

For publication on ORR website

Office of Rail Regulation

Approved Minutes of the 35th ORR Board meeting held on 19 June 2007 (10:00 – 13:20) at ORR's Head Office, 1 Kemble Street, London, WC2B 4AN

Board Present:

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| 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:

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| Shamus Kenny | Board Secretary |
| Juliet Lazarus | Director Legal Services |
| Liz Corrin | Head of Finance (item 8) |
| Brian Warrener | Deputy Director Corporate Services (item 8) |
| Sarah Straight | Director Safety & Economic Policy Development (item 9) |
| Andrew Wallace | Track Engineering Advisor (item 9) |
| David Morris | Deputy Chief Inspector of Railways (item 10) |
| Nigel Fisher | Head of Monitoring (item 11) |
| Andy Burgess | Head of Network Regulation (items 12 & 13) |

Item 1: Welcome and apologies for absence

1. The Chairman welcomed everyone to the meeting.

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 May 2007 for publication

3. The Board approved the minutes of its 34th meeting on 22 May 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)

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

Item 5: Board decisions taken in correspondence

5. Paragraph 8.10 of the Board's rules of procedure allowed the Board to take decisions in correspondence. The Board formally noted two decisions that it had taken in correspondence since its last meeting.

Senior Civil Service (SCS) pay awards and Chief Executive's contract

6. The Board received a paper in correspondence on 29 May 2007, containing recommendations from its Remuneration Committee. On 1 June 2007 it agreed SCS pay awards for 2007 and to offer a permanent contract of employment to Bill Emery as Chief Executive. The pay awards were sent to, and approved by, the Cabinet Office.

Portsmouth resignalling licence breach

7. On 22 May 2007, the Board discussed a potential licence breach by Network Rail in respect of the Portsmouth resignalling project. It requested further information before it made a decision. It received a paper in correspondence on 30 May, setting out the nature of the alleged breach, the evidence and reasoning, and other material considerations.

8. The Board concluded that Network Rail had breached Condition 7 of its network licence 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 risk involved. This particularly related to the period from September to December 2006. Although the performance of the contractor Siemens may have played a significant part in this, Network Rail had already acknowledged that it was responsible for ensuring that it managed its contractors effectively to deliver the works required.

9. On the basis of information Network Rail had provided about the action it had taken, and was taking, to complete the work and to learn from the experience of Portsmouth, the Board did not currently consider that there was a continuing licence breach. However, Network Rail would be asked to confirm:

- the planned completion date for the work and the interim milestones to achieve completion by that date; and
- the lessons it intended to apply from its experience at Portsmouth. It had already provided some details of how it would assess the readiness of contractors, especially those new to rail related work in the UK. ORR wanted it to confirm that it would distinguish in its risk assessment and decision making between those schemes where problems could lead to significant overruns and an adverse effect on

train operators and their customers and those where the impact could be contained more easily.

10. The Board agreed that before considering whether to impose a financial penalty for the breach it required a fuller assessment of the arguments for the size of penalty, including some benchmarking against other fines. The decision would need to reflect both the Postcomm Judicial Review outcome and further information from Network Rail and others on the costs and impacts of the overrun. A further paper on penalty principles and a proposed process to make a decision about any financial penalty in respect of Portsmouth was considered on 19 June 2007 (see item 12).

Item 6: Chairman's Report

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

- joint dinner between the ORR and Network Rail Boards on 15 May 2007, and attendance at Periodic Review and Safety Regulation Committee meetings;
- speaking at the Transport Group Quarterly Meeting on 'Developing the framework of rail regulation';
- attending a CRI policy seminar on the regulation of publicly owned companies;
- meetings with Sir Roy McNulty (CAA Chairman), EIB, London TravelWatch, Robert Wright (FT), Colin Walton (Bombardier) and Peter Matthews (NIAUR);
- meeting with franchise owners to discuss effective engagement with Network Rail on delivering future rail strategy; and
- participating in the Non-Executive Director Interviews on 24 May.

12. The Board noted the Chairman's planned activities for the following month (including the likely impact of his role as Arbiter of the Public Private Partnership) and progress with the internal review of the effectiveness of each main Board committees.

13. DfT would make an announcement on ORR Board appointments on 25 June 2007. It had appointed Dr Chris Elliott as a new Non-Executive Director. He was an independent consultant with expertise as a barrister and systems engineer and a visiting professor, with extensive experience of rail and other transport issues. He had been particularly involved with the management of safety, working with European railway companies and in the UK with the Rail Safety and Standards Board to develop policies that properly reflect safety legislation. He would take up his post on 1 July 2007. At the same time, Professor Jeffrey Jowell QC was standing down from the Board after three years. As this was Professor Jowell's last meeting, the Chairman and Board thanked him for his valued contribution to ORR. Professor Jowell returned the compliment.

14. DfT would also announce that it had re-appointed Peter Bucks to 31 March 2010. This would ensure continuity on the Board as ORR reached conclusions in 2008 on the Periodic Review of Network Rail's outputs and finances for the next five years.

Item 7: Office report

15. The Board discussed the Office report, which integrated the information previously provided in separate Chief Executive and Chief Inspector's reports. It provided an update on industry and ORR activity over the previous month and highlighted forthcoming issues.

16. The Board had previously agreed to grant TfL a thirty-year track access option for the East London Line, tied to the development of and agreement on a buy-back option. It had agreed that if a buy back option could not be agreed ORR would award a 20-year option instead. At TfL's request, the Board agreed to grant a 20-year track access option for the East London Line.

