

Office of Rail Regulation
Minutes of the 100th Board meeting on 26 November 2013
(09:30 – 15:00), ORR offices, One Kemble Street, London – Room 1

Present:

Non-executive directors: Anna Walker (Chair), Tracey Barlow, Peter Bucks, Mark Fairbairn, Stephen Nelson, Ray O'Toole and Steve Walker.

Executive directors: Richard Price (Chief Executive), Ian Prosser (Director, Railway Safety), Alan Price (Director, Railway Planning and Performance)

In attendance, all items: Dan Brown (Director of Strategy) John Larkinson (acting Director of Railway Markets and Economics), Juliet Lazarus (Director, Legal Services), Richard Emmott (Director of Communications), Tess Sanford (Board Secretary), Gary Taylor (Assistant Board Secretary)

In attendance, specific items: Item 5: Carl Hetherington (Deputy Director, RME), Item 3: Sue Johnson (Deputy Director Railway Safety), Item 8 and 9: Brian Kogan, Rob Plaskitt, Ian Williams, Paul Hadley, Item 6: Annette Egginton, Chris Simms.

Item 1: Welcome and apologies for absence

1. The Chair welcomed everyone to the meeting. There were no apologies.

Item 2: Declarations of interest

2. None.

Item 3: Monthly safety report

3. Ian Prosser told the Board that at the half year point, good focus on the passenger/train interface by Network Rail (NR) had contributed to a 7% reduction in the safety risk across the system – greater than the HLOS target.
4. Two general enforcement notices had been issued on vegetation control and repeat track twist faults. NR had undertaken to deliver new guidelines on vegetation management which had not been delivered. Some routes were managing vegetation well, but some were not doing preventive clearing and only reacting to specific incidents. Inspectors were alert to this issue and a programme of cab rides was being undertaken to gather more information.
5. ORR had written in October asking to see the safety validation process which NR would apply during the 15% management cuts that had been announced. No reply had been received.
6. ORR's interventions on safety issues must meet the legal requirement to demonstrate actual risk and the team now felt that enough evidence had been gathered to identify actual risk on the handling of track twist faults across the system.
7. Sue Johnson explained that the current programme of inspections of delivery units was yielding evidence that supported the team's previously reported concerns about

the long term deterioration of assets as a result of NR's poor maintenance regime and, significantly, the associated gradual increase of the safety risk.

8. Our inspectors generally reported that the local staff were competent and that there were good systems in place to deliver the necessary work. But they also reported that the maintenance depots were saying that there was no funding to deliver the necessary proactive work.
9. Twist track faults are known to increase the risk of derailment and latest information is that 30% of the twist track faults which NR are fixing are repeats. These faults were often being fixed manually and then fixed again a few weeks later. Although concrete evidence was not presented, it was asserted by our Director of Railway Safety that many were on track where renewal had been deferred.
10. ORR had issued an improvement notice requiring NR to identify why repeat faults were happening and to develop a plan to address them. That plan needed to cover resources, access and delivery.
11. The Board welcomed the steps taken to address this specific issue and noted that it was one aspect of a wider set of problems. We noted the mismatch between what we understood was the state of NR's funding and the messages that the delivery units were giving our inspectors about being starved of necessary cash. We had been told by the executive previously that there was an underspend in maintenance and renewals in the order of £1.2billion.
12. We discussed the possible underlying causes of the shortfall in maintenance work, including the question of whether there was appropriate local or organisation-wide capability in NR to deliver the necessary programme of maintenance and renewals that has been funded. The anecdotal evidence pointed to an organisation unable to plan possessions, relevant equipment and people to deliver maintenance effectively.
13. We noted that the executive had given us a comprehensive picture, backed by evidence and built up over time, of the way that NR's underspend on maintenance and renewals had impacted on its performance. This had been articulated very clearly previously by one of our executive members. We agreed that we recognised how that growing backlog of maintenance threatened to impact on safety. We had been told that some of NR's directors asserted that there was no money to do the work, but we had also been told that the work had been funded but not done. What we had been told about resource availability within the company led us to conclude that hard internal constraints had been applied which meant that the funds were not being used for the purpose for which they had been made available. We could see no operational justification for this.
14. We agreed that we must act to address these issues directly with Network Rail's Board. We needed to share our perspective, demonstrate how we had reached it, and make our concerns very clear.
15. We needed NR to account for the unspent sums which had been intended to fund maintenance and renewals and to take urgent steps to address the growing safety

risk. It was their responsibility to make sure that sufficient resources to do the necessary work were made available – or to make serious representations if there was not sufficient resource.

