

## **For publication on ORR website**

### **Office of Rail Regulation**

#### **Approved Minutes of the 41<sup>st</sup> ORR Board meeting held on 19 February 2008 (10:00 – 15:00) at ORR's Head Office, 1 Kemble Street, London, WC2B 4AN**

##### **Board Present:**

Chris Bolt	Chairman
Michael Beswick	Director Rail Policy
Peter Bucks	Non-Executive Director
Chris Elliott	Non-Executive Director
Bill Emery	Chief Executive
Richard Goldson	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
Jessica Walters	Deputy Director Legal Services
Sam M Hodgson	Assistant Board Secretary
Brian Kogan	Deputy Director Access, Planning & Performance (item 8)
Tim Griffiths	Senior Economist, Transport Economics (item 8)
Andy Burgess	Head of Network Regulation (item 9)
David Simmons	Independent Reporter, Halcrow (for discussion of draft investigation report under item 9)
Jen Dinmore	Senior Legal Adviser (item 9)

##### **Item 1: Welcome and apologies for absence**

1. The Chairman welcomed everyone to the meeting. There were no apologies for absence.

##### **Item 2: Declarations of interest**

2. There were no interests for Board members to declare relevant to the agenda.

##### **Item 3: Approval of minutes of Board meeting of 22 January 2008 for publication**

3. The Board approved the minutes of its 40<sup>th</sup> meeting on 22 January 2008 and authorised the Chairman to sign them. The approved minutes would be published on ORR's website.

#### **Item 4: Matters arising (not taken elsewhere on the agenda)**

4. The Board noted progress on actions agreed at previous meetings.

#### **Item 5: Chairman's Report**

5. The Board noted the Chairman's activities since the January 2008 Board meeting and his planned activities for the following month. These included:

- attendance by the Chairman and chief executive at the Transport Select Committee on 23 January 2008, with a further session planned for 5 March 2008;
- further discussions with engagement with heritage railway and tram operators on ROGS issues; and
- discussions with the chief executives of passenger and freight train owning groups to ensure that they felt properly engaged and consulted as part of ORR's current investigation into Network Rail's engineering overruns (see item 9 below).

6. The Board noted arrangements for its effectiveness review, which included consultation with contacts in Government, the industry and other regulators.

7. The Board noted the draft programme for its meeting in Scotland on 17-18 March 2008, which included a meeting with Scottish Ministers and Transport Scotland and meeting regional staff.

#### **Item 6: Chief Executive's overview and office report**

8. The Board discussed the chief executive's overview and office report. This provided an update on industry and ORR activity over the previous month and highlighted forthcoming issues.

9. ORR continued to deliver in accordance with its business plan and budget. Considerable time and effort had been dedicated to work on the crossrail track access option, the investigation into Network Rail's engineering overruns and work associated with the periodic review over the previous month.

10. The Board noted progress on the Grayrigg investigation. Following BTP agreement, ORR was proceeding independently with its investigation of possible health and safety offences. Consultation on RAIB's report, currently expected to be published at the end of May, would commence shortly.

11. Progress on the development of the 2009-14 corporate strategy was noted and a full update would be provided in March 2008. Progress on the review of ORR's risk management was also noted and a full update would be provided to the Audit Committee in March 2008.

12. The Board discussed progress on sustainable development issues including preparation for publishing some key performance indicators (KPIs) from the industry covering the years 2005-06 and 2006-07 in the 2007-08

National Rail Trends Yearbook in July 2008. ORR was also reviewing its corporate policy in respect of the environment to improve its performance.

13. In response to a request from Lloyds TSB to update ORR's bank mandate, the Board resolved that an account be continued with Lloyds TSB Bank plc.

### **Item 7: Annual review of Board rules of procedure**

14. In accordance with good practice in corporate governance, the Board reviewed its rules of procedure and agreed to the recommended changes. A redrafted set of the rules of procedure would be presented to the 18 March 2008 meeting for approval.

