Office of Rail Regulation
Minutes of the 109th Board meeting
On Tuesday, 28 October 2014
(09:30-15:45), ORR offices, One Kemble Street, London, WC2B 4AN

Present:

Non-executive directors: Anna Walker (Chair), Tracey Barlow, Mark Fairbairn, Michael Luger, Justin McCracken,

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: Dan Brown (Director of Strategy), Richard Emmott (Director of Communications) John Larkinson (Director of Economic Regulation), Juliet Lazarus (Director, Legal Services), Tess Sanford (Board Secretary), Tom Taylor (Director of Corporation Operations) Gill Bull (Assistant Board Secretary)

In attendance, specific items:

Item 7 Chris Hemsley, Deputy Director Competition RME
Item 8: Rob Plaskitt, Ian Williams, David Reed, Liz Thornhill, Chris Hemsley, Joe Quill, Emily Bulman

Item 1   WELCOME AND APOLOGIES FOR ABSENCE

1. The Chair welcomed everyone to the meeting.
2. Ray O'Toole was abroad and had sent his apologies.

Item 2   DECLARATIONS OF INTEREST

3. There were no declarations of interest.

Item 3   MINUTES OF BOARD MEETING ON 23 SEPTEMBER 2014 AND POLICY DISCUSSION ON 22 SEPTEMBER 2014

4. The minutes should record the appointment of Michael Luger as chair of REMCO. The minutes and notes were agreed.

Item 4   ACTIONS OUTSTANDING

5. We noted the updated list of actions outstanding. We asked that these be managed tightly so that the list remained short and contained only items of significance.

Item 5   MONTHLY HEALTH AND SAFETY REPORT

6. Ian Prosser drew out some of the highlights of his report. He noted the high number of enforcement actions this year and said they were largely dominated by worker safety issues with some particular issues among contractors and their management by NR. This had been drawn to NR's attention. Electrical safety was one area of focus following some serious incidents.

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7. NR's changes to their site safety processes (the introduction of 'safe work leaders') would need to be carefully managed by them but could pay dividends by engaging everyone (including for example, drivers) in identifying and addressing safety issues. Ian also wanted to see NR's leadership taking a more active approach in addressing safety issues as they moved around the network – this would have a beneficial effect on the culture. Overall, he thought that major projects tended to have better safety management in place than the smaller working parties.

8. Ian reported that Scotrail had discharged their enforcement notice on track twist faults. He said that there had been local focus on bringing maintenance teams up to strength, which was welcome. He warned us that he expected the Gloucester and Cambridgeshire derailments would result in significant enforcement action or prosecutions.

9. Level crossing risk assessment work was going well, but it had reduced the resources available for proactive inspection and this would inform resource planning for 2015-16. After an intervention involving the Law Commission, DfT had understood the importance of securing the changes recommended by the Commission on level crossing legislation and he was optimistic that this work was, once again, being taken forward.

10. Ian told us that though there was a slight reduction in the PIM overall, it was not significant.

11. The RAIB annual report had been published. It recorded one item where RAIB and ORR disagreed about the action to be taken in response to a report by RAIB. This single incidence was an improvement on previous years and reflected an improved understanding between the two organisations about our relative roles. **[Action: Ian to circulate the report and explain the background to the single outstanding issue]**

12. We discussed NR's changes to its site safety processes. The safety directorate were alert to the challenges for NR in delivering this change – and to the risks that it was not implemented well. Ian was encouraged by what had been seen of NR's training – and some individuals were failing the training which suggested trainers were taking a robust approach. The training would need to be followed up in practice and the processes embedded and the ORR team was seeking assurance on how that would be achieved. This was a significant programme which should deliver safety improvements across the network – but ORR would be watching carefully to see how it worked.

13. We talked about the continuing growth in numbers of SPADs and sought reassurance that ORR was doing what it could to address this. Ian explained that the industry was focusing on higher risk SPADs, reviewing how they were risk ranked because there was concern that the current rankings did not reflect the true situation. There was focus on issues such as 'reset and continue' where there was a risk that drivers were responding automatically without considering why the brakes had engaged. TPWS also helped mitigate the risk and should be increasingly adopted. He assured us that work was going on to support the industry's focus on reducing this risk, including within RSSB, and that there was no question of tolerating such a high number of SPADs.

14. We talked about the financial impact of bad safety practices – Alan reported that improved performance on some freight loops had delivered noticeable reductions in fuel consumption because trains were meeting red signals less frequently and

therefore having to stop/start on fewer occasions. Conversely it was clear that unsafe practices resulted in longer possessions and more prosecution costs. We thought NR should have some way of assessing the cost of poor safety to reinforce the message that an efficient network is a safe one. Ian would make this point to Mark Carne.