16. We agreed that this should be a staged process. Our Chair and Chief Executive would speak directly to their NR counterparts as soon as possible after the meeting to explain the depth of the Board's concerns and the overall issues which we felt needed to be escalated.
17. The Chief Executive and Director of Planning and Performance would urgently seek time with the NR Board. At that meeting, they should present the same information that the ORR Board had seen on performance, maintenance backlogs and safety. They should explain the analysis and conclusions that we had reached.
18. The Secretariat would arrange a meeting between the two Boards at which we should make our concerns and expectations about their responsibilities very clear. This needed to be as soon as possible.

Board 26.11.2013 Action i: Meetings with NR to be set up (R Price).

Board 26.11.2013 Action ii: Chair and CEO to speak to NR counterparts

Item 4: PR13 progress

19. John Larkinson gave a verbal report. The process for implementing access contracts following the Determination was proving more complex even than anticipated. Resources were being added and close management would be required to meet the 20 December deadline. The draft enhancement delivery plan, which was due from NR in the new year, would need whole industry involvement to be effective and credible. There was potential for controversy and an associated risk of delay.
20. Staff were working with NR in an effort to understand and resolve any questions on the interpretation of the Determination. The size of the gap between ORR's appraisal of NR's financial performance and NR's own assessment in the summer of 2013 meant that everyone was focused on agreeing how ORR would measure and assess NR financial performance (and if necessary make adjustments) in CP5 before the control period began. NR had commissioned external professional advice to help identify objective measures and ORR staff were awaiting a letter setting out their position on this issue.
21. John Larkinson noted that NR thought there was a risk that the larger amounts of data required from them in CP5 would lead ORR staff to interfere in their business. This was not the intention. It was important that we developed a pragmatic solution to the lack of confidence that existed.
22. John reported on a tripartite meeting with the Competition Commission at which NR had explained some of their concerns including reference to the pace and scope of change needed.
23. John noted two remaining items of board business on PR13. A draft of the success measures would be proposed at the January meeting. There was also the question

For publication

of commissioning the independent review of the PR13 process which we wanted this to start as early as possible. Scoping the project and work to identify an appropriate lead would begin now.

24. Richard Emmott said that media coverage of the Determination had been stronger than expected. 80% of coverage had been neutral (which was exactly where the regulator needed to be). The trade press had not yet commented because of publication dates.

Board 26.11.2013 Action iii: John Larkinson to meet the Chair to discuss the independent review of the PR13 process.

Item 5: Crossrail and financial sustainability

Item 5 to be redacted as it relates to commercial issues in the operation of Network Rail.

Item 6: Presentation by the Competition and Markets Authority

31. Anna Walker welcomed the CMA team: Lord Currie (Chair), Alex Chisholm (Chief Executive), Andrea Koscelli (Executive Director Markets and Mergers) and Tom Kiedrowski (Transition team). She said that the ORR Board believed in the overall direction of the CMA's strategy and supported Government policy in pushing for better collaboration between the CMA and sectoral regulators. ORR was keen to keep our concurrent powers and to work alongside the CMA.
32. David Currie said that the CMA had no desire to remove concurrency as sectoral experience was important.
33. Tom Kiedrowski said that CMA had appreciated ORR's contribution to setting up the UK Competition Network (UKCN). He explained the requirements of the revised regime and CMA's role in it – particularly in the annual accountability report. He noted that 34% of the UK's GDP was generated by organisations within the Competition Network's purview.
34. The UKCN covered six areas of focus designed to promote competition by encouraging good networks and supporting each other to improve capabilities. Sharing best practice was a simple and powerful way of improving everyone's basic skills. UKCN would also be a rare voice advocating a competition approach in public. The first annual concurrency report would show how the various regulators were aiming to use their competition powers.
35. Juliet Lazarus explained what ORR had been working on since David Currie had met the team. A board workshop had fed our priorities into business planning. We had a case under the Competition Act 1998 under investigation where we were getting good cooperation from the CMA and had valued their support on the site visit.
36. ORR was currently scoping a retail market review to focus on two areas: Indirect harm to passengers via restrictions on the role of third party retailers and direct harm to passengers.

