

THE OFFICE OF RAIL AND ROAD
178TH BOARD MEETING
26 January 2021, 09:00 – 13:30
By MS Teams

Non-executive members: Declan Collier (Chair), Stephen Glaister, Madeleine Hallward, Anne Heal, Bob Holland, Michael Luger, Justin McCracken, Graham Mather

Executive members: John Larkinson (Chief Executive), Graham Richards (Director, Planning and Performance); Ian Prosser (Director, Railway Safety)

In attendance: Dan Brown (Director, Economics, Markets and Strategy), Russell Grossman (Director of Communications), Freya Guinness (Director, Corporate Operations), Juliet Lazarus (General Counsel), Tess Sanford (Board Secretary)

Item 1 WELCOME AND APOLOGIES FOR ABSENCE

1. The Chair welcomed everyone to this tenth video-conference meeting of the ORR Board.
2. There were no apologies.

Item 2 DECLARATIONS OF INTEREST

3. No new interests were declared.

Item 3 APPROVAL OF PREVIOUS MINUTES AND MATTERS ARISING

4. The board approved the minutes of the December meeting.
5. The board noted the updated action list.

Item 4 CHIEF INSPECTOR'S MONTHLY REPORT

6. Ian Prosser updated the board confidentially on the investigation into the Carmont derailment.
7. He described recent work around Covid, including concerns around emerging new variants and the risk of complacency among staff and passengers. He described reductions in timetabled services and work with the trades unions to develop a system of testing which would enable driver training to continue. There remained concerns *[reported in the media]* around the accuracy of tests, which was dependent on the skill of the swab-taker.
8. Ian reported on progress by Eleclink in delivering a draft programme as one of the conditions for the next stage, noting that Eleclink wished to bring forward the date for full operation. CTSA work on this continued. The first trilateral meeting between EPSF/IGC and ORR would be held the following week. There would be regular updates to the board. [Action 01/01: Ian Prosser]
9. He reported on a major new piece of work to assess asset integrity and asset management at LUL drawing on expertise across the office. LUL had welcomed the work as informing safety priorities while they were under financial pressure.

10. The board discussed issues in the report including: whether retaining wall and parapet collapses indicated a systemic problem with the design or the age of the assets, speeding incidents and a question about the use of speed limiters in modern rolling stock [Action 01/02 IP would consider this issue], the persistent level of near misses in spite of good progress reported on track worker safety and the importance of consistent focus on this area.

Item 5 CHIEF EXECUTIVE'S REPORT

11. John Larkinson briefed the board on a number of issues.
This report is redacted from the published version as time-sensitive and covering confidential issues.

Item 6 HIGHWAYS

19. Graham Richards briefed the board that traffic flows on the network had quickly recovered to normal after a very quiet start in January. Operation Brock was still in place. Only limited data was available on document compliance yet, but congestion in Kent had reduced significantly. The board discussed the importance of proper facilities for delayed drivers and vehicles in Kent: this was managed by Kent County Council with the Kent Resilience Forum (KRF) of which HE was a member.
20. These arrangements had been discussed with HE by the Highways Committee in November and the board asked for HE's views of the success of the arrangements by the KRF. [Action 01/05 Graham Richards to inquire]
21. ORR had been effective in convening stakeholder groups to address railway issues and the board wanted to explore whether similar intervention would be helpful now. It would be important to be able to frame such intervention in the context of ORR's role and duties if the intervention was to be successful. [Action 01/06: paper exploring ORR's options and locus to engage in this area/HSE role]. The board noted that further changes to border and import controls were due on 1 April and 1 July, when cargo flows would be higher than now, and that these changes risked further disruption.

Paras 22-24 have been redacted as strategy/policy development

Item 7 QUARTERLY BUSINESS PLAN UPDATE: Q3

25. Freya Guinness briefed the board on a full year forecast underspend of 7%, 4% of which would be the direct result of covid, including very large savings on travel and subsistence and training. Achieving this [net 3%] underspend depended on delivering a significant level of planned consultancy spend before the year end. The executive outlined some of the work that this would deliver.
26. The board discussed vacancy levels (which continued to run at about 10%), the number of staff working excess hours, and the very low level of reported sickness at 2.2 days. Freya reported that work was in hand to look more closely at sickness following the staff survey results. The Board discussed the challenge for staff working from home and particularly with

home-schooling. The executive had made clear that staff needed to plan for the hours they could do and agree priorities with their managers. It would be important not to shift the burden to colleagues without children – many people were finding lock down hard.

