

For publication on ORR website

Office of Rail Regulation

Approved Minutes of the 32nd ORR Board meeting held on 19 March 2007 (14:00 – 17:15) at the Hilton Hotel, Kingsway, Cardiff CF10 3HH

Board Present:

Chris Bolt	Chairman
Michael Beswick	Director Rail Policy
Peter Bucks	Non-Executive Director
Bill Emery	Chief Executive
Richard Goldson	Non-Executive Director
Jeffrey Jowell	Non-Executive Director
Michael Lee	Director Access, Planning & Performance
Jane May	Non-Executive Director
Jim O'Sullivan	Non-Executive Director
John Thomas	Director Competition & Regulatory Economics
Linda Williams	Chief Inspector of Railways

In attendance:

Shamus Kenny	Board Secretary
Juliet Lazarus	Director Legal Services
Sarah Straight	Director Safety & Economic Policy Development (items 11 & 12)
Annette Egginton	Head of Competition Policy (item 11)
Steve Armitage	Head of Competition Economics (item 11)
Colin Greenslade	Head of Network Code Policy (item 12)

Item 1: Welcome and apologies for absence

1. The Chairman welcomed everyone to the meeting.

Item 2: Declarations of interest

2. Peter Bucks owned shares in Lloyds TSB Bank. Lloyds TSB was a potential new entrant into the passenger rolling stock leasing market(s). The Board agreed that, as Lloyds was only a potential entrant into the market, Peter Bucks would be able to take part and vote in the discussion on the potential referral of the market(s) to the Competition Commission (item 11).
3. There were no other interests for Board members to declare relevant to the agenda.

Item 3: Safety Regulation Committee membership

4. The Board agreed to appoint Sarah Straight to its Safety Regulation Committee.

Item 4: Approval of minutes of Board meeting of 20 February 2007 for publication

5. The Board approved the minutes of its 31st meeting on 20 February 2007 and authorised the Chairman to sign them. The approved minutes would be published on ORR's website.

Item 5: Matters arising (not taken elsewhere on the agenda)

6. The Board noted progress on actions agreed at previous meetings and updated the table.

Item 6: Chairman's Report

7. The Board noted the Chairman's activities over the last month, which included:

- Speaking at the Rail Conference and to Lichfield Commuters Club at the House of Lords.
- Attendance at: a Cass Business School event where Peter Hendy, Transport Commissioner for London, discussed TfL's Transport 2025 plans; a seminar at the Regulatory Policy Institute; the HSBC Rail Industry Awards on 28 February; and participation in the British Transport Police Strategic Plan panel.
- Meetings with: Philip Fletcher (Chairman of the Water Services Regulatory Authority); Nigel Harris (Rail Magazine editor); Ian McAllister (Chairman of Network Rail), Bill Callaghan (Chairman of HSE); Peter Hendy (Commissioner, Transport for London); and Andy Friend (Commercial Adviser, DfT).
- Chairing ORR's Review of Markets Passenger Rolling Stock Leasing Committee and attendance at the regular meetings of the Periodic Review and Safety Regulation Committees.
- A visit, with the Chief Inspector of Railways, to the site of the Grayrigg derailment.

8. The Board noted his planned activities for the following month.

Item 7: Board review of effectiveness 2007 and objectives 2007-08

9. The Board discussed the results from the self-assessment questionnaire that it had completed as part of a review of its effectiveness. Overall, the results were encouraging. There were some areas of perceived weakness, but these had generally already been identified and were being addressed.

10. Proposed initiatives for 2007-08 were agreed. These included: a further informal session to consider steps to develop ORR's strategy as a combined

regulator; an autumn away day to review progress on the Periodic Review (in the light of the July White Paper) and to consider longer term developments in the rail industry as an input to a review of ORR's strategy and business planning for 2008-09; a review of all the standing committees; and the development of a forward diary of meetings, visits and other events involving Board members.

11. The Board discussed proposed objectives for itself and the Chairman for 2007-08. It would submit comments on these and clear its objectives in correspondence and agree the Chairman's objectives on 17 April 2007.