37. ORR was considering a piece of work in relation to market structure on Network Rail's system operator role (planning and managing the use of the whole system efficiently, rather than building, owning and maintaining it). Our aim would be to scope the NR role in running the market efficiently rather than focusing solely on the infrastructure – particularly in terms of maximising and selling capacity – and identifying what incentives might drive NR to improve its delivery of those benefits.
38. ORR was also going to be doing some work in relation to on-rail competition (ie non-franchised) but the area was complicated as open access operators do not contribute to fixed costs and that would need to be considered – particularly in the light of the economic equilibrium test from Europe. We were currently considering our 'not primarily abstractive' test in this respect and a full review of the structure and scope of charges for the next price review. Staff would keep in touch with CMA and the competition network as this work progressed. We would need to take account of developing European policy.
39. We noted that policy convergence between CMA and ORR was clearly desirable but recognised that there could be tensions between our agendas that might be appropriate, or even necessary. There could be scope for ORR and the CMA to work together to influence government policy.
40. We noted that infrastructure regulators can be vulnerable to political interventions which did not always serve the consumer well. Being joined up and consistent in our thinking and the positive pursuit of competition across all the regulators would be powerful. Evidence emerging from consumer activities would also be useful for competition purposes.
41. We noted that the CMA's first report in April would set the baseline of activity for competition regulators recognising their different circumstances. We agreed that we would keep in touch with the CMA as a Board (though not necessarily through set piece meetings like this one).
42. The Chair explained that we were also reflecting on how we undertook competition cases at Board level given the need to separate investigation decisions and enforcement decisions. As a Board we needed to retain our oversight of issues, but without overburdening everyone with the significant time that an enforcement investigation would require. She noted that ORR is required to have someone on the Board who is 'competition competent' – although none of our other functions carried that requirement.
43. Alex Chisholm explained how the CMA would make a decision as a board on reference for investigation, undertake supervision of the overall portfolio of cases, procedures and quality issues – but would not itself make a decision on enforcement. Decisions would be delegated to a committee as everyone involved needed to have substantial time to commit to reading and weighing all the evidence.
44. The Chair thanked Lord Currie and the team for their time and contribution.

Item 7 Consumer Programme

For publication

45. John Larkinson introduced the paper which set out his outline plans for work specifically on the consumer agenda from the end of 2013 until November 2014, when he anticipated having additional SCS resources in place. He explained that much of ORR's existing work had the consumer/passenger as its focus and he thought that we sometimes failed to give sufficient credit to staff for that.
46. The business plan would be drafted on the basis of delivering our existing public commitments within existing resources and assessing our impact over time in order to inform decisions about what should be planned next.
47. There were some unexploited opportunities to involve consumers and some where plans were still developing (like how to involve passengers/consumers where it would be relevant in enhancement planning).
48. We agreed that ORR should deliver on its public commitments and noted the current limitations on resources. We wanted to see a better articulation of what our longer term goals were for consumers: what good would look like, what would be different for consumers and how ORR would achieve this. We asked John to work on this with the team - but we accepted that our immediate ambitions might need to be kept modest pending the arrival of the deputy director. We agreed that delivering well on modest commitments now would help build ORR's credibility for any more ambitious plans that emerged later.

Board 26.11.2013 Action iv: John to develop articulation of our longer term goals for consumers.

49. We discussed whether the significant information base about passenger views - on pricing, quality, safety, performance and so on – could be mined for systemic or geographic differences. We would be interested in understanding how regions might compare in their approaches. We also needed to be clear on what we were doing for consumers in different areas: eg safety, performance, enhancements, fares, etc. John reminded us that we needed to distinguish between the things which we could influence actively and those which we could not. He proposed discussing this with the consumer panel.

Board 26.11.2013 Action v: John to ask consumer panel to engage with these issues.

Item 8 High Speed Rail Link: HS2

50. Brian Kogan updated the Board on the publication of the Bill which had been accompanied by a very long environmental impact statement. The Bill proposed giving ORR an additional statutory duty to facilitate construction of Stage 1 and the Secretary of State would issue new advice on that duty. The Bill currently disapplied the requirement for network licensing and statutory closure provisions during construction and imposed duties of cooperation on relevant bodies.
51. At dinner the previous evening the Board had discussed the questions set out in the paper and now fed back the results of that discussion:
 - a. ORR should remain neutral on HS2 – to build or not to build was a government decision.

