Office of Rail Regulation
Minutes of the 106th Board meeting
On Tuesday, 24 June 2014
(09:00-15:30), ORR offices, One Kemble Street, London, WC2B 4AN

Present:

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

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

In attendance, all items: Dan Brown (Director of Strategy) Juliet Lazarus (Director, Legal Services), Tess Sanford (Board Secretary), Gill Bull (Assistant Board Secretary)

In attendance, specific items:

Items 5: Nigel Fisher (Head of operations and network regulation), Sam McLelland Hodgson (Manager, Licensing & Network Regulation) Richard Fisher Rail Delivery Manager)

Item 11: Amanda Clarke (Interim Senior Financial Analyst), Katherine Brownstein (Legal Adviser), Jonathan Hulme (Senior Financial Analyst), Les Waters (Manager, licensing and network regulation)

Item 14: Brian Kogan Deputy Director, Railway Markets and Economics, Laura Majithia (Senior Legal Adviser

Item 1: WELCOME AND APOLOGIES FOR ABSENCE

1. The Chair welcomed everyone to the meeting. Richard Emmott (Director of Communications) and John Larkinson (Director of Economic Regulation) were on leave and had sent apologies.

Item 2: DECLARATIONS OF INTEREST

2. There were no declarations of interest.

Item 3: ANNUAL HEALTH AND SAFETY REPORT

3. Ian Prosser gave us a presentation of some of the highlights of the annual report.
4. The UK now had the record as the safest railway in Europe but that headline masked some longer term challenges including:
    - increased risks associated with higher numbers of passengers particularly around the platform/train interface and station overcrowding;
    - higher numbers of SPADs on an increasingly congested network;
    - continuing concerns about the quality of asset management and associated infrastructure risk, (for example, repeat track twist faults);
    - the relatively poor level of track worker safety on the mainline railway;
    - the need to close more passive level crossings and improve safety at others.
5. It was important to remember that past performance was no guarantee of future compliance and a single accident could undo that performance record.

6. We noted that our twin safety and economic roles helped us have a particularly good understanding of the potential tensions between growth in the industry and safety, and we should keep each in sight when thinking about the other.

7. We agreed that we continued to feel uncomfortable with the overlaps and inter-relationships of the different risk models and the way their results were presented. It was very difficult for us, and for other readers, to interpret the numbers in any meaningful way without accompanying explanation. We reminded Ian of the outstanding board action for him to draw up a layman's guide to the various models, including an explanation of what a reduction in level crossing risk actually looked like [see minutes of Board meeting 20 May 2015]. There should be a full Board discussion on the different models and what they were telling us. **[Action A: Ian Prosser**]

8. We agreed that normalising the risk levels was helpful for some comparison purposes, but unhelpful overall because it masked the absolute number of injuries or fatalities. It was important that everyone understood that the numbers of incidents corresponded to real people suffering real harm, and actual figures were an important part of that. Higher numbers of passengers and a busier network would result in more individual incidents unless safety risk continued to improve. (ie 3% of 1000 is 30; 3% of 1500 is 45 – the rate stays the same, but the number increases).

9. We asked when it would be possible to break down the Safety Risk Management Model by line and identify which were the higher risk routes in the UK (ie safety by route). This was not yet possible but Ian thought that it should be possible to look at PIM by route at the end of 2014/15. We looked forward to this **[Action B: Secretariat to include in board programme for April 2015: IP to include in board reporting April 2015]**

10. Ian told us that while London Underground Limited (LUL) had embraced the RM3 methodology (and were planning how to move themselves to the next level of performance against that measure), Network Rail continued to prefer the Dupont model. He hoped to persuade Mark Carne to consider adopting RM3 as a tool to support his drive for improved safety performance and a shift in the underlying culture. Ian had pointed out that NR continued to rely on ORR's inspectors to find faults instead of local management spotting and addressing them. Our interventions, whether locally or through enforcement notices, had played too big a role in driving improved safety on NR's network. The Board asked Ian to consider whether a tougher approach was needed and NR should be told our approach was based on RM3, that they would be assessed on that basis, and that we therefore expected them to use this method [Action: IP].

