Office of Rail Regulation
Minutes of Board meeting
On Tuesday 24 February 2015
(09:00-15:30), ORR offices, One Kemble Street, London, WC2B 4AN

Present:

Non-executive directors: Anna Walker (chair), Tracey Barlow, Mark Fairbairn, Bob Holland, Michael Luger, Justin McCracken, Ray O'Toole

Executive directors: 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), Andrew Winstone (Associate Director of Communications), Juliet Lazarus (Director, Legal Services), Tess Sanford (Board Secretary), Tom Taylor (Director of Corporation Operations), Gill Bull (Assistant Board Secretary)

ORR staff in attendance, specific items:

John Larkinson (Director of Economic Regulation),

ITEM 1 APOLOGIES FOR ABSENCE

1. The Chief Executive, Richard Price, had sent apologies as he was on annual leave. Alan Price would be absent for some of the time as he was meeting the Secretary of State.

ITEM 2 DECLARATIONS OF INTEREST

2. There were no declarations of interest from members of the board or staff.

ITEM 3 APPROVAL OF BOARD MINUTES

3. The Board approved the minute of the board strategy session on 26 January and their meeting on 27 January subject to some minor corrections.

4. The board agreed that the detail of conversations with external attendees (such as the RDG[1] Freight Group who attended in January) should not form part of the minutes for publication. This commitment would enable invitees to be entirely frank in raising and discussing with the board issues with ORR or with the wider industry. The minutes should record who attended, the broad subject and any next steps agreed. The January minutes would be amended accordingly. **[Action: Secretariat]**

ITEM 4 ACTIONS OUTSTANDING

5. We noted progress against the outstanding actions.

6. Anna had asked John to update the board on the retail code of practice under the chief executive's report.

ITEM 5 CP5 MONTHLY MONITORING.

7. Alan Price reported that PPM[2] was around 89% and stable, which meant that in period 10 it was 4.5% better than last year. This was largely as a result of the

[1] Rail Delivery Group
[2] Passenger performance measure

benign winter. That was also reflected in CASL[3] which was better than the same period last year.

8. NR and TOC[4]s had undertaken quality reviews of the route performance strategies, but he was disappointed in the level of senior management engagement in the process. This was particularly odd given TOC concerns about poor performance. We noted that TOCs were broadly focused on delay minutes, rather than the PPM.

9. Alan observed that passenger perception did not always reflect the real scale of delays. LSE's[5] PPM was particularly poor but 5% of trains were only 2 minutes or less late: if those 5% could be sorted out the region would start outperforming its targets.

10. Alan summarised key issues: the NR Q3 report continues to reflect known data quality issues and the monthly report was also not showing improvement. One key concern was that renewals volumes were all showing under performance against NR's own plan. His observation was that the major enhancements programme was distracting senior management. This attention was not delivering better outcomes: 12 of the 19 projects at 'GRIP[6] stage 6' were showing delays since approval.

11. We discussed what the report meant. We were continuing to see evidence of issues with underlying capability around planning and delivery. Alan explained these were becoming more apparent as the ECAM process continued to scrutinise projects and highlight issues with change control. He thought that NR lacked sufficiently good internal resources to manage the large integrated projects, particularly when the original planning and benefits assessments were lacking. Ian reminded us that NR had lost much of its infrastructure planning (IP) capability in the last reorganisation. The overall picture was one of delay in submissions through ECAM, programmes that were not integrated, failure at the centre around portfolio management and solution identification, and route managers struggling to get resources to deliver. One bright spot was the recognition within NR of the need to improve the quality of their programme management.

12. We discussed specific examples of scope creep on projects which in some cases sounded alarming. We recognised, however, that the underlying problem was that there was no link being made between increasing the scope of a project and the judgement about the value for money of that project. So when costs went up there appeared to be no meaningful reassessment of whether a scheme continued to be a worthwhile infrastructure investment.