15. We noted Ian's focus at recent external meetings on the importance of leadership in promoting a strong safety culture. He expected the appointment of the former COO of LUL to Network Rail to have a noticeable positive impact on the culture across the network.

16. We noted the serious breaches by LUL which Ian had reported and which were uncommon from that Company in our recent experience. Ian said that the LUL management had acknowledged the seriousness of the breach, and his team would be working with them to address any complacency that had developed on their network.

17. We noted that the current wave of improvement notices seemed to be caused in part by the failure to deliver the agreed renewals and maintenance volume in CP4. We needed to keep that in mind when trying to prevent issues escalating in CP5. We also noted that catching up with work was more costly than doing it in a planned way.

18. Ian told us that he was very close to taking enforcement action on NR's failure to address vegetation issues in Scotland.

Paragraph 19 has been redacted as it includes advice from our Director of Legal services

20. Ian reported that the safety working group had met and agreed four actions:

   a. A short statement of our Health and Safety Regulatory Strategy should be published;

   b. We should continue to refine the six-monthly report to the board so it acted as a good basis for the Board's strategic discussions on safety. The Board saw this report as similar to the CP5 tracker;

   c. Reviews should be carried out of our external various processes as a safety regulator and the results taken to either ARC or SRC. It was agreed an effective regulator reviewed its own processes.

   d. Research what other safety regulators publish (including those in Europe) and reviewing what of our regular safety (including investigation and RM3) reports could/should be published. It was noted other safety regulators published more than we did.

21. Tracey asked that the team ensured the important monthly health and safety reports highlighted the key strategic issues. **[Action: monthly H&S report to highlight the implication of key issues/statistics]**

Item 6   NR: CP5 PERFORMANCE TRACKER

22. Alan Price introduced the item. He reminded us that NR were working to a delivery plan which they had put in place to enable them to achieve the performance targets set in the final determination by the end of CP5. ORR had agreed that implementation of the delivery plan would be taken into account when considering whether NR had done everything practicable to deliver the performance targets.

23. It was now possible to see that where the plan was being delivered it was having less impact than expected on performance. The final determination had said that ORR would intervene when performance was 2% below target at a TOC level and that limit was already being approached for some TOCs. Meetings had begun with TOCs to discuss poor performance at the end of Q2.

24. Alan explained that it was becoming clearer with each tranche of data received that some of the regular data provided by the routes to NR's centre was inconsistent and unreliable – sometimes to the point of uselessness. He shared some examples.

25. In other areas, the data recorded what had been done, but this was low in comparison with the volumes of work that should have been completed. So, on vegetation management NR's own plan was being missed by a huge margin – only a third of the work included in the delivery plan had been completed. Poor vegetation management could affect overhead lines as had happened in Scotland. Different routes had very different problems. In Wales, it was signalling. In the East Midlands, temporary speed restrictions (TSRs) had been imposed because of problems with an upgrade.

26. We discussed the role that we expected the centre of NR (or of any well run organisation) to play in moderating and analysing information from the routes and sharing good practice between them. It seemed clear that this role could not be done effectively if the data was as poor as we understood it to be. This quality issue appeared to apply to financial, asset and performance information.

27. We discussed whether the relatively recent appointment of a new CEO and further changes in the senior team should weigh in our consideration of what enforcement action to take and when. We noted that data quality was a key cause of regulatory action in other industries.

28. We asked the executive what they knew about whether the NR Board recognised this issue and what it was doing to address it. John Larkinson reminded us that he had sent a draft letter about the poor quality of financial data as part of our exchanges over the annual efficiency assessment we had published in October. He had now received an improvement plan addressing the issue which included additional resources. The chair of NR's audit committee had subsequently sought a meeting with Richard Price to discuss data quality.

29. We asked whether the NR Board were considering commissioning an external data review to help establish the scope of the issue, but there was no evidence of that at this time. We noted the opportunity to raise the issue of data quality at the board to board meeting with NR in November.

30. Alan drew our attention to the pages of the tracker which related to the enhancements programme and ECAM. The data quality here was also poor, but some progress was being made. About 22% of the submissions expected had been processed and it was unlikely that the May deadline for completion of all the assessments would be met.

31. Enhancements were an example of a programme being reported as being on track right up until it missed its completion (ie there was no recognition that a project was slipping and that the forecast completion date needed to be adjusted). It was clear to ORR that ECAM could not complete by March 2015, as expected, and therefore that the size of any financial gap between available funds and CP5 resources for the enhancement programme could not yet be set out.