Item 8: Chief Executive's report

12. The Chief Executive's report provided an update on industry and ORR activity over the previous month.

13. Since the last meeting, the Board had agreed in correspondence a response to a proposal from DfT for ORR involvement in the Intergovernmental Commission for the Channel Tunnel. This agreement was subject to further discussion between officials on the detail of the proposals.

14. The Board noted updates on key policy and office activities over the previous month.

15. Railway performance in Period 11 fell to 86.0%, a 0.4% reduction from period 10 and 3.2% lower than in period 11 2005-06. This reduced the 13-period moving annual average by 0.2% to 88.1%, the first fall for over a year. Delays attributed to Network Rail were 77% higher than in period 11 2005-06. Much of the increase was due to adverse weather, in particular the gales on 18 January 2007 when speed restrictions of 50mph were imposed in stages across the network. That one day accounted for around a quarter of all 'Network Rail' delays in the period. Network Rail's year-end delay minute forecast was now 1.8% below the regulatory target (compared with 6% below target at the end of period 10) and 6.3% above its own stretch target for the year.

16. ORR had investigated Network Rail's handling of the snowfalls of 24 January and 8 & 9 February 2007. Network Rail had apologised to the industry, to the Minister and in public for what it acknowledged was a mishandled event. The second snowfall was more widespread but Network Rail's precautionary measures were better. However there were again high levels of points failures, confirming doubts about maintenance and exposing a significant backlog of point heater renewal. ORR highlighted its concern about these matters in the latest Network Rail Monitor and would track Network Rail's progress in dealing with them.

17. ORR had published its crystal marked level crossing policy statement. The executive planned to set a target to get more of its documents crystal marked.

18. ORR had published its Advice to Ministers and framework for setting access charges document. It had also provided updated 'spot' estimates of the CP4 revenue requirement to DfT and Transport Scotland, consistent with the ranges in the Advice to Ministers document, and updated its preliminary

advice provided in November 2006. The Board noted the key issues from the updated PR08 programme plan.

19. ORR had received its first appeal under the Railway Infrastructure (Access and Management) Regulations 2005 from GB Railfreight Limited (GBRf). The appeal was for access to Freightliner Limited's terminals at Southampton Maritime and Millbrook. Subject to initial discussions with GBRf, ORR would undertake a consultation process similar to that used for section 17 applications.

20. DfT had made a submission to the European Commission (EC) on 8 March 2007 in response to GNER's allegation that the charging regime for open access operators constituted state aid. ORR would make a separate submission, which would provide a more detailed explanation of the basis for our charging framework for open access passenger operators and expand on some issues that DfT addressed at a high level. ORR would also flag up the potential impact on PR08 if the EC took a long time to make a decision.

21. Wrexham, Shropshire and Marylebone Railway (WSMR) had withdrawn its track access application as West Coast Trains held contractual moderation of competition protection preventing Network Rail selling access rights to other operators on the flow between Wolverhampton and London Marylebone. WSMR submitted a revised application barring the services to Wolverhampton-London passengers, and taking a northerly route on weekdays that avoided New Street: this was now out for industry consultation.

22. Progress was being made on closing down the few remaining issues on TfL/Network Rail's section 18 application for an access option for the East London line. ORR expected to make a decision on this in late March / early April 2007. ORR was also in discussion with DfT and Network Rail in respect of DfT's proposed application for an access option in relation to the Crossrail project.

23. ORR had arranged a meeting with Network Rail and First Great Western in mid-April 2007. This would discuss underlying trends in Western performance and their performance management in 2006-07. It would then discuss their joint performance improvement plan for 2007-08 and beyond. ORR would then make a public statement about the outcome of its Western performance investigation.

24. The Board and executive remained concerned about problems with the renewal of signalling in the Portsmouth area. A restricted service was in operation, and Network Rail would not commit to a date for resolution of the problem. ORR was considering whether there were stronger parallels with the Sandbach-Wilmslow renewal of signalling project than originally seemed to be the case. It would review the written response from Network Rail before deciding if further action was required.