11. Ian said that the areas for focus in supporting NR to improve safety on the railways in 14/15 would include:

- Passenger/train interfaces, particularly platform safety in crowded stations;
- Reducing the numbers of SPADs – NR were trying to identify the higher risk signals on the network and take them out;
- Removing passive level crossings and changing half barriers for full barriers;
- Improving consideration of safety at the design stage (safety by design);
- Track worker safety.

12. As ever, the most important thing for NR to do to secure improvements in safety would be to get the basics of asset maintenance and renewals right.

13. A draft of the annual report would be ready by the end of the week and would be shared with RSSB, NR and RAIB in advance for factual corrections. It would be signed off by the Chair and Chief Executive before publication which Ian hoped would be early in July.

Item 4: MONTHLY HEALTH AND SAFETY REPORT

14. Ian reported that there had been eight enforcement notices issued to NR some of which would probably result in prosecutions. He had brought this to the notice of the NR SHE[1] Committee because LUL (which handles similar numbers of passengers) usually gets about one notice every eighteen months.

15. It was not clear to us that the NR Board was sighted on either the number or the significance of these notices. Ian did say that the NR NEDs on the SHE committee had reacted appropriately to the discussion about the Gloucester derailment. They had noted that the planning could be poor and route leadership was variable.

16. Ian had raised with the SHE Committee the risk of 'initiative fatigue' within HR.

17. NR responded well to crises but seemed to find it much harder to manage the day job well.

18. We discussed the importance of technological responses to some issues (such as ERTMS against SPADs) and our desire to be kept informed with progress in this area. Richard Price explained that the executive expected a revised business case to accelerate delivery of ERTMS in key areas. While ERTMS was critical to improving safety and capacity, there were real safety risks about a haphazard, over-extended, or badly planned deployment, which everyone was alive to. Ian Prosser reminded the Board of the Spanish rail accident where signalling systems had not been aligned.

19. The Board asked Ian Prosser and Alan Price for an update on what ORR is doing to drive or support technological change that would support improvements in safety or performance. **[Action C]**

Item 5 CP4 REGULATORY OUTPUTS - PERFORMANCE INVESTIGATION AND ENFORCEMENT DECISIONS

Nigel Fisher, Sam McLelland Hodgson, Nick Fisher joined the meeting

20. Alan Price reminded us that we had been updated on progress on the emerging picture on CP4 performance over the last several meetings. The team were seeking decisions on the final outturn of CP4 so that all outstanding enforcement action could be undertaken as quickly as possible. This would enable all the parties to draw a line under CP4 and focus management effort on improving performance in CP5.

21. The independent reporter had found that NR had repeatedly made plans to address performance in CP4 and then, when those plans had not been delivered, had simply made another plan. They had moved too slowly to address the problem. This was described as a 'culture of over-optimism'.

[1] Safety health and environment committee

Long distance sector – enforcement order

22. The team reminded us that the investigation had found that the Long Distance sector had missed PPM by 5.1pp and that NR had not done everything reasonably practicable to deliver its targets in the sector in 2013-14. The enforcement order had set a reasonable sum calculation which had led to an original penalty sum.

23. We had previously looked at adjustments to the PPM outturn to reflect areas where NR could not be held responsible for all of the delays, on the understanding that this would be reflected in the final penalty sum. These adjustments now included sums for: extreme weather, TOC-on-self delays, 50% of external delays, cancellations by First Transpennine Express as a result of industrial action, and some rounding corrections.

24. A previously proposed correction for operator-on-operator delays had been withdrawn after consultation with the industry. Operators had no contractual relationship with each other and relied on Network Rail to sort out and recover these delays so they did not feel that an adjustment was justified.

25. The final reasonable sum proposed after all relevant adjustments was £53.1m. We agreed that this penalty should be levied under the existing enforcement order on Long Distance.

London and the South East (LSE)

26. Network Rail had missed the LSE PPM target by 3.4pp. Our investigation found that NR had not done everything reasonably practicable to deliver the target in particular it had failed to deliver its own performance plans for improvement and it had failed to investigate the cause of large numbers of delays (and could not therefore claim that there was nothing further it could have done because it did not know).