### **Item 8: Crossrail track access option**

15. The Board had discussed and input into the review of the track access option (TAO) application, jointly made by DfT and Network Rail, on 20 November 2007 (minutes for item 11) and 22 January (minutes for item 10).

16. As part of the review process ORR held an industry hearing on 1 February 2008 to ensure that the Board's decision was properly informed by the views of the applicants and all those interested stakeholders. The hearing examined some of the key issues arising from the application, specifically demand, capacity and performance and the change control mechanisms.

17. The review of the application had shown that there was still a lot of uncertainty in the project as it was not yet clear exactly what services would be run, how the network would need to be changed to accommodate them, or what the operational consequences of those services would be. At the hearing, DfT and Network Rail said they wanted to be "good neighbours" and were confident that the project could be accommodated without undue impact on the interests of other operators. Going forward, Network Rail and DfT would be expected to identify potential issues such as freight growth and consider how these would be addressed through mechanisms such as the freight route utilisation strategy.

18. On 20 November 2007, the Board had agreed in principle that a TAO was justified in this case. In reaching its conclusions on the detail of the TAO, the Board took into account:

- (a) all of its statutory duties and concluded that its decision represented the appropriate balance between these;
- (b) relevant legislation, in particular the requirements relating to the duration of framework agreements (which include TAOs) under the Railways Infrastructure (Access and Management) Regulations 2005; and
- (c) its track access options policy and criteria and procedures for the approval of track access contracts.

19. The Board agreed that the TAO should include the requested access rights in the peak and shoulder peak periods. However, it was not satisfied that the case for access rights in the off-peak periods and at weekends, which would also accommodate the needs of other users, had been made. It therefore agreed that the TAO should contain two fewer rights per hour in each direction in those periods than had been requested in the application. The Board concluded that the duration of the TAO should be 30 years, effective from service commencement (anticipated to be December 2016), rather than the 50 years sought, and should contain a buy-back provision.

20. The use of the access rights in the TAO would be made conditional on an objective test. This would require the parties to demonstrate that they were able to schedule the proposed crossrail services, together with the passenger and freight services (with an allowance for growth) that had been included as assumptions for the modelling carried out by the parties before the hearing, with a minimum of 92% PPM. ORR would need to be satisfied with the provisions relating to the use of the model and modelling assumptions. The change control mechanism would be modified in a way that reflected these principles and would use objective tests.

21. Consistent with ORR's TAO Policy, the "use it or lose it" provision would be modified to remove the provisions giving the Optionholder extended and special protection.

22. The next step would be to publish details of the TAO that ORR was minded to approve to enable representations to be made on any new material or factual inaccuracies. It was recognised that there would also need to be engagement with the applicants in respect of the consequential modifications.

23. The Board noted the correspondence from the Minister for Transport to ORR's Chairman confirming that most of the clauses in the Crossrail Bill that ORR objected to would be removed, except those relating to inadvertent approval of conflicting access rights and blocking rights. ORR would write again to the Minister setting out the reasons why it considered that the remaining contested clauses should be removed.

### **Item 9: ORR investigation into Network Rail's management of engineering projects, focusing on 2007-08 Christmas / New Year possessions and the robustness of Network Rail's plans to complete the west coast route modernisation programme**

24. Further to its discussion on 22 January 2008 (minutes for item 9), the Board considered the draft investigation report into Network Rail's management of engineering projects and the robustness of its plans to complete the west coast route modernisation programme. David Simmons, the independent reporter from Halcrow, explained the basis of the findings and answered questions on the issues covered in the draft report. The Board thanked the reporter and the investigation team. (At this point David Simmons left the meeting.) The Board agreed to the publication of a final version on 28 February 2008 at the same time as the announcement of the action ORR proposed to take.

25. Having considered the draft report, the Board considered whether Network Rail had breached, or was currently or likely to be in breach, of its network licence.

