

Office of Rail Regulation
Minutes of the 110th Board meeting
Tuesday, 25 November 2014 (09:00-16:00),
ORR offices, One Kemble Street, London, WC2B 4AN

Present:

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

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)

Observer (to item 7): Bob Holland (NED designate)

In attendance, specific items:

Item 6: Carl Hetherington, Gordon Cole, Amanda Clark, Mark Morris

Item 7: Chris Hemsley, Rob Plaskitt, Ian Williams, Liz Thornhill, Chris Hemsley, Joe Quill, Emily Bulman

Item 8: Richard Gusanie, Emily Bulman, Deren Olgun; Item 9: Richard Coates; Item 10: Annette Egginton

Item 1 WELCOME AND APOLOGIES FOR ABSENCE

1. The Chair welcomed everyone to the meeting. Ian Prosser would arrive around 10.30 after he had attended a meeting of NR's SHE¹ Committee.
2. She had invited Bob Holland to observe the meeting in advance of his appointment to the board from 1 January 2015.

Item 2 DECLARATIONS OF INTEREST

3. There were no declarations of interest from members of the board or staff.
4. It had been agreed that Bob Holland should not observe the discussion of the open access application as the application came from a subsidiary of Arriva – the company he had recently retired from. He had not been sent the relevant board papers.

Item 3 MINUTES OF BOARD MEETING ON 29 OCTOBER 2014 AND POLICY DISCUSSION ON 28 OCTOBER 2014

5. The draft minutes and notes were agreed, subject to minor corrections and clarifications.

Item 4 ACTIONS OUTSTANDING

¹ Network Rail Safety and Health Executive Committee

6. We noted the updated list of actions outstanding.
7. John Larkinson said that he had reviewed NR's reconciliation of their MIP to the CP5 regulated outputs and this was with the chair and CE.
8. The chair highlighted three further actions where she was keen to keep focus.
 - Action 17 – Alan Price to review ORR's work on driving or supporting technological change (date to be agreed)
 - Action 22 – Ian Prosser to revert to the board on worker safety in advance of the February 2015 meeting, which Mick Cash of RMT had been invited to attend.
 - Action 27 – the executive would be looking at how to develop more combined health and safety/economic reporting and report back to the February board.

Item 5 NR: CP5 PERFORMANCE TRACKER

9. Alan Price introduced the item which had also been discussed in preparing for the dinner with the NR Board the evening before. NR's performance across the board had been disappointing, with three TOCs (Western, Anglia and Southern) currently forecasting a year 1 outturn at more than 2% below PPM (the level at which we had indicated we would consider enforcement in years 1 and 2 of CP5). On the other hand, LNE had demonstrated a significant turnaround over the last two years – something achieved through steady attention to the basics. The ECML was the only part of the network where the delivery plan was delivering the expected outcomes. In particular, Alan cited the CaSL for the line which was now below 4.2% - a figure that had been thought undeliverable at the end of CP4. Overall however, the routes were not learning from each other's successes and there was no consistency around good practice sharing through the centre.
10. We talked about the confusing picture presented by the high workbanks, low rates of work, low numbers of failures, high levels of spend against budget and unreliable data. It was clear that NR continued to under-deliver on renewals and maintenance, that they would continue to under-deliver against the revised plan on issues like vegetation, and that their data meant that there were clear limits in their understanding of what was being done, what it was costing and how effective it would be.
11. Alan also reported on the enhancements programme where it was clear that potential issues his team had identified months earlier (delays to north west electrification for example) were only now being acknowledged by NR.

Paragraphs 12-14 redacted as relating to policy discussions

15. We asked our chair to write to the chair of NR setting out concerns and inviting them to a year-end discussion of their performance. We would need to think carefully about what tools and sanctions would be available

to us which would best drive improvements.

16. [Action: Richard Price to draft a letter to RPJ following the dinner]

Item 6 NR FINANCIAL PERFORMANCE MEASUREMENT IN CP5

Carl Hetherington, Gordon Cole, Amanda Clark, Mark Morris, joined the meeting

17. John Larkinson reminded the board of the difficulty we had had in agreeing NR's financial performance in CP4 in terms that were widely understood.
18. The team had been working to develop a financial performance measure for CP5 that could be agreed both by us and NR. The measure would only include things within NR's control that contribute to sustainability of the business. It would also be adjusted for missed outputs. The issues were complex since spending less than budgeted (for example on maintenance and renewals) might reduce the overall sustainability of the network. We were also told that the measure would report against the final determination rather than NR's budget. The new financial performance measure would be used for CP5.
19. John then talked about efficiency. Efficiency was not a formal regulated output but a target had been set and we needed to be able to understand and report on what was happening in relation to it.
20. A further significant change was that reclassification had led to a cap on borrowing and this would need to be carefully watched.
21. The new CP5 performance tracker would include information on both financial issues. John also talked about the poor financial reporting in Scotland.

