

THE OFFICE OF RAIL AND ROAD
MINUTES OF THE 119TH BOARD MEETING
09:00-15:45, TUESDAY 27 OCTOBER 2015
ONE KEMBLE STREET, LONDON, WC2B 4AN

Non-executive directors: Anna Walker (Chair), Tracey Barlow, Mark Fairbairn, Bob Holland, Michael Luger, Stephen Glaister; Justin McCracken,

Executive directors: Richard Price (Chief Executive), Ian Prosser (Director, Railway Safety), Joanna Whittington (Director Railway Markets and Economics),

In attendance, all items: Juliet Lazarus (Director, Legal Services), Tess Sanford (Board Secretary),

ORR staff in attendance are shown in the text.

Apologies: Ray O'Toole (NED), Alan Price (Director of Railway Planning and Performance)

ITEM 1 APOLOGIES FOR ABSENCE

- 1 Ray O'Toole and Alan Price were out of the country and had sent apologies.

ITEM 2 DECLARATIONS OF INTEREST

- 2 Bob Holland reminded the Board of his previously declared interest in ECML¹ – he would absent himself for that item.

ITEM 3 APPROVAL OF DRAFT MINUTES

- 3 The board secretary apologised that the wrong version had been circulated – some of the corrections made by the executive had not been captured. A further set would need to be produced and agreed in November. **[Action A: Secretariat]**

ITEM 4 ACTIONS OUTSTANDING NOT TAKEN ELSEWHERE ON THE AGENDA

- 4 The report was noted. There were four red-flagged items which the Chair would pursue with the board secretary. **[Action B: Chair]**

ITEM 5 MONTHLY SAFETY REPORT

- 5 Ian Prosser drew out some headlines from his report. He was pleased to report that there had only been one passenger fatality this year (which was not industry related). There had been no level crossing deaths in the last six months – this was the first time that had been recorded. He also thought it was possible to see green shoots in improving workforce safety and there had been no fatalities this year.
- 6 He picked out some other headlines:
 - The *Industry Safety Strategy* was closer to publication.
 - The ORR had held a successful industry seminar on issues with passenger crowding.

¹ East Coast Main Line

- Testing of PDSW² had showed up some early problems and Network Rail (NR) need to do the roll out carefully – our executive believed this programme was worth pursuing and would aid good safety mapping.
 - Ian talked about passive level crossings where NR had concerns that local curfews for whistles were working against risk reduction.
 - The SPAD³ risk last month had spiked although overall it was generally steady. Ian thought it possible that the system had reached the limit of what risk reduction could be achieved by signalling (because of the reliance on the driver's response)
- 7 Track twist faults still contributed the largest part of the risk model. NR was using improved technology to establish the geometry at crossings following ORR's work with the industry on freight train derailments. We understood that this meant that the increase in the number of track faults was a result of more accurate measurement and reporting, rather than an increase in actual faults.
- 8 Ian said that he would be seeking agreement at the November board to a revised MOU with the HSE⁴ to accommodate a bigger role for ORR in securing safety by design. **[Action C: Ian Prosser]**
- 9 Stephen commented on the note in the report on rail driver distraction by mobile phone technology – which reflected similar research and concerns about the impact on road safety. Bob Holland said it was understood and monitored by TOCs. While CCTV would help reduce the incidence, it was important that education for drivers was put in place to understand the risks and dangers. Ian noted that there was high turnover among drivers in some companies and this carried training and cultural risks.
- 10 Justin commented that the level crossing item was particularly good news – and he hoped it continues. At HSRC⁵ the previous day, the committee had noted good progress with RAIB⁶ recommendations and generally an improved relationship. [The Chair] reminded Ian to ensure that recommendations by RAIB which RSD⁷ disputes needed to be escalated to director level and receive appropriate attention in advance of any publication in RAIB's annual report.
- 11 Justin asked about accountability for safety in the deep alliance between Abellio Scotrail and Scotrail. He thought there was real potential for confusion about safety responsibility and this should be clarified urgently. **[Action D: Ian Prosser]**
- 12 Ian noted that NR had pleaded guilty in a case in respect of a charge of failing to comply with an improvement notice in November 2013 on electrical safety and compliance with the Electricity at Work Regulations, 1989. This may result in a 'Newton Hearing' - where a judge assesses two side's conflicting evidence to decide culpability. The NR Board was now asking for more information and showing more engagement with the issue.