13. This sounded as though there was a lack of capability around planning, impact assessment and cost – and particularly in terms of governance and change control on major projects. We were unclear why the disciplines required on other government infrastructure projects did not seem to be applied in this sector. We were keen to see what we could do to help address this. ECAM had been intended to help establish properly costed, delivery-ready plans but costs were

[3] Cancellation and significant lateness
[4] Network Rail and Train Operating Companies
[5] London and south east services
[6] Governance for Railway Investment Projects

continuing to rise even after projects had cleared ECAM. Enhancement projects needed to be handled differently and potentially with a longer time horizon than a five year control period.

14. We discussed the relationship between the expectations set out in the HLOS[7] and those in franchise agreements. It was clear that these were not completely aligned and this appeared to be related to the timing of publication of each.

15. We talked about the long term negative impact of these delays on overall efficiency. One example suggested was that where electrification is delayed but rolling stock has to be replaced then the new rolling stock had to be diesel rather than electric. If the rolling stock has a 30 year life span then the industry will have missed the opportunity to electrify for all of that longer period.

ITEM 5 UPDATE TO NR'S BUSINESS PLAN

16. John Larkinson explained the delays to the process that was underway in NR to deliver an updated business plan for publication in March.

Paragraphs 17-19 have been redacted as relating to current regulatory processes

20. We noted the link to current potential enforcement issues and performance on enhancements.

21. We also noted the need to ensure transparency in terms of Network Rail updating its delivery plans.

22. John pointed out that the business plan issues were focused on England and Wales, with no disproportionate effect on Scotland. He also told us that NR had set up a board subcommittee to look at the business plan review which gave us some comfort that the board is grasping the issue.

23. John explained that the team had planned its review of the business plan to meet certain DfT deadlines and asked that the Board agree to meet, before its scheduled meeting on 24 March, to discuss the options.

24. There was no point in speculating at this point on what might be in the plan and the drip of figures into the process was likely to hamper proper and quick assessment. The board agreed that it would arrange to meet at a suitable point in the process to consider:

    a. The executive's views on the analysis, what the plan tells us and whether it is credible.

    b. Why NR thinks it has got to the current position.

    c. What ORR should say about the plan to the DfT, to NR, and in public.

25. The board asked John to be as clear as he could on where there are failures and why, setting out why ORR should disagree with NR (if we do) either because of the evidence or because of the outcome.

26. We noted that any attempt by NR to materially reduce the volumes of renewals and maintenance work to be delivered in the control period would need to be extremely carefully considered to ensure that it did not involve a degradation of

[7] High level output statement

the network and prevent NR fulfilling their duties on sustainability and to run an increasingly safe railway. Given our close scrutiny of the original plans during the PR13 process, it seemed unlikely that we would be comfortable with material reductions.

Paragraphs 27-31 redacted as relating to policy development.

32. John suggested that the board should discuss ORR's role in next steps on the enhancements programme at the March board meeting. **[Action: Secretariat]**

33. We discussed the importance of striking the right balance between publicly identifying issues and their causes and in helping find the right solutions – including appropriate regulatory action. It was very important that we maintained our professional, independent and objective position as these complex issues were discussed.

34. We talked about what information we would need to see to help us understand the issues. A paper should set out what the problems are, why we think they have arisen, and what level of risk is associated with each one.

ITEM 6 PRESENTATION BY MICK CASH, GENERAL SECRETARY OF THE RMT[8].

35. We had invited Mick Cash to talk to the board after his election to the role of General Secretary. We were particularly keen to hear his views on worker safety and any thoughts he had on NR's safety culture.

36. Mr Cash expressed concerns to us about the impact of growth in zero hours contracts on safety, general worker safety and ORR's recent prosecution of an individual train driver.