- b. Our regulatory decisions would continue to be taken on the facts at the time and would take HS2 into account where appropriate.
 - c. We should not seek formal involvement except where the scheme interfaced with the existing regulated network.
 - d. The economic or other case for HS2 was not a matter for ORR.
 - e. We did not think that HS2 would be a meaningful comparator for the existing network (except possibly HS1).
 - f. There was a range of views as to whether NR's involvement in the construction of HS2 would be a good use of their expertise in major construction or risk being a major distraction from running the existing network. Ultimately this was not a matter for the ORR as long as NR was adequately resourced to undertake any additional work.
52. We noted that the construction of HS2 was a unique opportunity to increase interoperability on the UK railways.
53. We asked the team to keep us updated on any emerging issues for the existing network or for ORR as the Bill progresses.

Item 9 Alliance application for access to the west coast main line (WCML)

Paragraphs 54-70 to be redacted as relating to a future decision on an access application

71. We agreed that the Board would consider the new paper and discuss it further on a conference call to be arranged within the next ten days.
- Board 26.11.2013 Action vi:** Further paper to be prepared and circulated to Board members in advance of a Board conference call – to take place as soon as possible.

Item 10 Competition Decision making

72. Juliet Lazarus introduced the paper which set out proposals to respond to the changing environment in the regulation of competition in the UK.
73. These changes meant that any decision on enforcing competition powers would be more time-consuming than previously and that at least some of those to be involved in such decisions would need to be 'competition competent'. This made it impractical for our whole board to be the decision making body on competition case decisions.
74. The proposed approach was in line with other regulators – and that described by the CMA earlier in the meeting as their approach. ORR's Board would be responsible for oversight of the process and would receive assurance on the processes. They would have the opportunity to discuss their views on a particular case with the group who would hold delegated authority to make the final decision.
75. We agreed the proposals and asked for them to be incorporated into revised Board procedures for approval before the new powers begin in April 2014.
- Board 26.11.2013 Action vii:** Revised Board procedures to be produced - incorporating proposals.

76. We agreed the desirability of having a Non-Executive Director (NED) who met the requirements for competition competence and that these skills were identified in the forthcoming recruitment of new NEDs. We noted that if no appropriate candidate was forthcoming, we could explore further the option of co-opting an independent expert to chair the decision group.

Item 11 Chair's report

77. We noted the Chair's report and agreed that we wanted to celebrate with staff the likely achievements of 2013/14 – including but not limited to PR13 which seemed likely to conclude on time. We felt that a celebration at the end of the staff conference would be problematic because of people travelling home. We asked Richard Emmott to consider with the executive what might be appropriate.
78. The Chair would write to all staff formally at Christmas congratulating them on the achievements of 2013.

Board 26.11.2013 Action viii: Richard Emmott to think about how to convey thanks on behalf of the Board to staff involved in PR13.

Item 12 Chief Executive's report

79. We agreed to the Statement of Intent by the UK Competition Network and authorised the Chief Executive to sign it for ORR.
80. We noted the provisional underspend and asked the executive to bring forward any work that could be funded legitimately from this year's budget.

Item 13 Board forward programme

81. We agreed to set a provisional date for a Board meeting in December 2014 as recent experience suggested that the gap between November and January Board meetings was usually too long. We would not plan to meet, but would hold diary space either for a meeting or for a telephone conference. [The provisional meeting was set for Tuesday 16 December].

Item 14 Board minutes from 1 and 22 October 2013.

82. The Board Secretary highlighted that these minutes covered our main PR13 decisions.
83. The minutes were approved subject to any final comments by the Chair and legal teams.

Item 15 Matters arising

84. We noted the progress on the action list of matters arising.

Item 16 Any Other Business

85. The Chair reminded us that this was Steve Walker's final Board meeting (he would chair the SRC meeting in December) and wanted to record formally her thanks for his work as a NED. Steve had a passionate commitment to safety and she noted his contribution in chairing the SRC, in improving the Committee's approach to and understanding of risk, its improved strategic reporting, and supporting RSD in

structuring the annual report better. This work had all been well received. He was well respected by the staff, particularly in RSD and would be missed. ORR also owed him a debt of gratitude for his contribution to the wider Board agenda.

86. Steve thanked the Chair and said he had enjoyed his four years very much. He had seen tremendous progress in ORR, particularly in the way that the safety team had connected with other parts of the organisation to develop into a joined-up regulator. He thought the fact that the industry had multiple risk owners made risk management more difficult than it was in other industries. He knew that there were many excellent people working at ORR and he would miss his contact with them.