² Planning and Delivery of Safe Work program

³ Signal passed at danger

⁴ Health and Safety Executive

⁵ ORR's Health and Safety Regulatory Committee

⁶ Rail Accident Investigation Board

⁷ ORR's Rail Safety Directorate

ITEM 6 NR CP5 TRACKER

Graham Richards and John Larkinson joined the meeting

- 13 Graham Richards reported that the team had escalated, for close attention by NR, ppm⁸ performance on four TOCs.
- 14 The team were observing at NR planning reviews for this year's Christmas working – ORR staff believed NR had discharged the findings from the Christmas review 2015. While the reviews focus on NR's role, the teams recognised that TOCs also have a role to play in passenger experience and options in these circumstances. The ORR team had reminded Department of Transport (DfT) officials of DfT's scope for influence over TOCs at this time as the franchising authority. ORR should also remind Paul Plummer (in his new role at RDG⁹) that TOCs needed to plan for passenger impact as well.
[Action E: John Larkinson]
- 15 John touched briefly on the financial situation of NR. They will spend more than they thought they would need this year but would deliver less than planned. Missed outputs would add more to future funding pressures and the overall underperformance was likely to be in the region of £750m.
- 16 The team said there was no sign of any improvement in financial performance.
- 17 We asked when the response on mitigations instead of a performance fine was due - this was 13th November.

ITEM 7 PR18 REGULATORY FRAMEWORK

Chris Hemsley joined the meeting for the next three items

- 18 Joanna Whittington explained that this discussion followed on from the September debate about aims and objectives for PR18. These now included content on passengers/customers as requested by the Board. In particular the presentation now tried to set out what would look different after PR18.
Paragraphs 19-25 have been redacted as relating to policy development.
- 26 We thought that communicating this programme would be very important. We should particularly find ways to express how things would be different for passengers and freight users.
- 27 We supported this direction of travel and Joanna should now start sharing this thinking outside ORR (ie with DfT and NR, possibly the Rail Delivery Group).
[Action F: Joanna Whittington]

ITEM 8 PR18 PROGRAMME DELIVERY

- 28 JW explained her plans for running the programme and proposals for how to engage with the board.

Paragraphs 29-40 have been redacted as relating to policy development.

ITEM 9 PR18 STRUCTURE OF CHARGES INITIAL CONSULTATION

- 41 Chris Hemsley introduced the paper which followed board discussions in February and June.

Paragraphs 42-56 have been redacted as relating to policy development.

ITEM 10 CMA REPORT ON ON-RAIL COMPETITION

Chris Hemsley joined the meeting.

⁸ Passenger performance measure

⁹ Rail Delivery Group

- 57 The draft CMA report as published is very long and, as ORR had plenty of chances to comment, any response would be short and have the objective of taking the public debate forward.

Paragraphs 58 to 67 have been redacted as relating to policy development

- 68 Richard would pick up the issue with BIS at UKRN next week. **[Action G: Richard Price]**

ITEM 11 ENFORCEMENT POLICIES.

Nigel Fisher, Sam McClelland-Hodgson, David Hunt and Peter Antolik joined the meeting.

- 69 Peter introduced the two draft policies: the guiding principles underpinning each were consistent with each other and our powers in each area.

Paragraphs 70-76 have been redacted as relating to policy development.

- 77 We agreed to revisit the policies in two years' time as this would enable us to take into account the European recast and other developments.
- 78 We were pleased to see the read-across between the two policies.

ITEM 12 NR BUSINESS PLAN UPDATE FROM MARK CARNE

John Larkinson and Mark Morris joined the meeting

Mark Carne (Chief Executive), Denise Wetton (PS to MC) and Gary White attended from Network Rail.

- 79 Mark Carne began with some statistics about the UK railway: it was the fastest growing, safest, and had the highest customer satisfaction of comparable railways in Europe. Nearly half of the EU's congested railways are in the UK, but it was seventh out of twenty in terms of punctuality.

- 80 Mark reflected on the current high level of external scrutiny. He described himself as relentlessly pursuing safety and performance hand in hand.

- 81 Mark described his approach to the medium and long term change that was needed in how NR worked. He reflected on successes so far and the remaining challenges in this long term project.

Paragraph 82-84 are redacted as relating to regulatory considerations

- 85 The Board asked how far NR had considered the implications for CP6 of the decisions that were being taken now.