27. On the basis of the information before us and the recommendation of the team, we accepted that there had been a past breach of condition 1 of the network licence in relation to the delivery of LSE Sector PPM regulatory target in 2013-14.

28. The second question before us was whether a penalty was appropriate for the breach. No calculation had yet been carried out on what a penalty should be. When pressed, staff said that if the same level of penalty/pp missed was applied as had been applied in the LD penalty, then the figure would be about £24m – but added that this would need to be adjusted for the impact on a higher number of passengers.

29. We were reminded that NR had already accepted some responsibility for failure in this area and the tone of that acceptance encouraged the team to think that lessons had been learned. Our tighter monitoring in CP5 meant that we would pick up any current or future breach much more quickly.

30. One of the major drivers for the underperformance was the extreme weather of the winter 13/14. This had highlighted the lack of weather resilience in the asset base and NR were proposing now to set aside an additional sum of around £20-£25m to address resilience in the region. Decisions about what such a fund should be spent on would be made in the light of the route resilience plans which were due to be delivered in September 2014 for all routes (other than Western, which had been the first plan produced). The Board sought assurance – and the executive gave it – that the proposed additional expenditure would be over and above the CP5 commitments on resilience.

31. The team had asked TOCs in the LSE sector whether they would support such additional spending on resilience over spending in some other area, and they had indicated that they would.

Paragraphs 32-37 have been redacted as relating to the application of enforcement policy

38. In summary, we noted the proposal by NR to invest additional funds in a resilience fund for LSE and their acceptance (in their response to the case to answer letter) of substantial responsibility for the underperformance on the sector. We did not think that a penalty would drive improved performance more than NR's existing commitments and we were confident that CP5 monitoring would pick up a failure of those commitments quickly.

39. We agreed that a penalty was not appropriate in this case but supported the additional proposed spending on resilience.

40. We formally agreed that no further action was required on any other regulatory targets for CP4.

41. We noted the proposals for the announcement and handling which would be agreed with the Chief Executive and Chair. **[Action D]**

42. We asked the executive to consider how they would keep us informed of the performance picture during CP5 so that we could be assured that NR was meeting its public obligations. **[Action E – Alan Price and John Larkinson to come forward with proposals for regular Board involvement in monitoring CP5**]

43. We thanked the team for the painstaking professional work that had underpinned the presentations and papers and enabled us to engage confidently in reaching decisions.

Item 6 NR RECLASSIFICATION - UPDATE

44. Dan Brown updated us on progress with the work on reclassification.

Paragraphs 45-53 have been redacted as containing sensitive information about policy development

54. We asked the team to bring back to the board in the autumn a discussion about ORR's role in preparations for the spending review and HLOS taking account of vfm and capacity issues. **[Action G: Dan Brown to agree timings for forward programme]**

Item 8 RAIL FRANCHISING UPDATE

55. Dan Brown introduced slides which set out the existing market structure and the timeline for forthcoming franchise reviews.

56. ORR's views on franchising had been set out in our LTRS, the position was understood, but was unlikely to lead to change in government's approach. Dan reminded us that the LTRS had been well received and that we should keep all the issues alive – and turn up the volume on specific items as appropriate.

57. We noted that the 4th package in Europe might have implications for the franchise approach, but it was too early to know what parts of the package would survive the legislative process.

58. We noted slide 14 set out a list of key issues where we needed to be sure we had an 'ORR view'. We asked Dan to make sure that a discussion was

scheduled at an appropriate time to inform next steps **[Action H: forward programme]**

59. We asked ourselves whether there was more we could do about information for passengers given the medium-term local monopoly structure that franchises offered.

Item 9 CHARGES AND INCENTIVES

60. Joanna Whittington's slides reminded us what the current structure of charges and incentives was and how it fed into the funding of the railway and the costs of different types of operators. She set out the existing constraints such as European legislation and the hold-harmless provisions in TOC franchises which delayed the impact of any changes.

Paragraphs 61-70 have been redacted as relating to policy development

Item 9 CORPORATE GOVERNANCE UPDATE

71. Anna Walker introduced the paper. Given the anticipated arrival of new NEDs in the next few weeks and our commitment to setting up a new roads committee to respond to that new function, this was an opportune moment to consider changes for the future.