32. We talked about the high value we attach to transparency in achieving public understanding of investment in the railway. We needed to make sure that our position as independent regulator supported the new management at NR in any moves to improve data quality. The forthcoming Monitor should highlight any problems on CP5. We noted that the question of whether and when ORR should enforce on data quality had not been resolved.

33. John Larkinson said that the financial information in the tracker was being reviewed as he thought it was not easily understood in its current presentation. He asked for some time at our next meeting to reflect on NR's financial performance, particularly efficiency, and this was agreed.

Item 6   ECONOMIC ENFORCEMENT POLICY REVIEW

Nigel Fisher, Sam McLelland Hodgson, Gary Taylor, Liz Thornhill, Ruth Luxford joined the meeting

34. Sam introduced the item, explaining that the review had begun from the agreed presumption that the enforcement principles set out in the economic enforcement policy were still sound but the executive thought the policies should be reviewed at the beginning of a price control period. The review would therefore focus on three areas: penalties, reparations and intervention options.

Paragraphs 35-42 have been redacted from the published minutes as relating to policy development.

43. The team had also raised some wider issues about ORR's powers and supporting legislation. These were matters of longer term interest to an internal audience, but should not be included in a public consultation at this time.

44. We agreed that the team should prepare a public consultation on the basis of our discussion. We thought that it would be important that the policy did not distinguish between publicly funded organisations and others, so that the range of regulatory tools was available whichever licence holder was in question. We noted that it would be helpful to have examples on how the different tools might be more appropriate in different situations.

45. We noted the potential benefits that formalising enforcement at an earlier stage might bring and supported this thinking – particularly in terms of any parallels that might be appropriate between the economic and safety functions.

46. We asked for a further paper on these issues by April [**Action: forward programme**]

Item 7   NETWORK RAIL: POTENTIAL SYSTEM OPERATOR FUNCTION

47. Chris Hemsley introduced the item and explained the context. The project was designed to deliver ranges of options for decision later in the PR18 process. There was already some work underway with NR on how capacity might be measured and a performance dashboard.

Paragraphs 48 to 56 have been redacted from the published minutes as relating to policy development

57. We thanked Chris for the presentation in this very important area. We asked for rolling stock issues to be reflected in the work which should now go ahead. Work in hand on improving coordination across the network now should continue. We looked forward to receiving the project initiation document when it was agreed. [**Action: forward programme**]

Item 8   **TRANSPARENCY UPDATE**

58. Richard Emmott introduced the paper which aimed to set out progress since the last report. Greater transparency was important when it led to improvements in the sector, he thought that NR was beginning to make better progress itself – and it would need to do more once it became subject to the Freedom of Information Act. This would require a shift in their current information culture which would take time to achieve.

59. He reported that TOCs had a historically different approach to information but were moving slowly towards a more open culture. This had been helped by a change in leadership at RDG and supported by ORR's actions. The story on accessibility of Darwin data was improving but there remained some constraints for third party providers – particularly around the use of information predicting delays. RDG tended to work at the pace of the slowest TOC, which could be slow and difficult.

60. Richard explained that ORR's transparency work continued in areas like the retail ticketing study, publications on our reasons for safety work, more focus on regionally disaggregated statistics and better transparency about our own decisions, as well as building up public understanding of how the network works and is financed.

61. We noted that the paper was focused on what was happening this year, but we would also need to consider what next year's plans should focus on.

Paragraphs 62-63 have been redacted from the published minutes as relating to policy development

64. We were reminded that competition powers might be relevant here, but that our current approach was to work through collaboration and encouragement rather than direction. Richard said that improvements had so far been achieved with a low level of ORR resources but achieving further improvements might require relatively higher levels of resource. We asked Richard to include in his next report his assessment of where our approach has contributed to observed changes in the industry. **[Action: forward programme]**

Item 9   **WEST COAST MAINLINE OPEN ACCESS APPLICATION**

65. John Larkinson introduced the session.

66. We began by noting that a late submission had been received from the applicant the previous evening. The team had not yet had time to review this fully. It was agreed that the letter itself would be circulated in full.

67. We agreed that we were prepared to defer a decision pending a full analysis of the latest submission from the applicant, but only on the basis that others were given the same additional opportunity for further comment and that a new, fixed deadline was set.

68. Noting that some of our members were relatively new, we agreed to discuss the wider issues before turning our attention to any specific information requests we had for this application.

