

## **For publication on ORR website**

### **Office of Rail Regulation**

#### **Approved Minutes of the 36<sup>th</sup> ORR Board meeting held on 17 July 2007 (10:00 – 13:20) 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
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
Sam McClelland-Hodgson	Assistant Board Secretary
Andy Burgess	Head of Network Regulation (item 7)
Paul McMahon	Deputy Director Competition & Regulatory Economics (item 9)
John Larkinson	Deputy Director Access Planning & Performance (item 9)
Nigel Fisher	Head of Monitoring (item 10)
Emma Kelso	Senior Economist (item 10)

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

1. The Chairman welcomed everyone to the meeting. This was Chris Elliott's first meeting since his appointment to the Board on 1 July 2007.
2. Apologies for absence were received from Jane May (Non-Executive Director).

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

3. Jim O'Sullivan was employed by a subsidiary of E.on. He left the meeting during an oral update on E.on's appeal against the decision of the High Court as to the effect of ORR's directions on the coal carriage contract between EWS and E.on, under item 6 below.
4. Following discussion with the Chairman, Richard Goldson had agreed to undertake some work for the National Audit Office on value for money in passenger franchising. There were no items on the agenda related to this interest.

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

### **Item 3: Approval of minutes of Board meeting of 19 June 2007 for publication**

6. The Board approved the minutes of its 35<sup>th</sup> meeting on 19 June 2007 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)**

7. The Board noted progress on actions agreed at the previous meeting. The Directors' Group was addressing all outstanding actions.

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

8. The Board noted the Chairman's activities since the last Board meeting, which included:

- meeting Colin Walton (Bombardier), Nigel Harris (journalist) and Brian Souter (Stagecoach);
- meetings with other regulatory chairmen: Peter Matthews (NIAUR) Nigel Stapleton (Postcomm), Philip Fletcher (Ofwat) and Sir Ian Byatt (Water Industry Commission for Scotland);
- speaking at the IEA 'Future of Rail' conference on 27 June;
- attending the Railway Industry Innovation Awards on 28 June;
- representing ORR at the Competition Commission hearing on the review of passenger rolling stock leasing market on 10 July (see minute 13 below); and
- attendance at Periodic Review and Safety Regulation Committee meetings and at a Directors' Group meeting for a presentation by Mark Lambirth (DfT) on the forthcoming White Paper.

9. The Board noted the Chairman's planned activities for the following month. These included his first meeting with the new Secretary of State for Transport on 17 July and the first meeting with Robert Devereux as DfT Permanent Secretary – Bill Emery would also attend both of these meetings.

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

10. 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.

11. The Board noted progress with discussions on DfT's proposal that ORR take on a formal advice and assist role to the UK delegation to the intergovernmental commission for the channel tunnel. The Board agreed the draft memorandum of understanding with DfT. This set out the proposed arrangements and addressed the assurances that the Board had sought on funding and liabilities, the scope of the proposed role, and the terms of appointment for the proposed ORR member and ORR nominated head of delegation. DfT would now formally confirm the arrangements and consult the industry with a view to bringing into effect the necessary statutory instrument in November 2007.

12. The Board noted progress on Grayrigg investigation matters: This included the decision of RAIB to issue urgent safety advice on 6 June, Network Rail's response, and the activities of the British Transport Police. RAIB was expected to issue its second interim report in Autumn 2007.

13. Chris Bolt led ORR's team at the Competition Commission's hearing on 10 July 2007 on the review of the passenger rolling stock leasing market. The high level discussion focussed on an expansion of the reasons why ORR had made the reference and the risks and uncertainties it had considered.

14. Despite the efforts of the office, performance on the western main line was materially below the trajectory agreed in the joint performance improvement plan agreed between Network Rail and First Great Western in March 2007. Network Rail's performance was of concern and we were reviewing all the information provided to establish whether Network Rail understood why the March plan was not working and if it had credible plans to get back on to the trajectory. If Network Rail did not have credible plans we would consider the matter as a potential licence breach. The Board would receive further updates in August and September 2007.

15. The Board would be asked in September 2007 to sign off our annual formal report to the European Rail Agency. The Directors' Group would thoroughly review the contents of the report before submission to the Board.

16. The Board discussed relations between the key industry parties, prompted by a number of issues. This included issues raised on the acceptance of vehicles and infrastructure when we were considering Network Rail's safety management system. RSSB had since produced a revised draft railway group standard but ATOC had raised some issues with the standard and in particular the transitional arrangements. We would continue to encourage all parties to find an agreed solution.

### **Item 7: Portsmouth re-signalling licence breach penalty**

17. The Board had concluded on 5 June 2007 that Network Rail had breached condition 7 of its network licence (this was formally noted by the Board at its meeting on 19 June 2007, minutes 7-10 for item 5). This was in respect of the Portsmouth project by making decisions that put it at risk of failing to meet the reasonable requirements of its customers over a reasonable period of time, without taking all reasonable steps to evaluate and mitigate the risks involved. This was a past breach rather than a continuing breach and we considered

that Network Rail was taking all reasonable steps to mitigate the immediate consequences.