- 86 The Board asked whether Mark was confident that his organisation could deliver the challenges before it. The meeting discussed some of the regulatory targets for CP5 and whether they would be met.

- 87 Anna thanked Mark for attending. These were significant issues of concern to the ORR board and they would need to reflect on these. She undertook to respond to NR and, in the light of this discussion, to flag immediate concerns with the Department.

LUNCH

ITEM 12 continued REFLECTING ON NR BUSINESS PLAN

John Larkinson and Mark Morris attended this item.

- 88 The Board reviewed the list of issues with the business plan which John Larkinson proposed be flagged to NR and Dft.

89 The Board discussed what they had heard from Mark Carne and how it affected their views of the issues. John Larkinson would draft a letter based on the conversation to go to Mark Carne and be copied to DfT and Transport Scotland.

Paragraphs 91-101 have been redacted as relating to regulatory considerations (s.31)

ITEM 13 FOI DETERMINATION: NR REPRESENTATIONS

102 At dinner the night before the Board had discussed their approach in response to NR's representations about the proposed release of details of Board to Board conversations and other documents. The ORR Board considered each document in turn and sought to establish a coherent approach to NR's expressed concerns and the associated risk to the regulatory relationship.

103 Agendas provide a minimal level of detail about planned discussion and attendees and contribute significantly to transparency: both agendas will be released.

104 The Business plan paper, the ORR timetable for dealing with NR's business plan and the CP5 Tracker are documents created by ORR for internal use and will be released as originally proposed, except that all the additional redactions requested by NR should be reviewed individually to assess whether the specific redaction requested was reasonable under s.31. This was necessary because some of the redactions proposed were re-statements of facts either appearing elsewhere in the same document or which had subsequently been put in the public domain in another medium (for example some financial and performance information has been published in the ORR's Monitor). In those cases where the comments attributed some sentiment or action to NR and NR had asked for it to be withheld, the Board agreed those items should be exempted under s.31.

105 The Board paused over NR's request to redact two tables from the CP5 Tracker: the Regulatory Escalator and ORR's Confidence Index of the 20 highest risk projects.

- The regulatory escalator is produced by the ORR's IDR¹⁰, and is shared with NR and NR's Board. It records and tracks areas where ORR has concerns that may lead to regulatory action. When concerns become sufficient to trigger regulatory intervention that fact is made public. ORR is content that until regulatory action is triggered, this table is an important part of a private conversation about the regulator's developing concerns.
- The confidence index table gives ORR's RAG status against schedule, cost, output and impact (combining to give a numerical value of the confidence index) for the 20 projects where ORR is least confident. There is no opportunity for challenge from NR. The Board were content that this table should be protected as part of the private conversation about the regulator's developing concerns.

106 The Board agreed that the notes of these meetings should not be released in any form (s.31 applies). NR's representations about the nature and intent of the notes were credible and echoed some comments by ORR board

¹⁰ IDR¹⁰ – Industry delivery review group

members about the high level of detail that we include. In future, however, the Board committed to a formal exchange of letters between the Chairs following each Board to Board meeting, setting out the issues discussed and key concerns –with the intent of publishing this exchange immediately. Full notes of the meetings will also continue to be kept but with the expectation that s.31 exemptions would be considered in response to any further FOI request.

107 In all cases, the agreed grounds for exemption are s.31(1)(g) and (2)(c) – that is in the view of the ORR Board, disclosure would, or would be likely to, prejudice the exercise by ORR of its functions for the purpose of ascertaining whether regulatory action may be needed by reducing NR’s frankness with ORR and thereby reducing ORR’s ability to put early pressure on the company to comply with its regulatory outputs and licence requirements set for CP5 under the statutory regulatory framework.

108 The revised pack for release is to be shared with NR and DfT in advance, but with a clear deadline for it to be sent to the applicant. [Action I: Tess Sanford]

ITEM 13 CHIEF EXECUTIVE’S REPORT, SCHEDULE 8

109 The report was taken as read, except that John Larkinson gave an oral update on the Schedule 8 error issue. Most consultees had responded and all responses agreed with the proposal that the Board had accepted. The team would now move to implement as all parties were keen on a swift resolution. [Action H: John Larkinson]

ITEM 14 ECML UPDATE

Bob Holland left the meeting.

This item has been redacted as relating to current regulatory considerations.

[ends]