the increase in work banks was a real concern and that, in the swiss cheese model, the holes were getting bigger. The human check was the last and least reliable line of defence. He quoted the Gloucester incident caused by a mix of human oversight and poor maintenance. The deficiencies of resources caused by the 2B2C programme had led to deferred maintenance work in CP4 which continued to have an impact when combined with the delay in meeting the volumes of renewals work agreed for CP5. Ian stressed the problem was not an immediate one but increased the risk of serious problems later on if not tackled now.
- 11 The Board agreed it must understand what the issues were and have sound evidence. Ian said that inspection of maintenance units and their work banks was a vital part of that.
- 12 The chair commented that our recent letter to the NR Remco on their 2013/14 performance had not reflected the level of concern she now heard from Ian. It was important that ORR moved quickly to make the NR Board aware of our concerns.
- 13 Ian summarised by saying that there was an emerging picture of under-delivery in CP5 on both renewals and maintenance following on from historical under-delivery in CP4. We agreed that our concerns should be reflected in our response to NR's business plan, but we would also alert Mark Carne and Richard Parry Jones directly to our concerns. **[Action: Anna Walker and Richard Price]**

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<sup>1</sup> Potential high risk train accidents

- 14 It was clear that deferring renewals put additional pressure on the maintenance delivery units; this looked like a pattern we had seen a few years previously where a cutback in renewals led to real performance issues during CP4. In time the backlog meant that access issues became even more challenging because of the need for more and longer possessions. More renewals could be part of the answer on improving maintenance

## **ITEM 6 UPDATE ON NR BUSINESS PLAN**

- 15 John Larkinson gave us an update. The team had had meetings with all NR routes.
- 16 There had been a good level of engagement by route management at the meetings with opportunities for clarification, which had been very helpful in understanding the available data and in developing a better picture overall. Unfortunately the remaining data sets had not yet arrived and so the schedule for the business plan was now significantly delayed.

*Paragraphs 17-29 have been redacted as consideration of circumstances that may justify future regulatory intervention*

## **ITEM 7 NR CP5 TRACKER**

- 30 Alan Price reported that we had begun a formal investigation into GTR, Southern and Scotland performance (PPM targets). The end year figures were in. The composite performance indicator had stopped getting worse and showed a slight movement in the right direction. That masked a more complex story between the routes.

*Paragraphs 31-36 have been redacted as including policy development and consideration of circumstances that may justify future regulatory intervention*

## **ITEM 8 USE OF NR ROUTE BASED INFORMATION**

- 37 John Larkinson explained the range of data that was now available, much of it publicly. NR was continuing to improve the accuracy and type of its data including safety. Some of this improvement was a result of the 'pull' effect of ORR's proposed policy approach in PR18 to focus more on individual routes. The annual efficiency assessment which ORR publishes will have better route level data and analysis in it this year. We still needed to apply significant resources to turn the data into useful information and we hoped to have something significantly better for the autumn Monitor, in particular the team were looking at how to deliver a sustainable and more useful information base for Wales as had already been done for Scotland. The intention was to continue to expand the information available and to work with NR on improving the quality of the underlying route data.
- 38 Michael Luger asked whether this was about making better information available publicly or having better information for our own use. The team explained that the data was already publicly available this was a staged

- approach to developing our use of it. Michael suggested that funding academic studies might be an efficient way of generating new uses.
- 39 Anna reminded us of our stated ambition to use more comparable route data to hold NR to account. This was a comparative model of regulation that was well established in the UK and there was significant pressure to use it in rail. We should continue to do as much as we can in the lead up to PR18. This would help test its usability and get people accustomed to working with the available data. The Board agreed this overall approach: wherever possible the route level information should be published using existing publications.
- 40 It was clear that NR's centre did not use or understand all the data and that capability in the routes varied widely. We should make sure that people recognised that this data was publicly available.
- 41 The volume of data presented resource issues for the ORR which we would continue to consider while we improved our understanding of it. Additional resources had been included in the business plan.
- 42 It was noted that a route-based approach – or equivalent – was also being explored on roads.

## **ITEM 9 ANNUAL REPORT AND ACCOUNTS**

- 43 Tracey Barlow, as chair of the audit and risk committee, commended the report and accounts to the Board for signature. The NAO had audited the accounts and no significant items had been raised. The NAO team had also commended the ORR accounts team led by Lucy Doubleday – something which she endorsed - particularly in the light of the significant disruption they suffered at a critical point of the year end as a result of the Holborn fire.
- 44 We thanked the ARC and the ORR team and approved the annual report and accounts.