72. She identified the key issues that a review should solve as:

    a. Board agendas are currently too long and complex;
    b. It was hard for the board to find time to take a wider perspective or strategic view;
    c. There remained some inconsistencies in which issues were brought to the board;
    d. We need to find a way to quickly identify differences, explore them and reach a shared conclusion.

73. We discussed some of the various risks and options for change that might help us improve effectiveness.

74. We all agreed that we need to be more focused in our interventions and more disciplined in sticking with the core issues.

75. The Chair said she was concerned that any delegation of decision-making on economic issues to committees would undermine collective board responsibility. But there would be scope for a committee to explore issues in detail and put recommendations to the Board.

76. Non-committee members would need to focus on the process followed in reaching recommendations to the full board and make sure they offered scrutiny and challenge to the recommendation by the committee. There would always be a gap between the executives' understanding of an issue and that of the NEDs because EDs could be involved in all the early discussion whereas NEDs would be presented with a fully worked up and carefully argued piece. It was argued that NEDs involvement in Board committees would allow them to join in the early policy development.

77. After further discussion we agreed the following next steps:

    a. We should plan for a regular six monthly full day review of all areas of the business so that all board members felt that they understood what was happening in the business and the wider industry;

b. The first of these days in the autumn should be used to re-shape our forward programme and review our ways of working together;
c. We should set aside time in board meetings to resolve all the half dozen issues identified in the paper as suffering from a mismatch between the NED's ambition and the executive's pragmatism. The items listed were: Transparency, Consumers, Freight, Europe, On rail competition, PR18 development;
d. We should consider a short aide memoire or prompt card which set out ways we could help meetings run to time;
e. A NED and an ED (identified by the Chair and Chief Executive) should be asked to examine the arguments for and against a new economic sub-committee and bring recommendations back to the Board

78. **[Action J –** Secretariat to programme and coordinate this work alongside induction for the new NEDs].

Item 10 FEEDBACK FROM REMCO

79. Stephen Nelson reported back as Chair from the REMCO meeting the day before. The committee had reviewed emerging proposals for a new reward structure, both consolidated and non-consolidated pay. Proposals for consolidated pay arrangements included a shift to career families and spot salaries. They were complex and would take time to develop so implementation was planned for 2015/16.

80. More detailed and well thought through proposals had been made for the non-consolidated reward pot of £440,000 for the 2014/15 year. Essentially these were for three groups of award:
    a. Individual awards: limited to 10% of the workforce, more modest than currently (max of £4,000) and only for outstanding performance against individual objectives. These would be awarded as currently, to non-SCS staff and based on the agreed executive view. Total value up to around £120,000.
    b. Team awards would be aligned to delivery of the five strategic objectives and be weighted for each individual and team in line with their workload. Recommendations would be made by the executive to the board based on milestones achieved in the business management system. Total value up to around £200,000.
    c. Organisational award for delivery over and above the business plan. Payment would be based on a recommendation by the chief executive, judged by the board.

81. In each case, not all of the pot would necessarily be spent in year and it was very important that staff understood the criteria that would be applied to the various judgements at the year end. It was unlikely that all the money in the team and organisational pots would be used every year.

82. Stephen recommended the Board accept the proposals for the use of the unconsolidated pot in 2014/15 and agreed that the team should now work with staff on implementing plans for the consolidated pot in 2015/16. The Board agreed.

83. REMCO had also reviewed the directors' objectives, which worked alongside the business plan to ensure that there was senior accountability for delivery. These would be finalised by the Chair and Chief Executive.

Item 11 FINANCIAL RING-FENCE: PROPOSED PROPERTY ACQUISITION

Katherine Brownstein, Amanda Clark, Jonathan Hulme, Les Waters joined the meeting.