*Paragraphs 22-26 have been redacted as relating to regulatory policy development
Bob Holland left the meeting*

Item 7 WEST COAST MAINLINE OPEN ACCESS APPLICATION

27. We discussed an application for approval of a track access contract between Network Rail and Great North Western Railway Company Limited (GNWR), submitted to us under section 18 of the Act in June 2014.
28. We carefully considered the papers presented to us, which included details of the GNWR application, our own analysis, and details of further evidence submitted to us by GNWR, Network Rail and DfT.
29. We recognised the proposed new GNWR services would bring some real passenger benefits in terms of competition, new journey opportunities, some improved journey times, and substantial investments in rolling stock and stations.
30. However, we had several areas of concern that could affect our decision. These were the result of our NPA test, factors related to the Trans Pennine infrastructure works and the nature of the impact on the funds available to the Secretary of State.
31. We discussed the results of our NPA test. The baseline timetable we modelled produced a mid-point NPA ratio of 0.26, below the 0.3 threshold for the test; the threshold is set at a relatively low level that

- already reflects the value we place on the benefits competition can bring. The 0.26 includes consideration of fares, service quality, crowding and other factors.
32. But, consistent with our duty to promote competition, we considered what further assumptions would need to be made to produce a ratio of 0.3. The assumptions required (of additional passengers) were, in our judgement, not realistic.
 33. A new timetable supplied by GNWR produced a mid-point NPA ratio of 0.29. Again we considered what further assumptions would need to be made to produce a ratio of 0.3. The specific assumption of additional passengers required was, in our judgement, more plausible, whilst recognising that uncertainty over the actual timetable which would be run could affect the confidence we have in this scenario. One possibility would be to make agreement to the application conditional on running the service.
 34. But overall on the NPA test we concluded that the application was at best marginal in certain circumstances, on a ratio which is already weighted in favour of an open access application.
 35. We went on to discuss if there were any further aspects of this application that were relevant to our duties and which we had either not already considered in the NPA test or that had been considered but merited additional weight in the particular circumstances of this case.
 36. In respect of the Trans Pennine works, we agreed approving this application could reduce the value for money of the project which DfT is developing with Network Rail. In reducing the value for money there could be the potential for wider disbenefits to passengers, for example, by limiting use of the capacity for improving direct services between stations across the North of England that overall might be more valuable to passengers (although we noted we had not received an application for such services).
 37. We also noted the current significant uncertainty about the scope and timing of the project, upon which part of GNWR's application depends. There is, therefore, uncertainty about the benefits that the application might in practice be able to deliver.
 38. We considered these factors should be taken into account under our duties, for example in relation to protecting the interests of users, value for money, promoting improvements in railway service performance, and having regard to the funds available to the Secretary of State.
 39. Finally, we noted the absolute impact on the funds available to the Secretary of State would be broadly comparable with the totality of open access applications we have approved on the ECML. But in this case the impact occurs more quickly because the services are introduced in two stages rather than developing more slowly over time. We considered that this should be taken into account under our duty to have regard to the funds available to the Secretary of State.
 40. In our judgement, none of these further aspects of the application were in themselves determinative but, taken together, tended to point to rejection of the application.

41. Therefore, having considered this application fully and balanced all our duties as we are required to do, we decided to refuse the application.
42. Further information on the analysis and reasoning behind our refusal and how we balanced our duties in reaching this decision would be set out in our decision letter which would be published.
43. We discussed handling and next steps. We agreed that a decision letter setting out our reasoning in reaching this particular decision would be issued to the applicant for factual correction as soon as possible (recognising that drafting was likely to take several days) and the decision made public as swiftly as possible after that. The Board was content for the chair and chief executive to approve the letter.
44. All approaches from the applicant or interested parties should be directed to John Larkinson and no indication of the outcome should be given before the decision letter was ready. As guidance to John, we agreed that we were not minded to consider any revision to this application that the applicant offered to make as part of this decision or to defer issuing our decision: it was important to give certainty not just to the applicant, but to other stakeholders. We noted, however, that the applicant was welcome to submit a new application at any time.
45. We noted the different assertions that had been made about the impact of open access operations in practice on the east coast mainline and we asked the team to commission a fact finding study to capture what had actually happened. [Action: Rob Plaskitt]

Item 8 PR18 PROJECT: UPDATE ON NR COMPETITION

Richard Gusanie, Emily Bulman, Deren Olgun,

46. Joanna Whittington introduced the session – this was part of the PR18 work building towards public consultation in 2016. The team had begun research and scoping for the full project.