37. He also observed that NR's leadership had gone through a great deal of change and were now showing the right approach to safety, but that it did not always filter down to route or track level. He thought that the performance issues following engineering work at Christmas demonstrated weakness in NR's planning processes and the risks of running multiple projects in a short period. Congestion on the network and the drive to run a seven day railway both made necessary maintenance work harder to deliver.

38. The board thanked Mr Cash for his openness and for his time.

ITEM 7 MONTHLY SAFETY REPORT

39. Ian Prosser echoed what Mr Cash had said about the issue of growth driving increased risk on safety because of the pressure to deliver work within shorter and shorter possessions.

40. He reminded us of the Cullen report which had been very important in driving improved safety after the Ladbroke Grove crash. One of the things he observed was the steady erosion of railway operations expertise and corporate memory among the NR's middle and senior management. This carried significant risk both in safety and economic terms. There was also a risk of change fatigue

[8] National Union of Rail, Maritime and Transport Workers

setting in, so ORR was focusing safety resources on checking the implementation of any new plans.

41. Ian reported that ORR had issued an enforcement order on drainage to improve critical asset protection. The central plan produced had been good, but the routes had delivered inconsistently against it. They would now have to respond to the notice. The Inspectorate had also issued a notice following a failure to comply with project authorisation work on bridge parapets.

42. Ian commented that although the PIM[9] showed a slow decline in risk (mostly due to level crossing improvements) it would not take much to reverse the improvement.

43. Ian drew our attention to the report that work he had previously highlighted on formalising a demarcation between the Health and Safety Executive (HSE) and ourselves on road vehicle incursions and safety by design was being addressed by updating the existing MOU. He anticipated that in the long term, addressing safety at the design stage would deliver a cheaper product in the end.

44. He mentioned the industry's new platform train interface (PTI) strategy which had been developed by the RSSB and which demonstrated how effective the industry could be when it came together. The PTI now represented the biggest area of passenger risk.

45. Ian also reported that his team would review the recent disappointing loss of a prosecution about guarding equipment to see if there were any lessons for ORR. We agreed that SRC[10] should consider the lessons learned report. Juliet Lazarus advised us that changes to the system would result in more cases being heard by magistrates and that lost cases were likely to increase as magistrates were inherently less predictable than juries.

46. Ian said that he was encouraged by how NR were starting to tackle workforce safety with their contractors, four of whom were on significant safety improvement plans. This represented a step change in trying to deal with construction workforce safety. He understood that safety critical workers would no longer be employed on zero hours contracts and that IP staff would be in the same place in a year's time. His team would be keeping this under review.

47. We talked about the importance of proper contractual relationships for safety critical workers and we asked Ian whether the additional work on safety by design and road vehicle incursion would stretch his existing resources. Ian said that it would be possible to target authorities where we saw particular risks on road vehicle incursions, although local authorities might be short of cash to deliver improvements.

ITEM 8 HS1[11] STATIONS PERIODIC REVIEW RESPONSIBILITY

David Reed joined the meeting

48. Alan Price reminded us that HS1 was the private operator of an asset owned by DfT and subject to a different regulatory regime to NR. In 2014 ORR had carried

[9] Precursor indicator model
[10] ORR's Safety Regulation Committee
[11] HS1 is the high speed rail link between London and the Channel Tunnel

out a successful periodic review of the infrastructure but this excluded stations because those are reviewed by DfT.

49. In 2014 DfT had brought in consultants to undertake their periodic review of stations but DfT now proposed that the station review should be aligned with the price control and should be handed over to ORR to undertake as part of the next price review. This would require a change to the framework agreement and was supported by HS1.

50. There would be some small impact on resources but it was entirely manageable within the existing headcount and the timing worked well in dovetailing with the NR periodic reviews.

51. The Board agreed to the proposal that ORR should take on the role.

52. We discussed the different station regimes we now regulate: HS1, TOC-run and NR-run. In CP4 we had favoured changes in station management away from NR, but this had not been fully implemented. The regulatory target requires NR to keep its stations to the existing standards, but we wanted to consider whether there was more that could be done to drive better management of this important property portfolio.