25. Progress on ORR's internal integration workstreams was noted. The executive was congratulated on reaching agreement on the establishment of a staff council that would bring together union officials and non-union staff representatives for the purpose of information, consultation and negotiation with staff.

26. The Board noted that ORR had effectively completed the delivery of the 2006-07 business plan on time and 9% below budget. Key regulatory outputs had been: leading the successful transition to the new model for managing safety on the railways (ROGS); consolidating the regular performance monitoring of Network Rail and TOCs into the new quarterly National Rail Review; significant progress on the 2008 periodic review including a thorough review of Network Rail's initial strategic business plan for the 2009-14 period, and triggering the formal stage of the review as planned in February 2007; considerable progress with ORR's ever more focused and effective regulation agenda; the successful defence in the High Court of ORR's decision on Grand Central's open access application; and the successful and innovative closure of the long-running EWS competition case involving coal flows to power stations.

Item 9: Chief Inspector's report

27. The Board noted the Chief Inspector's report. This provided information on: overall health and safety performance, HMRI work activities for 2006-07 to support its priorities, statutory duties, formal enforcement, significant meetings, RI outputs, and industry progress reports and current issues. There had been no RSSB formal inquiry reports in this period.

28. ORR continued to predict a broadly improving trend in safety performance for Network Rail as a whole over the year. The Grayrigg derailment on 23 February 2007 illustrated that there could be variability of safety management standards at various locations, whilst aggregated data for Network Rail as a whole could still show modestly improving safety performance.

29. Network Rail's internal SEAR Report for Period 11 showed no Network Rail or contractor fatalities in the period. Twenty-one RIDDOR reportable workforce injuries occurred, four were classed as major. The normalised annual accident frequency rate for the company stood ahead of its target for the year. There were eight incidents reportable as significant train accidents in the period. The 24 broken rails reported in the period, gave a total of 150 for the year to date, a 40% improvement over the same time in 2005-06. There were 25 SPADs; 6 more than the equivalent period in 2005-06, with the improving trend on SPADs being reversed for the last four periods. Operating irregularities results were an improvement on last year and the improving national trend continued.

30. LUL's performance continued to give no cause for concern, although there had been a rise in the number of reported passenger-train interface incidents in the last quarter, possibly related to increased passenger journeys.

31. Inspectors were making satisfactory progress with work contributing to the Network Rail Delivery and National TOC/FOC Plans. There would be a reduction in the resources allocated to planned inspection work with Network Rail in 2007-08, to free up resources to focus on other priorities.

32. During the period, RAIB has published one report and had started its investigation into the Grayrigg derailment.

33. Two improvement notices and one prohibition notice had been served in the period and one further notice was being considered. Progress on compliance with two existing notices was noted.

Item 10: Grayrigg, Cumbria, high speed passenger train derailment

34. On 23 February 2007 there was a major incident when a high-speed passenger train derailed at Grayrigg, Cumbria. The incident resulted in one fatality and 22 people taken to hospital with various injuries.

35. The Board noted the activities and respective roles of RAIB, British Transport Police and ORR in the investigation of the incident. Cooperation on site between the three organisations had been very good. RAIB had published its 48-hour report on Monday 25 February 2007 and this indicated issues with the points and particularly the stretcher bars.

36. The Chairman and the Chief Inspector of Railways had visited the site of the incident on 1 March 2007 and spoke to inspectors. ORR was conducting an internal “lessons learnt” review of its major incidents procedures and the facilities for staff on site, to see if any changes were required. The costs of ORR’s investigation could be met from existing budget provision.

37. RAIB’s role covered investigating the “prior role” of ORR / HMRI i.e. relevant actions since the Potters Bar derailment in May 2002. The Board discussed the terms of reference for an internal review of ORR’s safety and economic regulatory role in assuring effective management of switches and crossings (points) on the mainline railway from 2002 to date. The scope of the review was limited to ORR’s actions with a focus on learning any lessons. It would consider if decisions taken, given the information available at that time were right. It would not look either to justify past action or blame individuals. The outcome of the review would enable ORR to consider its safety management oversight regime going forwards and would help to inform any RAIB investigation of ORR’s “prior role”. Sarah Straight was the lead director on the review and would report directly to the Chairman on her findings. The Board would be updated in April and the report conclusions reported to it in May or June 2007.