The rest of this item is redacted as relating to policy development

Item 9 ROADS UPDATE

Richard Coates attended

55. John Larkinson introduced the item. He gave a quick summary of where progress had been good. There were some issues still with obtaining data from the Highways Agency. He had received fresh assurances and was waiting to see if these were met, but he undertook to seek Board intervention if there were further delays beyond the autumn statement. The lack of data was contributing to delays in preparatory work although much good work was being done, particularly on the monitoring handbook and consultation document.
56. The legislation now included draft duties which were broadly in line with what we had expected. Our own funding would be in place from 1 April 2015. Stakeholder engagement was going well – including some early questions about similarities on road and rail.
57. There were two main issues: recruitment of key posts was very slow

- and the team had concerns about the proposed funding mechanism for our work.
58. The deputy director recruitment was going slowly and we were unlikely to identify a candidate who would be able to start before 1 April when our role began. Business planning was being done on the basis that existing resources would be stepped down as new people came on stream, so delay would have knock-on effects to other programmes.
 59. Richard Coates explained the range of options for government to fund ORR's roads work. Our preferred option would be a regulatory levy on the regulatee (SHC) which modelled other regulatory arrangements (including on rail). DfT's preferred option was our least favoured – grant funding direct from DfT. This carried significant risks to our independence and to the level of funding that would be available to support the work.
 60. We agreed that the chair should write to the DfT permanent secretary to set out again the arguments for a levy. If a levy was not achievable (which might be because of the need to amend the bill) we should stress the importance of mid- term certainty to enable us to do the work. [Action: John Larkinson to draft letter]
 61. We noted again that cross-subsidy is not permissible between our road and rail and safety work.
 62. We discussed the slides around communications issues. We understood the need for clarity around the our rail and roads roles, particularly in terms of managing our stakeholders, but we noted that we had been given the roads role because of our existing skills and background so we thought it was important to make both work together. A micro site embedded into the ORR site seemed appropriate and low cost at this stage. We noted that some expenditure would be needed to establish the roads expert panel. John asked us to think about possible groups to include.
 63. We would hear from the team again in January when a draft consultation document would be available. We agreed to consider whether some interaction at Board level with the new Highways company would be appropriate. **[Action: forward programme]**

Item 10 MONTHLY HEALTH AND SAFETY REPORT

64. Ian Prosser drew our attention to the key issues in his report.
65. The police had reclassified some previous trespass deaths to suicides and this had the overall effect of noticeably reducing the PIM. This was helpful because it more closely represented the true picture, but should not be taken as a major improvement in safety. There would be a correlating increase in the number of suicides counted. Ian said that NR worked hard to identify track areas with suicide risks and improve security around them.
66. He explained a dispute that was brewing between ASLEF and NR, partly as a result of what seemed to be a misunderstanding about the successful prosecution of a FCC driver for a 'reset and continue' SPAD. He was working to explain the safety implications of the proposed action to the union leadership.

Item 11 COMPETITION UPDATE

- 67. Juliet Lazarus updated us on Project Marshall.
- 68. ORR had commissioned a report from Norton Rose on whether ORR had used its competition powers, rather than regulation, in appropriate situations. Their opinion was that we had used the right powers in the right situations and were seen as having done so successfully. There was only limited scope to apply some competition powers in rail and this was acknowledged. Juliet was reviewing the recommendations some of which were being addressed and would be captured in the 15/16 business plan. We welcomed the update.
- 69. Juliet also updated us on the work of the UK Competition Network (UKCN). The CMA were proactive in pursuing competition issues in sectoral regulators where applicable, and in ensuring concurrency between them and the sectoral regulators was a reality. It was important that we took the initiative where we could to demonstrate our commitment to the use of competition where it worked.

Item 12 CHIEF EXECUTIVE'S REPORT

- 70. Noted but not discussed.

Item 13 BOARD FORWARD PROGRAMME

- 71. We noted the forward programme.

Item 14 CHAIR'S REPORT

- 72. The chair asked board members to let her know if they did not agree with her that we should not introduce an economics regulatory committee at this time – the paper explaining the arguments was in her report.
- 73. The chair congratulated Tracey Barlow on her reappointment to the Board, which would be announced by DfT shortly.

Item 15: ANY OTHER BUSINESS

There was no other business.