53. We asked the executive (DB/JW) to bring a paper to the Board on our overall policy towards NR's commercialisation of its assets (given the context of reclassification and the requirement to meet managing public money constraints) and this should include stations and the telecoms network. **[Action: Secretariat to schedule]**

54. Joanna Whittington drew our attention to the simple impact assessment associated with this paper. This was a new discipline that was being embedded to deliver more evidence-based policy making and a more analytical approach to decision making.

ITEM 9 INDEPENDENT EVALUATION OF PR13 REVIEW

Penny Boys, Richard Gusanie and Rachael Durrett joined.

55. We welcomed Penny Boys and thanked her for her report. She explained that the fieldwork had been completed six months earlier and the report finished before Christmas. This had been the first opportunity to meet with the Board to discuss the report.

56. Penny stressed the importance of doing consultation properly in enabling stakeholders to feel engaged (although their subsequent view of the process is coloured by how much of their interest is reflected). She stressed that consultation would need to be properly resourced again in PR18.

57. She suggested that ORR’s message on the price review needed to be more clearly prioritised – while setting out the strategy at the beginning was good, outsiders became confused when the programme was broken into work streams because it was not clear to them how they all linked together and whether ORR was still taking input on any given area.

58. She observed that the language the industry uses is complex and ORR needs to use simple and clear language so all audiences could understand it.

59. Penny observed that the outcomes were better when consultation was done openly and collaboratively and that this enabled adjustments to be made during development of the policies.

60. Penny said that the notes of her meetings reflected the vast range of opinions in the different audiences and also within segments of audiences. Different TOCs had different approaches ranging from ‘leave us alone’ through ‘plan more collaboratively’ to ‘get stuck in more as a regulator’. Effective collaboration will always be vital in delivering a good price control.

61. Penny suggested that more clarity was needed on what the DfT needed from the price review and this should be established for PR18.

62. She thanked the staff who had supported her work – particularly Richard Gusanie - and wished us good luck for PR18.

63. The chair said she was struck by how the internal review (which had not yet been circulated to the board) and external reviews show the same messages.

64. We asked how well we had followed up with external audiences about why we had made the choices we did. Penny thought we could have been more consistent on this: people were very pleased that ORR had engaged them face to face but thought we were less good at explaining how their views had been taken into consideration or if not, why not. There was also a misconception among some consultees that the process is a negotiation and they can assume that something has been secured as a result. They are then disgruntled when that is not what comes out in the final product. Penny stressed that if ORR adopted a collaborative approach with the sector it needed to ensure it was flexible enough to deal with what emerged from the consultation.

65. We noted that Penny had advised we relied more on the RDG, but they did not represent the whole industry. Penny recognised this point. ORR would need to consult a group that included everyone, including funders. We agreed there were some issues, like charges, where RDG would have an important role.

66. Penny said that for PR18 much stronger links would be needed with passenger groups; it would not be enough to rely on a representative body for their views.

67. We agreed that simplicity and brevity were desirable for the consultation documents and they need to be as simple and accessible as is practical.

68. We thanked Penny for her report.

Penny Boys left the meeting

69. We discussed the draft management response to the report.

70. John reminded us that much of the final determination document was about setting out the background to the industry and that this could be removed if it was available elsewhere.

71. Joanna reminded us that we were already seeing the development process for key issues for PR18 and that should mean the Board would not need to see so much of the detailed calculations later.

72. John highlighted some issues about consistency when new senior staff arrived, as had happened in PR13. It was hard to imagine that a new chief executive or director would not have views on the process, even if it was already under way.

He suggested the Board would not want to prevent change happening at that point but it had to ensure change was well managed.