38. Following the incident Network Rail had carried out inspections at 15% of similar points across the network and would carry out inspections of all points on the west coast mainline. ORR recognised the amount of effort Network Rail had put in since 2002 to improve systems and maintenance. However, it did not appear to have a mechanism in place to quality assure switches and crossings inspections, to ensure that they were carried out in accordance with the laid down procedure. ORR would follow this up and check if quality assurance mechanisms were in place for other maintenance work.

39. The executive was being provided with regular updates on the Grayrigg investigation. If any significant issues arose these would be reported to the Board.

40. Lord Justice Sullivan, sitting as deputy coroner in the Potters Bar inquest, had postponed the inquest having linked it to the Grayrigg derailment. He had

also written to the Secretary of State for Transport suggesting that he reconsider the need for a public inquiry. The potential delay in concluding the inquest had implications for ORR's ability to bring any prosecutions. ORR would normally only consider whether to bring prosecutions after an inquest had been concluded. The executive was considering whether to bring forward its deliberations on the case for prosecutions. The Board would be kept informed of the executive's decisions.

Item 11: Review of Market(s) for Passenger Rolling Stock Leasing

41. Following a submission from the DfT on 28 June 2006, ORR had conducted a market study of the market(s) for passenger rolling stock leasing. On 20 November 2006 (minutes for item 9) the Board considered the evidence provided from the study, which led to the suspicion that there was not sufficient competition in this market(s) to give it a clean bill of health.

42. Taking into account its section 4 duties, the Board had considered that a reference to the Competition Commission represented a proportionate and appropriate response to the concerns that had been identified in the passenger rolling stock leasing market(s). It therefore agreed that the parties and wider industry should be consulted on the basis that ORR was minded to refer the market(s) for passenger rolling stock leasing to the Competition Commission under section 131 of the Enterprise Act 2002.

43. ORR consulted interested parties on its "minded to refer" decision between 29 November 2006 and 28 February 2007. The Board Committee had considered the initial analysis of the detailed consultation responses from all parties likely to be affected by ORR's decision including all three ROSCOs and the DfT. Committee papers and minutes had been circulated to the full Board. More detailed analysis of the responses was ongoing. The Board now reviewed its "minded to refer" decision in light of the analysis of those consultation responses.

44. The Board concluded that the low threshold test for referral to the Competition Commission had been met because there were features of the market(s) both inherent and arising from the DfT's franchising process which distorted competition in the procurement of rolling stock leasing and associated maintenance supply.

45. The Board then considered whether a reference to the Competition Commission would be a proportionate and reasonable exercise of its discretion, in the light of its section 4 duties. It considered the potential benefits and costs of a reference. The 'benefits' were considered by reference to the scale of the detriment and the amount of detriment potentially 'recoverable' by the Competition Commission. The 'costs' were considered by reference to the direct costs of resourcing a Competition Commission investigation and by reference to risks to investment. It then considered whether ORR or the Competition Commission would best administer a 'remedy'.

46. Subject to any issues arising from the further detailed analysis of the consultation responses by the executive, the Board concluded that it should exercise its discretion to refer. The size and value of the market(s) (including conservative estimates of detriment) and the extent to which detriment could be remedied by a reference (via direct controls on prices or via increased competition at future franchise lets) outweighed the cost of the reference and the potential negative impact on the industry arising from uncertainty.

47. Although the figures could not be quantified, on the evidence before the Board it was reasonable to suspect excess returns by the ROSCOs. The Board therefore agreed that further investigation by the Competition Commission was necessary and that the Commission was the authority empowered with the appropriate remedies to achieve a more comprehensive solution to the competition problems identified, although it could not enforce a change to Government policy. Failed efforts to find an industry solution during the consultation period meant undertakings in lieu of a reference were not achievable or appropriate.