Item 8 HIGHWAYS COMMITTEE TERMS OF REFERENCE

27. The changes to the Terms of Reference proposed were approved. [Action 01/09 – update to be agreed with DfT

Item 9 NETWORK ACCESS [GUT application]

Martin Jones, David Reed, Pedro Abrantes, Jake Brown, Gareth Clancy and Joe Quill joined the meeting.

28. Dan Brown introduced the item. Non executive members had submitted a number of questions in response to the draft paper circulated the previous week and Dan explained how these had been addressed in the final version.
29. In introducing the discussion, Dan described how the executive had reached a unanimous recommendation centred around the current financial distress of the industry and giving additional weight to the duty to consider the impact on the Secretary of State's funds. He stressed that board members could have different views about how to weigh the ORR's various duties and that might mean that overall the board reached a different decision.
30. Juliet Lazarus set out the process the board needed to follow. In making a decision, it was governed by its duties – it had to act in the manner best calculated to achieve certain of its duties and having regard to others. This meant the board should determine which duties were relevant and then decide what weight to give them. There was no relevant overriding duty and the Act did not specify the relative weight to be given to each duty. That was a matter for Board judgment. The board needed to consider operational viability, capacity, performance and the not primarily abstractive test (NPA test) and then, in reaching a decision, consider whether there were any other factors which should be taken into account in weighing its relevant duties in the circumstances of this case. She reminded them that passing the NPA test was necessary for approval, but not sufficient to determine the application. The board had to make a decision on the basis that all relevant duties were taken into account and given appropriate weight in the circumstances of this application. She confirmed that this was the process the executive had followed in reaching their recommendation.
31. Board members noted that the paper was clear and that the opportunity to ask clarification questions in advance had been particularly helpful.
32. Board members discussed the application.

Operational viability

33. The paper set out detailed analysis in line with ORR's normal assessment of applications. The Board discussed the current uncertain state of passenger demand and noted this could pose more significant risks to the success of this specific operation than new open access operators have faced in the past.

Capacity and performance

34. The board noted that capacity for six return paths was available. The board considered NR's assessment of the likely impact on performance is a cautious representation and mitigations could reduce the level of negative impact.
35. The board noted that these would be new services for some of the destinations involved in the application, including significant new direct journey opportunities to London for stations including Severn Tunnel Junction, Llanelli and Carmarthen.

The 'Not primarily abstractive' (NPA) Test.

36. The board agreed that the NPA test was passed in terms of the ratio of revenue generation to abstraction. However, the board also noted that the abstraction forecast of £25.6 or £30.8m of revenue per annum is at the higher end or above the level at which ORR had previously rejected applications solely due to the absolute level of abstraction.

Relevant duties

37. The board discussed the other duties which might be relevant to this consideration and agreed to reflect further on the duty to consider the impact on the Secretary of State's funds.
38. The board were mindful that, as a result of the pandemic, the industry had experienced a sustained and significant reduction in passenger numbers and revenue. As a result government had been caused to revisit its contractual arrangements with formerly franchised operators and to significantly increase financial support to them, including GWR. Given that government was currently bearing a higher proportion of costs and assuming revenue risk on all publicly contracted services, there was potentially a more direct link between impacts on funding available and service provision in other parts of the network.
39. The board noted that in some places government was spending money on creating new services and that the Welsh Government had expressed support for the applications. The board heard that the Department for Transport submission on this application expressed concerns about the potential impact on Secretary of State's funds in strong terms.
40. The board determined that, given existing financial distress in the industry, the impact on the Secretary of State's funds of approving the application was unacceptable at this time.
41. The board did not consider that conditions in the industry were likely to become more predictable in the near future and agreed that there was no merit in deferring a decision, particularly since the applicant was seeking a prompt decision.
42. The board determined to reject the application.
43. The board discussed and agreed the next steps in this process.

44. The board considered how the risk of this decision having a chilling effect on other applications could be mitigated and asked staff to ensure that communications around the decision addressed this as far as they could.
45. Dan Brown reminded those present that the decision was commercially sensitive and must remain confidential until it was formally communicated to the applicant.