## **ITEM 10 ORR STATUS REVIEW**

- 45 We thanked Tom Taylor for his very comprehensive and useful status review. It was clear that there were very limited options on changing our status, and none which seemed entirely palatable. The reclassification of NR's finances did appear to have put a change out of reach. Our main concern was to explore ways of staying competitive in the salaries we could offer in key roles and teams. Work to address this was now going on through the project to develop career families and separate work on senior salary benchmarking, so the potential need for a change of status was less pressing.
- 46 We noted the need for a strong working relationship with DfT and, independently, with HMT if we were to resolve potential salary challenges in 2014/15.

## **ITEM 11 ORR: NON SCS NON CONSOLIDATED PAY**

- 47 Michael Luger explained that after the Remco discussion the previous day, the non-executive board members (NEDs) had discussed the ORR's performance in 2014/15 and the executive's proposal over dinner. In terms of

the organisation's performance, the NEDs recognised and appreciated the progress made by ORR during the year but considered there was still much work to be done.

48 Michael stressed that the scorings NEDs proposed were not driven by saving money, it was about reality-testing the outcomes achieved as opposed to the activity undertaken. The NEDs also considered that any awards needed to be sensitive to stakeholders perceptions of ORR's performance.

49 The NEDs views therefore differed from the executive recommendations. As the four executive members had not been part of that consideration, a further meeting would be arranged for the whole board to discuss and resolve the scorings.

50 Tom Taylor argued that the line of sight link between the business plan activities and the team reward needed to be reasonably clear if we were to honour what staff had been told and if we were to retain any incentive factor. The team reward element had been designed to have an objective, metric-driven base linked to the outputs specified in the business plan. The process documentation described the organisational element as being the more discretionary part of the package which could legitimately reflect the board's view of overall impact of ORR. On the other hand, it was noted that the need to consider ORR's impact in assessing awards had always been clear. If the business plan outcomes were wholly or mainly process ones, another way would need to be found to measure impact.

51 The executive also felt that there was a risk that distinctions which were too fine might appear arbitrary – articulating to staff the difference between a 7.5 and a 7 for example would be very challenging. Also, the incentive properties of the scheme could be diminished if staff felt that a significant part of the reward depended on results that were outside their control.

52 We recognised that this was the first time we had applied the new system and it was important that we all worked through the process and calibrated the range of outcomes. For example, if we invested resources in areas where the team could not deliver outcomes directly – such as our influencing on consumers – did that mean that the team would never be able to reach a 10 because they could not deliver in-year the desired outcomes? It was agreed that independent evidence should be used wherever possible to assess performance.

53 We agreed that we would meet as a board around the next formal meeting to work through these issues and reach a shared view we could all articulate clearly to staff and which was defensible to our stakeholders. We recognised we would also need to adapt our approach for future years (eg on how impact and stakeholder views were assessed). It was therefore important a review was carried out of how the system had worked this year. **[Action]**

54 Michael Luger undertook to write up the NED views and the executive should reflect on these in advance of the meeting. **[Action: notes to be circulated and meeting to be arranged]**

*CMA visitors joined the meeting*

- 55 Lord Currie thanked ORR for the opportunity to discuss the emerging thinking around CMA's report on on-rail competition before taking the report to their board. CMA was very pleased to have had the support and active engagement of Chris Hemsley and his team, throughout their consideration.
- 56 MG explained that the starting point was a rail passenger industry where only about one percent of passenger miles were supplied by open access operators. There were also some areas of overlap between some franchises, some of which had been removed over time. Competition for the market had worked well with discernible benefits including growth in the sector. The question was whether it was also desirable to have competition in the market and whether it was feasible. This was not about competition for its own sake. The work sought to identify benefits to the tax payer and to the customer of changes to allow new competition. It was important not to create additional risk in the system so any recommendations would be made on the basis of implementation at the end of a franchise period, not during it. There was evidence from Europe that in-market competition added upward pressure on service quality and downward pressure on fares. The challenge was to introduce more competition without threatening infrastructure investment or undermining public service obligations. MG rehearsed some of the arguments from the study.
- 57 CMA aimed to publish the document for discussion in July. He explained the four options that would be explored in the document.
- 58 We discussed various issues around capacity: incentivising NR to identify more of it and maximise its use, and highlighted the question of efficient use of capacity, including train loading at different times of day. We thought there were lessons from aviation here. There were also issues around capacity at termini which could prove limiting.
- 59 We talked about various questions around charging and the potential impact on government income. ORR is undertaking a review of charging as part of its PR18 programme. We thought it would be possible to develop a different charging framework for open access operators and franchisees with clearer and fairer incentive properties for all. We discussed existing barriers to entry and whether those could be replaced under a new system of charging.
- 60 Finally we discussed the handling of the emerging findings and the report. ORR would undertake an impact assessment during the consultation period to help gather and present evidence on the various options. We all agreed on the importance of having a sound evidence base on which to base any recommendations. This was an important piece of work and needed to be discussed not just at DfT but across government in HMT, BIS and Cabinet Office.
- 61 We all agreed that this was a very important piece of joint working which we were keen to support. The ORR board looked forward to seeing the final discussion document. **[Action: forward programme]**
- 62 We thanked the CMA party for attending and for a very useful and wide ranging discussion.