73. The chair told us that a good internal review had also been carried out but had not been circulated to the board yet. One key issue from this review was that the Board was seen as having got too involved in the detail. She thought that this had happened because the game changers and key objectives for CP5 were not established at the outset – and this was being addressed now for PR18. The Board would however have to assure itself that the methodologies for arriving at conclusions were understood and endorsed.

74. She also commented that a new chair would be arriving around the beginning of the consultation period. We needed to make sure the office was sufficiently flexible to deal with that.

75. We discussed the need for proper project management of PR18 and asked whether the Board should begin to do project oversight. Joanna described the the existing management arrangements and governance under the executive framework. She anticipated adding a programme manager during the summer.

76. John explained that the draft response to Penny Boys' report aimed to be forward looking and realistic in thinking about commitments for stakeholders. It needed to be sensible about what we will do and when and what we say about it, for example, we should be clear where we had concerns on recommendations.

77. We discussed the draft response and agreed that the chief executive should sign off the final version. We agreed that the report and the response should be published before the end of the first year of CP5 (ie by the end of March). **[Action: John Larkinson]**

ITEM 10 UPDATE ON OPEN ACCESS

Bob Holland reminded the board that he had been employed by Arriva until 31 May 2014 and that this could amount to a declarable interest. We noted this declaration and agreed that, for the purposes of this discussion, it was not problematic and that he should participate in the discussion.

78. David Reed briefed us confidentially on a new application on the ECML which had been brought to the team's attention. It was expected to go out to the industry for consultation as a s17 application the following week. The executive felt that it would be optimal to determine this alongside the other applications that were already known about, but accepted that this would make everything more complicated. The critical issue was that this new application must not slow down existing applications.

79. John Larkinson said that there had been significant internal discussion about the handling and timing of processes as there were a number of applications now which were competing for the same capacity. He believed it would be possible to consider them all in the same timeframe. This new applicant understood and was responding well to the need to move quickly. The team accepted that existing bidders might have concerns about this increased competition, but the executive's advice was that the process would be sound if it included all of them.

80. We agreed that as capacity is finite the fairer process would be to consider all applications together but we also agreed that no application should be able to delay the others.

81. We were content to proceed, but with the proviso that serious delay would make us rethink. We asked the team to make sure that the whole industry was reminded about the process and timetable and they said that they had done so and would clarify where the new application fitted in the process when they could do this publicly.

New work to collect evidence of the impact of competition on the ECML

82. We discussed the work that was being put in hand to investigate further the actual effects of competition as experienced on the East Coast Mainline (ECML).

83. The work would look at how modelled and actual data were blended together.

84. It might be necessary to do a follow up study on how we have applied the data we have had, but the timing of that would need to be considered in the context of unconsulted policy implications.

85. The chair asked that the team constantly consider whether everything possible had been done in terms of information to be clear to people who want access to this market. She asked for a meeting to follow up on this work **[Action: AW/JW/JLK/CH meeting]**.

Procedural lessons

86. We discussed the process improvements proposed in the paper following the West Coast Mainline decision.

87. We talked about the importance of achieving as much transparency as possible to deliver a fair process. We recognised that there were some real concerns on confidentiality (such as with DfT correspondence about applications). The executive told us that the important thing was to publish enough to give the gist of particular evidence. Juliet said that there was a public interest argument about some commercial judgements, but the applicant also had an interest. The legal requirement is that, as a minimum, all parties share information to the degree that they could all understand the gist of the opposing arguments.

88. We talked about how this works in practice and potential concerns from the industry that the DfT could use confidential submissions to discourage competition outside the franchise process. John assured us that DfT evidence was always checked and that follow up work was often needed. Parties had to be able to understand what the inputs were in order to have confidence about the assumptions we were making.

89. We challenged the proposal that the Board should not see specific pieces of evidence submitted after a deadline. Juliet assured us that the assumption is always that the gist of the argument must come to the Board, but recent experience had shown that un-moderated information going to the Board could be unhelpful and it might undermine due process. In a situation where we might be considering competing applications, it would be very important that Board members saw the same information and that one applicant could not claim that others had different opportunities of access.