48. The draft reference report would be shared with the Board Committee and Richard Goldson before it was issued alongside a stock market media announcement in late April 2007. This minute would not be published until the stock market announcement had been made.

Item 12: Sustainable development policy

49. The Board discussed the proposed policy in relation to discharging ORR's duties under section 4 of the Railways Act 1993. These were to contribute to the achievement of sustainable development and to have regard to the effect on the environment of activities connected with the provision of railway services. These duties must be balanced against ORR's other section 4 duties.

50. Previous Board discussions on 20 February (minutes for item 14) and 22 May 2006 (minutes for item 10) and an informal discussion in March 2007 had shaped the development of the policy.

51. ORR consulted the industry and other interested bodies between 11 October and 22 December 2006. The consultation set out how ORR currently discharged its duties on sustainable development and the environment, questioned whether it could do this in a way that addressed the three recognised pillars of sustainable development: economic, environmental, and social more effectively, and sought industry views on ORR's proposals to achieve this.

52. The Board agreed that ORR's priorities were:

- a continued industry focus on improving the performance, efficiency and market position of rail;
- to press and facilitate the industry to improve its relative performance on sustainable development, in particular on the environment, and address areas of specific concern;

- to be prepared to act as the ‘conscience’ of long term sustainability, highlighting inter-generational issues, and being responsive to longer term developments and trends (recognising the structural issues that led industry players to focus on the short-term); and
- to recognise the industry’s role in improved and sustainable economic performance (as highlighted by Eddington), and in addressing social inclusion and development of sustainable communities.

53. ORR’s approach would focus on where it could add most value in delivery of sustainability objectives, consistent with its better regulation objective. ORR would encourage the industry to take ownership and leadership of the sustainable development agenda, by influencing and facilitating industry initiatives (for example by encouraging the use of one set of consistent data and performance indicators that could identify trends). ORR also had limited enforcement powers that could be used independently of the Environment Agency or local environment officers.

54. ORR would publish its policy in early April 2007 and establish workstreams and projects to take the work forward. ORR would build upon its internal sustainable development initiatives, including considering sustainable development issues in all major work streams, as it was doing in the Periodic Review.

Item 13: East Coast main line competition issues

55. On 15 December 2006, DfT announced that it was inviting expressions of interest to operate inter-city services on the East Coast Main Line (ECML). This followed a period of financial problems for GNER’s parent company, Sea Containers, which led to its surrender of the franchise. The winning bidder was due to be announced in the summer of 2007. GNER would continue to operate the franchise until late autumn 2007, when the new operator would take over the services. On 20 February 2007, DfT announced the parties who had qualified as bidders: Arriva Trains East Coast (owned by Arriva plc); First London Scottish and North East Railways (owned by First Group); Inter-city Railways (owned by Virgin and Stagecoach in a joint venture); and NXEC Trains (owned by National Express Group).

56. The Board discussed specific potential competition issues around the awarding of the franchise to some of the qualified bidders. It noted how merger analysis was conducted and the factors taken into account by the Office of Fair Trading (OFT) and the Competition Commission (the competition authorities) when assessing the competition implications of a franchise acquisition. ORR would provide sector specific advice to the competition authorities.

57. The Board would have an informal discussion immediately after its April 2007 meeting on wider franchising and competition issues.

Item 14: Board committee minutes

58. The Board noted the minutes of its committees that had met since the last Board meeting.

Review of Markets Passenger Rolling Stock Leasing: 8 March 2007

59. The committee had discussed the initial analysis of consultation responses from interested parties. Its discussion informed the Board paper at item 11 above.

Safety regulation committee: 15 March 2007

60. The committee had received a presentation from Mike Strzelecki, Director of Safety, Quality & Environment at London Underground Limited on LUL's management of health and safety. The presentation would be circulated to all Board members for information.

Item 15: Any other business

61. None.

Item 16: Date of next meeting

62. The next ordinary meeting of the Board would be held on 17 April 2007 in London. Richard Goldson submitted his apologies for that meeting.

Chris Bolt
Chairman

Minutes approved by the Board on 17 April 2007