18. Before considering whether to impose a financial penalty for the breach, the Board had requested further information. It was provided with a fuller assessment of the arguments for a penalty against paragraph 7 of ORR's published penalty statement. After careful and detailed deliberation, the Board concluded that a penalty was appropriate. Taking into account proportionality issues the Board concluded that it was justified in levying a penalty of £6m. However, Network Rail had taken remedial steps to rectify the breach and had taken steps to minimise the risk of the breach reoccurring. On the basis of these mitigating factors the Board agreed that the penalty should be reduced by 60% to £2.4m. The penalty was intended to provide Network Rail with an incentive to undertake proper risk assessments to ensure that it approached similar decision in future with sufficient care and regard to the potential impact on third parties.

19. ORR would issue a notice under Section 57C of the Railways Act. Network Rail would have 21 days within which to make any representations. The Board would then consider these in correspondence before deciding whether to confirm or amend the penalty or not.

### **Item 8: ORR response to Better Regulation Executive consultation on the draft Regulatory Enforcement and Sanctions Bill**

20. The Board noted the key issues for ORR arising from the Better Regulation Executive's consultation on the draft Regulatory Enforcement and Sanctions Bill. It noted the position of HSE and of other economic regulators. It agreed that, on balance, we should seek to remain consistent with HSE in relation to its enforcement of health and safety and with OFT on competition powers. The Board agreed the proposed response to the consultation including that we wished to remain on the list of designated regulators in schedule 3 of the Bill.

### **Item 9: Periodic review 2008 (PR08) and high level output specification (HLOS) updates and process to sign off key PR08 decisions**

21. The Board noted a general update on the progress of PR08 and the content of the three-tier HLOS and statement of funds available (SoFA) issued by Transport Scotland. DfT was expected to issue its HLOS and SoFA in the week commencing 23 July 2007, though much of the structure and content was already known. Once both HLOSs and SoFAs had been issued ORR would look at the detailed assumptions used by DfT and Transport Scotland and work with Network Rail to ensure its strategic business plan addressed the appropriate level of detail for delivery of the HLOSs.

22. The Board agreed the process for finalising and signing-off key PR08 decisions and documents later in 2007 and in 2008. In December 2007, the

Periodic Review Committee would sign off (on behalf of the Board) ORR's initial assessment of whether the respective HLOSs and SoFAs matched. In January 2008, the Board would sign-off the policy content for ORR's February 2008 SBP assessment and update on the framework for setting access charges document.

23. The Board would sign-off the policy content for the draft determinations at an additional meeting around the end of April / beginning of May 2008, or the April meeting would be rescheduled. The sign-off of the policy content for the final determinations would be done at the end of September or beginning of October 2008.

24. The Periodic Review Committee had completed its review of effectiveness. It concluded that while the Board would take the key PR08 decisions, the committee provided a useful forum to occasionally brief and discuss issues with the Chairman and non-executive directors outside of scheduled Board meetings. Therefore, monthly meetings would be scheduled during 2008 but only held if the executive considered a more detailed discussion would help to develop work streams for subsequent decisions by the Board.

### **Item 10: Regional benchmarking**

25. In November 2006 the Board had identified a number of key topics for future focussed discussions to lead to greater understanding of how ORR could best pursue its vision for the railway. A part of the long-term incentives topic concerned the better and wider use of benchmarking beyond what was currently done by Network Rail.

26. The Board considered the proposals to take this work forward as effective benchmarking provided an incentive for poorer performing areas to improve and enforced better data disciplines: This had been demonstrated by the improved performance of train operating companies through the ATOC-led forward review and NFRIP programmes. The Board agreed that Network Rail should be making more sustained and effective use of internal benchmarking, which would also require more rigorous data discipline. The office would establish what plans Network Rail had in this respect, and seek to influence these if necessary. The option should remain open for ORR to conduct and publish such analysis if Network Rail's own activities were not seen to be sufficient.

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

27. The Board noted the activities of its committees that had met since the last Board meeting.

#### **Safety Regulation Committee: 21 June 2007**

28. The Board noted the draft minutes of the meeting on 21 June 2007.

#### **Periodic Review Committee: 26 June 2007**

29. A summary note of the meeting on 26 June 2007 was laid round for information.

**Item 12: Any other business**

30. None.

**Item 13: Date of next meeting**

31. The next ordinary meeting of the Board would be held on 18 September 2007 in London. The Board would be kept up to date on industry and ORR activities via a Chief Executive's overview and office report in August 2007.

32. There would be no Periodic Review or Safety Regulation Committee meetings in August 2007.

**Chris Bolt**  
**Chairman**

**Minutes approved by the Board on 18 September 2007**