26. The Board agreed that there had been a breach of condition 9 of the network licence in relation to the taking of a late notice possession at Rugby on 31 December 2007. The Board then considered whether it was appropriate to impose a penalty. It took into account the particular facts and circumstances of the breach and concluded that although the late possession was highly regrettable in that many people had made travel plans and train operators had taken bookings, Network Rail had acted in the longer term interests of its customer and rail users in seeking to complete the work required for the December 2008 timetable. The Board did not consider that its section 4 duties justified imposing a penalty in the circumstances. Having taken into account these and the other factors set out in its penalties statement, including the fact that it considered that Network Rail was justified in taking the action that it did, the Board agreed not to impose any penalty for this breach.

27. The Board agreed that there was a continuing breach of condition 7 in relation to systemic weaknesses in Network Rail's planning and execution of engineering projects in that: Network Rail was failing to plan and execute projects for the renewal, replacement, improvement enhancement and / or development of the network which required possessions in an efficient and economical manner and in accordance with best practice so as to meet the reasonable requirements of its customers and funders. The events at Rugby, Liverpool Street and Shields Junction were manifestations of these weaknesses.

28. The Board agreed that a draft Final Order would be published in accordance with Section 56 of the Railways Act 1993 in respect of this continuing breach. The Order would require Network Rail to produce and deliver a plan to ORR by 31 May 2008 demonstrating how it would implement such measures to the greatest extent reasonably practicable to ensure that planning and execution of projects that required possessions were undertaken in an efficient and economic manner and in accordance with best practice. This would address the weaknesses identified in ORR's investigation. Network Rail would have to consult its customers, relevant funders, Passenger Focus and London Travelwatch about this plan. By 31 December 2008 Network Rail would have to have implemented the plan and submitted a report to ORR demonstrating why it was satisfied that this was the case. ORR would commission an independent audit of the implementation of the plan to be completed by April 2009.

29. The Board also agreed that it would be appropriate to consider whether it should levy a financial penalty for the continuing breach. It would hold an additional meeting on 25 February to consider the appropriateness and level of any penalty. Key material for this decision would be the impact of the past aspects of the continuing breach as seen (to varying degrees) at Rugby, Liverpool Street and Shields Junction; and the severe disruption caused to passengers, freight customers and train operators.

30. The Board was not currently satisfied that there was an adequate plan in respect of the provision of the infrastructure capability to deliver the timetable outputs scheduled for December 2008, which was a key output of the West Coast Route Modernisation programme. It therefore concluded that it appeared that Network Rail was likely to contravene condition 7 because delivery of this output was a reasonable requirement. Network Rail would therefore be required by 31 March 2008 to produce, having consulted with relevant train operators and funders, a plan demonstrating how it would deliver this output.

31. Given the urgency of developing this plan, the Board agreed that a Provisional Order would be published pursuant to Section 55 of the Railways Act 1993.

32. The Board endorsed the executive report on the internal lessons learnt from the events of Christmas and New Year for ORR, as well as arrangements for communicating ORR's investigation report and action on 28 February 2008.

#### **Item 10: 2008-09 business plan and supporting budget**

33. The Board had agreed the 2008-09 business plan process and priorities on 16 October 2007 (minutes for item 8). It noted the thorough and robust process followed to develop the business plan and associated budget for 2008-09, to deliver the final year of ORR's 2006-09 corporate strategy, which had received industry endorsement. The process used built on that used to develop the 2007-08 plan, which had just received a full assurance rating by a Deloitte auditor acting on behalf of ORR's internal audit service provider. The Board commended staff on the process and on the clarity of the Board paper.

34. The Board approved the 2008-09 business plan, subject to some suggested presentational issues. It also approved the supporting budget of £31.2m and noted that ORR was very well placed to outperform its commitment to reduce its budget by RPI-2% over the three years of its current strategy.

#### **Item 11: Board committee minutes**

35. The Board noted the activities and draft minutes of its Safety Regulation Committee on 29 January and Periodic Review Committee on 5 February 2008.

#### **Item 12: Any other business**

36. None.

#### **Item 13: Date of next meeting**

37. The next ordinary meeting of the Board would be held on 18 March 2008 in Glasgow.

**Chris Bolt  
Chairman**

**Minutes approved by the Board on 18 March 2008**