*Lunch break*

### ITEM 13 OCCUPATIONAL HEALTH PROGRAMME

- 63 Sharon Mahwood presented highlights from the slide pack. ORR had made a good start with the first programme, but there was plenty still to do and the scale of the challenge was significant.
- 64 She described progress since the first programme began in 2010 from a very low baseline. The team had used all available levers both directly and indirectly and the programme had delivered real changes in health management within NR as well as how we regulate. For example, during the period DfT had included worker health in franchise agreements for the first time. Sharon welcomed RSSB's work on occupational health which had been stimulated by ORR's initial programme.
- 65 One of the most difficult issues was the lack of reporting of health issues by employers – this had improved significantly in NR, but was still poor in TOCs and very poor in contractors. As an example, NR's reported incidence of HAVS<sup>2</sup> had increased by 800% over the first programme and yet contractors had not reported any increase. This might be because of the more transient workforce, or because competition for work was very tough. Overall however it suggested that contractors were under-reporting but also that NR were taking the issue seriously.
- 66 Sharon explained how the impact of the programme had been assessed and how key messages would be rolled out in support of the current programme. For example, this year's conference of union safety representatives would focus on health.
- 67 Finally she set out the key messages for the current programme which stressed the importance of improved reporting and data collection in identifying and addressing common issues.
- 68 We thanked Sharon for her very interesting presentation.
- 69 We discussed the importance of our health as well as our safety responsibilities. Sharon said that the economic benefits of better health management in NR were understood by their management and that this was supporting their investment.
- 70 The team explained the balance between encouraging better reporting and without being seen to use that good behaviour as a weapon against companies. The important outcome was that reporting was being taken seriously and that the industry acted to deal with what it found. It was important not to dis-incentivise proper reporting. However, the team reassured us that inspectors always acted where they saw an immediate and apparent risk to health.
- 71 We discussed further levers to encourage full reporting. We noted that though we have no safety enforcement role in highways, it was likely that there was a common construction workforce and so the same issues would arise. We might consider drawing the report to the attention of Highways England.

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<sup>2</sup> Hand arm vibration syndrome

- 72 We asked about how the report was being rolled out internally and were reassured that our inspectors were receiving updated skills training, including where to encourage and where to enforce.
- 73 We summarised our discussion by concluding: the importance of keeping up pressure on health issues, of providing a clear steer on priorities (drawn for areas of poor performance in the sector) of using a range of levers, not just enforcement; of improving data and reporting; and maintaining inspection where necessary. We asked our SRC to spend some more time reflecting on the report and considering next steps. **[Action]**

#### **ITEM 14 RECAST OF THE FIRST PACKAGE (EUROPE)**

- 74 Liz Thornhill introduced the item which was seeking board agreement to ORR's response to government's consultation on the recast of the first package. DfT had produced draft regulations to implement the Recast Directive 2012/34 ("the Recast"). The draft regulations would replace the Railway Infrastructure (Access and Management Regulations) 2005. ORR's draft response to DfT's consultation responded to many points mostly of a technical legal nature but there are some of wider significance, namely in relation to:
- (a) Competition;
  - (b) ORR's power to give directions in relations to complaints;
  - (c) Reservation charges; and
  - (d) Application to the Heathrow spur, Crossrail and HS2 of a requirement to introduce a contractual arrangement akin to a periodic review by 2017.
- 75 Liz highlighted the changes that would follow from the recast and the improvements that could be secured. We agreed to the draft response.
- 76 We thought we should consider having a clearer channel for complaints. We also needed to keep in touch with CMA on the implications for our use of competition powers.
- 77 Agnès explained that Parliamentary approval would probably be received in the autumn. ORR would need to update some policies and guidance to reflect this. Juliet Lazarus said that as a public body, ORR should give effect to these powers now. There might be read across to our revised economic enforcement policy.
- 78 We asked the team to make sure that we were reminded about these additional powers before any relevant discussion.

#### **ITEM 15 HIGHWAYS COMMITTEE**

- 79 Peter Antolik said that the highways committee would be seeking independent members to bolster our in-house experience on operational experience of running a roads network. He reported on a successful stakeholder event including presentations from Highways England and Transport Focus.