This item and associated actions has been redacted as relating to potential commercial activity by Network Rail

Item 12 REAPPOINTMENT OF INDEPENDENT AUDIT COMMITTEE MEMBER

88. We agreed the recommendation to appoint Melvyn Neate as the independent member of our audit committee for a further two years **[Action L: secretariat]**

89. We reminded the chair of the opportunity to rotate committee memberships now that new NEDs were expected. **[Action M: Chair and Board Secretary]**

Item 13 FEEDBACK FROM AUDIT AND RISK COMMITTEE

90. Tracey Barlow reported back from the audit and risk committee meeting the previous day.

91. The annual report and accounts had been successfully laid before Parliament.

92. One audit report on ORR's IT outsourcing contract had given only limited assurance. The Committee was confident that measures to address the remaining issues were in hand. Tom Taylor said that there would be useful lessons for ORR which would show up over the next period.

93. The Committee had considered emerging plans for a new risk management approach which would draw on the mature business management system for operational risks and seek regular board engagement on strategic risks. Tom Taylor would lead this work and schedule an annual review of our risk approach for the autumn (alongside business planning) [Action N: forward programme]

94. The Committee had also had a useful conversation about how ORR could assure itself not just that it was complying with its own processes, but also that the processes were fit for purpose. This would be further discussed at an ARC meeting in September.

Item 14 CHANNEL TUNNEL REGULATION

Brian Kogan and Laura Majithia joined the meeting

95. Brian Kogan introduced the item by explaining the natural tensions that were likely to exist between two national regulators with different aims and interests.

96. There was also currently disquiet among French regulators as a result of the CMA's verdict on the 'My Ferry' decisions, which they saw as a bad outcome for French interests. Both sides in this discussion about channel tunnel economic regulation were alert to the risk that misalignment between them would leave a gap for others to intervene. It was important that both sides worked with good faith to deliver sensible alignment as far as possible and this was the aim now. There was then the question of what happened in the (hopefully very rare) cases where no alignment was possible. The French were seeking a formal, signed

agreement and would be uncomfortable with ORR's usual approach which would have been to develop a memorandum of understanding.

97. The emerging approach proposed was to have a working group with a board-agreed joint programme of work which would also act as a forum for information sharing on activity in the tunnel.

98. There would also need to be a decision making body with delegated authority from both boards. However, each body (ARAF and ORR) must retain their independence so there might be incidents where no agreement was possible at which stage both Chairs would have a final attempt at resolution.

99. Experience elsewhere in Europe was that without a mechanism for dispute resolution, issues could simply lie unresolved for long periods.

100. We suggested that the formal agreement should include ORR's objectives for regulation of the tunnel. That would give some points of reference when trying to reach agreement on issues. We agreed that the design of these objectives should be rooted in the interests of the users of the railway. We agreed to consider these in correspondence.

101. Brian would also make a recommendation on the appropriate ORR membership of the working group. The French were not permitted to delegate powers so their working group members would be executive board members, but his instinct was that ORR did not necessarily need to match their status.

102. [Action O: BK to circulate draft objectives for the agreement and proposals for membership of the working group]

Item 15 CHAIR'S REPORT

103. The Chair drew the Board's attention to the draft Board objectives for this year which were now agreed.

Item 16 CE's REPORT

104. Richard said that most of the items he wanted to highlight had been covered elsewhere. There was plenty of work going on in the consumer programme and this would be a major item on the July Board agenda. There was also progress on the open access applications.

105. We were constrained by the progress of legislation on the funding of our Roads activity – everything was currently being funded through DfT and this would have to continue for longer than we had hoped – again, a report would be brought to the Board in July. [Action P: forward programme].

Item 17: BOARD MINUTES AND FORWARD PROGRAMME

106. The Board minutes for 20 May were approved, subject to corrections, along with the note of our policy discussion the day before. The forward programme was increasingly unwieldy and would be re-cast over the summer.

Item 18: MATTERS ARISING

107. We noted the log of actions. There were no matters arising. The Executive committee would be reviewing the log before the next meeting.

Item 19: ANY OTHER BUSINESS

108. The Chair wanted to formally record her thanks, on behalf of ORR, for the ‘ten years’ hard labour’ Peter Bucks had put in as a member of the Board. His contribution had been very important and he would be missed.

109. Peter responded that he had been privileged to see ORR travel a huge distance since 2004. Safety, performance and capacity had all improved and ORR should take credit for significant impact on all three. Much credit was due to the people who work here and he complimented them as a seriously talented and committed team. He wished ORR well for the future.