90. We agreed that deadlines were important, but also understood that they were not applied blindly. Late information would always be looked at by staff (in the

available time) to see what the level of materiality was. We noted the particular importance of process controls in a situation with multiple applications to consider.

91. We agreed the process improvements broadly set out in paragraph 10. We asked for the evidence study, on what had happened on ECML as a result of open access in practice, to be delivered as quickly as possible so that we could consider it along with the CMA study.

92. Chris Hemsley updated us on the work to support CMA's study on on-rail competition.

ITEM 11 BUSINESS PLANNING 2015/16

93. Tom updated us on progress with the business plan. Since our last discussion the plan had been amended to reflect the Board's comments, particularly around embedding the plan for our new roads function and the comments from our stakeholder event.

94. We agreed that the proposed savings should be accepted – subject to some assurance that there would be no service degradation on IT. Tom assured us that IT issues would be addressed by some capital investment in 15/16. We also noted the risk that the calculation for the recharge on roads might turn out to be too generous, with a knock on effect to our cost base.

95. We discussed the specific proposals for 5.5 additional staff. We were particularly concerned that the new posts proposed to work on capacity, competition, and consumers were properly targeted. We noted that the competition role, in particular, would have a clearer direction following post-election debate in the summer. On consumers we understood that the issue was not additional posts, but filling the posts we already had and holding onto good people who could build stakeholder relationships. This was an area where the use of consultants was not generally effective. John explained how he aimed to improve retention in the team. We noted that our public commitments on the work to be delivered in this area made it one of particular risk.

96. John said that the executive was constantly balancing priorities against resources. Monitoring on consumer issues was likely to be resource heavy so there would be pressures on existing resources. We encouraged John as a minimum to staff up and deliver our public commitments.

97. Joanna reminded us that the report on Christmas disruption had delivered significant benefits by focusing on passenger impacts – and this had been done without a distinct 'consumer' member of the team.

98. We were content with the proposals but we asked the team to keep resource pressures under close review.

99. Anna told us that she would discuss the identification of intelligence leads on key areas of the industry ('the jigsaw') with Richard Price when he returned.

100. We agreed to the proposal for 5.5 new posts and that there should be significant flexibility retained until the early months of the new year. We agreed that we should use some of that flexibility to recruit for the future in RSD.

101. Tom said he would incorporate text on the synergies between roads and rail and set out roads as a new strategic objective.

ITEM 12 BOARD STAKEHOLDER ENGAGEMENT

102. We agreed that we should aim to meet outside London twice a year and the team undertook to look at this again. **[Action: Secretariat and EA]**

103. We noted and supported the plans for increasing engagement with staff.

ITEM 13 BOARD FORWARD PROGRAMME

104. The board noted the report.

ITEM 14 CHAIR'S REPORT

105. The board noted the report.

ITEM 15 CHIEF EXECUTIVE'S REPORT

106. The board noted the report.

107. John Larkinson updated the board with progress on the code of practice on ticket selling which would be published shortly. He wanted to stress that having a code did not mean that everyone would adopt it and meet it overnight. The hard work was making sure that all the TOCs agreed and implemented the code and the next step after that would be TOC level monitoring of compliance.

108. The code would be launched by RDG before the end of March.

109. Tom Taylor asked us to note the updates relating to project Marshall (para 14), the changed programme for our review of our economic enforcement policy (paras 18-21) and NED recruitment (para 47).

110. John Larkinson reported that the impact of the Network Rail (NR) management incentive plan (MIP) would be very small this year. Only two individuals were eligible to receive bonuses under the scheme and the likely level would be no more than 4-5%. NR's remuneration committee would need to account for how their assessment mapped across to the CP5 regulated outputs when making any award.

ITEM 15 ANY OTHER BUSINESS

111. There was no other business

Meeting closed 15.30