- 80 We agreed to the appointment of Terry Hill to the Committee, and to the recruitment of a further independent member of the Highways Committee. We asked Peter to move quickly to establish the expert panel and set up the first committee meeting. **[Action]**

#### **ITEM 16 UKRN UPDATE**

- 81 Dan reminded us that the network had been set up to explore ways of sharing resources, initiatives and experience. It had identified a number of joint projects which were still under way. It had enabled a shared voice on the benefits of independent economic regulation. The new government had announced its commitment to deregulation so a shared approach to that proposal would be helpful. The various bodies worked under their own boards and on specific items, so ORR was leading on how regulation can help improve efficiency. It was agreed that joint work on how to empower consumers could be very helpful.
- 82 It was important however that the UKRN work continued to add benefit as working with other organisations could be resource intensive.
- 83 We noted the update.

#### **ITEM 17 FOI – REQUEST FOR BOARD MINUTES**

- 84 Giles Buckenham introduced the paper which was very clear and easy to follow.
- 85 Justin McCracken had argued in advance of the meeting that one of the items on the table should be disclosed, but Joanna Whittington argued that we should aim to do all our initial PR18 thinking in private in order to allow all the options -including very radical ones - to be explored freely.
- 86 On balance we agreed with the recommendation in the paper and determined accordingly.
- 87 We noted the question about how much detail it was appropriate to include in minutes and agreed to discuss this next time we considered governance issues. **[Action]**

#### **ITEM 18 CHIEF EXECUTIVE'S REPORT**

- 88 We noted Richard Price's report.
- 89 Reflecting on the recent incident at Clapham Junction which had affected passengers badly we queried whether ORR had a sufficiently well-defined process on looking into passenger information failures. **[Action: exco to consider and report back to the Board]**

#### **ITEM 19 CHAIR'S REPORT**

- 90 We noted Anna Walker's report.
- 91 We asked when we should consider ORR's position on HS2 and its implications. John Larkinson said that ORR had already been involved in discussions around safety by design and disruption to Euston during construction and had now been approached for a more general discussion

about regulation generally. He thought the board should begin a discussion in the autumn.

92 **[Action: forward programme – September]**

*Bob Holland left the meeting because of a potential conflict of interest*

## **ITEM 20 OPEN ACCESS UPDATE**

93 Alan Price reminded the board that he had been recruited 2½ years ago from First Group who were now an applicant for access rights on ECML. The chair reported on her conference with counsel in relation to Bob Holland, where counsel's advice had been that Bob should not participate in the decision making process for either the ECML or WCML applications because of Alliance's involvement in these. We agreed that for this meeting, Alan's interest was relevant but unlikely to influence his exercise of his role and therefore agreed he should remain.

94 We discussed how much we valued Bob Holland's input on commercial rail matters, rooted as it is in direct experience. We observed the apparent mismatch between Bob's appointment by the Secretary of State after a six month cooling off period – which meant that it was now a year since he had left Arriva – and the case law quoted. We did not think that Bob's view would be disproportionately influential among the eleven other Board members.

95 We asked for more specific advice on the level of risk in including Bob in our deliberations and final decision. In the meantime we understood he would continue to exclude himself to protect the process.

96 Given the complexity of the processes which inform an executive recommendation on an access application, and the high degree of judgement which we would need to exercise in determining between competing applications, the staff proposed to undertake a 'teach in' session on open access. This would explain the methodology underpinning the cost benefit analyses and our calculation of the impact on the Secretary of State's funds. Both these were essential pieces of evidence that the board would need to assess the applications.

97 We also wanted to hear from NEDs with direct operational rail experience, on what the process looked like from the franchisees perspective. This would be a way to get some of the benefit of Bob and Ray's experience without applying it directly to the applications the team were assessing.

98 John Larkinson briefed us on preparations for the industry hearing on 12 June.

99 We were keen to ensure the views of users were fully considered. This was important both to avoid late challenges from objectors and to take on board the benefits that users anticipated. John said that the applications had covered that angle, but he would ensure that these views were drawn out at the hearing.

100 John thought there was good evidence that stakeholders were engaging with the process and the debate.

- 101 We discussed the importance of ensuring that the ORR's understanding of each of the applications was deepened by the hearing. We asked that the process for the hearing be shared with us as well as the applicants, so that there was no confusion on the day. **[Action: JLK to circulate programme]**
- 102 Justin and Stephen would attend as observers on the day.
- 103 John reported that Scotrail had just put in a new application for access rights and new stations on the ECML but that it was not complete and could not therefore be considered as part of this process.

**ITEM 21 ANY OTHER BUSINESS**

- 104 We noted the forthcoming board awayday.
- 105 There was no other business

**ITEM 22 MEETING REVIEW**

- 106 We had been very impressed with the presentation by Sharon Mahwood on occupational health, both the content and the discussion.
- 107 We had found the CMA discussion very useful and were keen to see an impact assessment which supported their work.

[ends]

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