Item 10 DELAY COMPENSATION LICENCE CONDITION

Stephanie Tobyn, Marcus Clements, Matt Westlake and Tom Cole attended for this item

46. Matt Westlake introduced the paper which set out stakeholder responses to the June 2020 consultation on delay compensation and how these had been taken into account in policy development. As well as useful refinements, there was one material change around the introduction of an accreditation scheme to be run by the RDG.
47. DfT continued to express support for the proposals at working level. Following a short consultation on a further draft, there would be a final statutory consultation on the final terms. The board would be consulted again should licence holders subsequently reject the licence condition.
48. The board approved the move to statutory consultation.

Item 11 PR23 – DEVELOPING THE ACCOUNTABILITY FRAMEWORK

49. Dan Brown introduced the item and described recent stakeholder discussions.
50. In considering the questions in the paper, the board stressed the importance of securing a system operator function, in whatever structure emerged, which is competent, properly resourced and behaves independently to deliver system wide benefit.
51. Will Chivers set out the questions in the paper.
52. The board noted the progress made toward developing ORR's role in enhancement monitoring and reporting, including support from DfT and HMT. This was a natural space for ORR and it had demonstrated that it could add value in other similar areas. However, DfT had just recruited a new DG on enhancements so it would be important to establish a shared understanding on the contribution ORR would make to oversight and assurance.
53. The board noted that a move to whole industry outcomes was in line with ORR's strategy. The board discussed how measurement and reporting against trajectories and floors rather than scorecards risked undermining the current scorecard system. Each approach had benefits and it would be important to develop a measurement and reporting system that balanced both and was responsive to change.
54. The board agreed the importance of ORR scrutiny in an environment where TOCs were contracted service providers rather than clients. The board also

agreed that NR should be held to account for the delivery of rail reform objectives alongside its PR23 responsibilities.

55. The board noted the risk that NR's increasing power in the new framework could lead to monopolist behaviour and agreed that PR23 should include expectations around outcomes, behaviours and capabilities. Collaborative behaviour would be particularly important and ORR should expect to be appealed to by stakeholders who were poorly treated.
56. The board discussed resource levels for the PR23 work, noting that the demand of this review would be greater than normal and that the rail reform programme would bring additional stretch as it developed. Resources would be kept under review.
57. Catherine Williams stressed the need for agility and responsiveness through the development of multiple strands of work.

Item 12 ORR'S ROLE IN MONITORING HIGHWAYS ENGLAND'S TIER 1 PROJECTS

58. Feras Alshaker introduced the paper which reflected an earlier discussion by the Highways Committee. The proposal around monitoring HE's tier 1 projects was a measured one and within scope of existing resources.
59. The board discussed the degree of overlap with other monitoring and oversight bodies and mechanisms and questioned whether a single deep dive each year could add value. The executive argued that ORR was different and additional because of the level of transparency it could bring to HE's performance and behaviour around its major projects. In the medium term it would also strengthen ORR's own understanding of HE's capability and efficiency challenges on these projects. Improving transparency for the supply chain, funders and planners was clearly an area of public interest and an area where ORR could add value.
60. This proposed work was not about auditing HE's delivery but more about assessing their capability and developing better understanding.
61. Other stakeholders, including DfT and the IPA have indicated that they were open to the suggestion and would welcome any insight ORR could offer.
62. The work would support HE's capability development, develop ORR's knowledge base and improve transparency around these very large projects.
63. The board agreed the Option 2 approach recommended.

Declan Collier left the meeting at this point and Justin McCracken took the chair

Item 13 ORAL UPDATES FROM ADVISORY PANELS, AND FEEDBACK FROM BOARD COMMITTEES

64. Stephen Glaister reported on the December meeting of the Highways Committee. They had commissioned a paper on HE's approach to long unplanned road closures (eg after major accidents).

65. Michael Luger reported on items at Renco including: staff survey results, the gender pay gap report, non-SCS pay, emerging people strategy.
66. Bob Holland reported on items at ARC including:
 - 4 reports from Mazars including one on Procurement and contract Management which had received only limited assurance.
 - Internal report showing that 97% of audit report recommendations now implemented.
 - debate on risk (papers attached below the line to board pack)
 - 2 deep dive presentations: Holding NR to account. Communications.

Item 14 ANY OTHER BUSINESS

67. The board noted the draft forward programme for 2021 and other items below the line.
68. Freya Guinness warned board members of a forthcoming decision by correspondence in relation to an MOU on information sharing with the Cabinet Office.

All executive attendees except the Board Secretary left the meeting

Item 15 NON EXECUTIVE DISCUSSION

69. The deputy chair briefed the non-executive members on CEO recruitment.