    ORR's approach to open access

69. We rehearsed our statutory framework and duties. We noted that larger applications could have a significant impact on franchises – which were granted

by government under a different framework managed by DfT. We discussed the wider European context, particularly in relation to competition.

70. We considered the history of successful open access applications and to what extent previous decisions might fetter our discretion in this case. Juliet explained that we should bear in mind why a decision was made and then decide what extent it is relevant to rely on it. We should remember that this decision would inevitably set a precedent.

71. We discussed how far it was reasonable for us to consider wider economic benefits of any application.

72. We asked whether we should consider the cumulative impact of applications or only on the immediate case before us in looking at impact on the Secretary of State's funds. Juliet advised that we had previously considered applications on a case-by-case basis and we would need to have a clear reason for moving to a cumulative approach.

73. We discussed how it might be possible that open access operations on one scale could be a catalyst for positive change, but on a different scale they might create a critical mass with negative consequence. The difference in size of operations that sparked the two outcomes might be very small.

74. Looking at the national network, we noted that the east and west coast mainlines were the two most obvious opportunities for open access operations. It had worked well on the east coast and we would be glad to see a similar impact on the west coast.

Methodology

75. Richard Price reminded us that the setting of the threshold for the NPA test meant that open access operations were expected to abstract income from the franchise holder – the question was how much additional traffic and income they generated. Meeting the NPA test was necessary but not sufficient: the board still needed to consider ORR's duties and the evidence needed to be applied to achieve objective decision making.

76. The team had sent out an explanatory note to the board on the industry model MOIRA. Michael Luger said that he had discussed the modelling process with the team as part of his induction. He thought the model used imperfect information in a very complex system.   Any model required judgements and Michael's view was that the model pulled together the right information to allow judgements to be made.

77. We asked what work had been done to moderate the models: eg where we had based an access decision on the outcome of a model, had anyone subsequently measured the actual outcomes against the model projections? John explained that there are two ways this is factored in. The parameters of MOIRA are adjusted by the industry to reflect observed outcomes – the model changes over time in response to evidence gradually becoming more accurate. On top of that, ORR benchmarks to see if further adjustments should be made. One idea to improve the modelling was to observe the gap between forecast and what actually happened, and then identify the root cause of the difference. ORR was planning some work on this. This was important as, for PR13 we had accepted what MOIRA said about growth even though we knew that growth on the network had, in the past, been greater than projected.

78. John said that ORR had not changed its methodology, even though the models continued to evolve. The same questions would be asked in the same order for all applications.

   Questions about this application

79. The application before us offered a range of new, better services and wider opportunities to passengers (with a proposal to invest £20m in rolling stock). The application used Queens Park as the London terminus, thus avoiding uncertainty issues with Euston during HS2 construction. The applicant was asking for rights over 15 years. Our normal term was 5 years, but given the level of investment involved in this application it would be reasonable to consider offering a longer term. However, there was no automatic contractual guarantee that any rights granted would actually be used by the applicant or used for the full term.

80. The application was under S18 which meant that it was supported by NR as being able to be accommodated without impacting on performance.

81. In response to a question, John said that neither DfT nor NR had altered their formal submissions relating to this application. It was important that the board focused on this quality of evidence when making their decision. This was why it would be necessary to go back to stakeholders again with the latest submission from the applicant. Only formal representations at an appropriate level should be considered as evidence in the decision process.

82. We discussed some of the detail in the proposals including things such as journey times, frequency and other improvements claimed.

83. There were three areas that we wanted to explore further before reaching a decision: the modelling and the NPA test, any wider economic benefits of this application, and the impact on the Secretary of State's funding.

84. **On the NPA test**, Emily told us that the applicant disagreed with the ORR position that station switchers were abstractive, not additional. They had also argued that ORR should take into account the actual evidence of passengers' behaviour resulting from earlier open access agreements. The letter received overnight had offered new revenue data which the team had not had time to analyse.

85. **On the wider economic benefits** the applicant had cited a number of points about economic benefits and sustainability and road traffic issues. Government (DfT) did not apply these sorts of benefits in their modelling.

86. We noted the claim about increasing numbers of support staff at stations but were told there was no substantive evidence to support it.

87. We recognised that there were some quantifiable benefits that might arise and some that could not be measured but we had to reflect first on whether those softer benefits were relevant under our duties and second whether they were significant enough to be taken into account. We noted that some large scale projects such as HS2 did cite wider economic benefit as part of their business cases.

88. We noted that the applicant claimed to use existing capacity more effectively as well as utilise new capacity. John reminded us that DfT already had plans to use the new capacity within the next franchise. Crowding would reduce with the extra capacity, whoever was running the services.

   Conclusion

89.   The chair summed up. No decision would be made today as members had several unresolved questions. The access team should consider the new information from the applicant, offer other parties the chance to comment further and come back to the board with a new paper, balancing the arguments for and against approving the application. If possible the paper should be brought in November for a final decision. **(Action: John Larkinson and team)**

Item 11   CHIEF EXECUTIVE'S BUSINESS REVIEW: 2014-15 QUARTER 2

90.   Tom Taylor introduced the report which built on the Q1 report that the board had broadly approved.   There was a 'bow wave' of delayed milestones building up but progress was being made on all items. Staff were still learning from the planning and reporting processes and he expected milestones to be more specific and clearer in the next plan.

91.   He highlighted the significant underspend against budget and said that his judgement was that this was a result of over-caution in budget setting. The executive team were discussing a fresh approach to budget setting for the next year to avoid these structural underspends.

92.   Turnover of staff had been higher than anticipated and a high level of recruitment was under way. Some of the strategic issues discussed by the board had included consideration of the possible resource impact.

93.   We welcomed the report as a significant improvement. We sought clarification about the projected delivery of the business plan and the use of the budget. The executive confirmed that they were seeking the board's agreement to use the underspent budget to address resource shortages and to bring forward work into this financial year where it made sense to do so. For example, there were plans to make a shift in resources in the strategy unit.

94.   John Larkinson said that as part of business planning, the team were also reviewing the overall pattern of stakeholder engagement. Events like the recent freight panel demanded high levels of senior engagement and attendance. Some were very rewarding, but we needed to be sure that we factored in the cost in resources when assessing what investment was worthwhile.

95.   We encouraged the team to think about future pressures and to develop capacity to meet future need – we were prepared to countenance over-resourcing in the short term if that give us an underpinning core of quality capacity.

96.   It was also important that the internal controls and delegations were adapted to reflect any changes to ways of working in terms of budget and complement management.

97.   We talked briefly about changes to the strategic risks set out in the report. We noted that the November meeting would review our strategic risks and that work was underway to improve our risk management and reporting.

Item 12   BOARD FORWARD PROGRAMME

98.   We noted the forward programme.

Item 13   CHAIR'S REPORT

99.   The chair's report highlighted three ORR meetings with stakeholder groups and although these had been important and successful she had been struck by the senior time required to make them a success.

100. She reported that DfT were about to recruit two further NEDs for ORR, one to lead on roads (as agreed with the Minister earlier) and one to bring fresh perspectives to our consumer programme. We would be involved in the recruitment.

Item 14   CHIEF EXECUTIVE'S REPORT

101. Richard Price reported on discussions with DfT on the possibility of ORR becoming the economic rail regulator for Northern Ireland (European legislation required only one in each country).   John Larkinson would take his team to Belfast in November for discussions.

102. On roads, John thought the sector was beginning to understand our likely function and support the change. There would be a stakeholder event in December. The road investment strategy (RIS) would be published by government in December and this would give us something more concrete to discuss with stakeholders.

Item 15:   REMCO

103. The chair reported on the previous day's REMCO meeting. The proposal to move to career families had been made in order to address changes to pay progression and give opportunities for advancement within ORR. The committee had endorsed progress so far and encouraged the executive to minimise bureaucracy and complexity. They had also been asked to keep developments sensitive to the organisation's future agenda, not to focus only on past requirements.

Item 16:   SRC

104. Mark Fairbairn reported on the previous day's meeting of the Safety Regulation committee. They had looked at a detailed report on recent freight train derailments where it had become clear that where containers and rolling stock were both operated at the limits of their tolerance, then track tolerances were likely to be exceeded.

105. The committee had also reviewed HSE's triennial review for any lessons for ORR. One was the importance of securing ORR involvement earlier in enhancement design so that we could improve operational safety through design, rather than retrofitting it after construction had completed.

106. Ian reported also on the RIHSAC meeting where a particularly powerful session from the Samaritans had presented their work with NR to prevent suicides. The meeting had also discussed level crossings and a presentation from NR/RSSB on a PTI[1] strategy.

Item 17:   ANY OTHER BUSINESS

107. Justin and Michael wanted to record their thanks for the individual briefing sessions they had received on our open access policy, which had been very helpful in allowing them participate fully in the discussion earlier in the day.

Item 18:   MEETING REVIEW

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[1]PTI - Passenger/train interface

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108.   We agreed that it had been a good meeting. The structure that John had brought to the WCML discussion had helped marshal that effectively. Our new NEDs commented that they found it very helpful to have the whole team available for questions during the discussion.

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