17. ORR had been discussing the possibility of a CrossRail access option with DfT and Network Rail since 2005; DfT expected to make an application in the summer of 2007. Although ORR would not generally support the approval of an access option between Government and Network Rail, the Board agreed it would be appropriate for CrossRail, given both the background to the case and the unprecedented nature of the project. However, ORR would consider the application in the same way as any other; that implied the incorporation of a compulsory buy-back provision and a duration limited to the minimum required for investment.

18. The Board noted that a high level statement on ORR's role on the duty of cooperation and system safety would be published at the same time as RSSB's guidance on the duty of cooperation, which was likely to be late June or early July 2007. The Safety Regulation Committee would discuss ORR's statement on 21 June 2007.

19. Following complaints about South West Trains' recent decision to increase the prices of certain categories of unregulated saver fares, ORR had published a statement on the limitations of Competition Act powers in this matter and discussed the reasoning with Passenger Focus. The Chief Executive would also raise this matter at the next high level meeting with DfT to encourage an open and transparent process on fares policy.

20. ORR had written to First Great Western and Network Rail, following up a joint meeting to consider past and future Western performance. Both parties had acknowledged their part in the very disappointing performance in the final quarter of 2006-07. ORR had confirmed its belief that the 2007-08 Joint Performance Improvement Plan was sound and emphasised the importance of delivering both the improvement initiatives and the PPM trajectory. ORR would monitor this closely throughout the year and press for remedial action if the outputs were not being delivered. The letter had been published on ORR's website, DfT had been briefed, and the issues had been highlighted in the current National Rail Review and Network Rail Monitor publications. The Board also noted the outcome of an internal review that concluded that

Network Rail was not in breach of its licence, but which identified lessons ORR had learned from the process.

Item 8: Audit committee

21. The Board noted and adopted the annual report of its Audit Committee, which detailed its activity in 2006-07, including its self-assessment review of performance and governance issues and its priorities for 2007-08. The report would be published on ORR's website. The Board thanked Committee members, and the staff who supported it, for its work in 2006-07.

22. Following the recommendation of its Audit Committee on 5 June 2007, the Board approved ORR's annual resource accounts for 2006-07 and the letter of representation that would be signed by the Accounting Officer. NAO's audit found that there were no material weaknesses in the accounting and internal control systems. It expected the Comptroller and Auditor General to be able to give clear "true and fair" and "regularity" audit opinions on them during the week of 25 June, to enable them to be laid before Parliament in the week of 2 July 2007. This met the Treasury's Faster Closing Initiative targets. NAO would issue a management letter in due course. The Board congratulated the finance team for its work.

Item 9: Draft report of Grayrigg Internal Review

23. ORR had commissioned an internal review after the Grayrigg derailment in February 2007 to look at the processes and interventions of ORR, both before and after merger with HMRI, in the period since the Potters Bar derailment in May 2002. The Board had approved terms of reference in March 2007 and updates on progress had been made to the Safety Regulation Committee, including preliminary findings on 17 May 2007.

24. The Board discussed the draft report to the Chairman and made suggested amendments. The Chairman would discuss the draft with the Director Safety & Economic Policy Development before he received a final report, which would be copied to the Board. ORR's executive would then produce a management response and an action plan to address the issues raised, and update the Board in September 2007.

Item 10: Analysis of Railway Accident Investigation Branch (RAIB) recommendations

25. ORR had commissioned an analysis of the first 34 RAIB reports from the Health and Safety Laboratory (HSL). HSL reviewed the RAIB reports published up to 30 January 2007, categorised the issues arising, identified common issues and recommendations, and provided a view on the quality of recommendations. Reports were analysed to identify individual, job, and organisational factors in the causal chain leading up to the accident. Those occurring most frequently were: inadequate risk assessment, poor work planning, communication, resources, supervision, job procedures, and job task / workload. These incident causations reflected the experience of ORR's

inspectors' investigations of incidents and no new major themes in accident causation had been identified.

26. The report had been sent to RAIB for comment and would be published on ORR's website. HSL would produce a further report in early 2008 and annually thereafter.

27. The Board noted the internal procedures for closing RAIB recommendations, which was a key component of how ORR managed health and safety on the railway. It supported the view that RAIB's published reports should make clear that the recommendations were addressed to ORR. It also supported ORR producing a public response to RAIB recommendations.

Item 11: Passenger priorities and ORR's role

28. 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. One topic was to establish passengers' priorities and to consider ORR's role in ensuring that the industry meet these effectively. ORR had identified the highest priorities for passengers, drawing in particular on Passenger Focus research, the industry Passenger Demand Forecasting Handbook and its own analysis.

29. The Board recognised that priorities were dynamic, rather than static, and changed according to different market segments. The main priorities identified were: safety; personal security; punctuality; frequency and journey time; comfort and crowding; value for money; cleanliness; and provision of information. It noted the role currently played by ORR in addressing each of the main priorities and considered where ORR could take a wider or more active role. The Board agreed that the executive should develop the value for money options and make recommendations based on issues where ORR ought to act under its statutory duties and then where it could choose to act. The options would focus on added value, whether ORR should be more active or encourage others to act or lead, resource implications, consequences and risks.

Item 12: ORR's approach to penalties and the Postcomm judgement

30. The Board noted the approach proposed to reach a recommendation on a penalty for the Portsmouth licence breach, consistent with ORR's current enforcement and penalties policy. The recommendations would be sent to the Board to make a decision in correspondence.

31. ORR's current economic enforcement policy and penalties statement had been published in April 2006. The Board had discussed the statement further following the penalty it issued to Network Rail for the breach relating to infrastructure capability, consideration of the effect of that penalty on a company limited by Guarantee, and the publication of the Macrory Report.

32. The Board agreed that the general approach of its policy was right. It discussed the case for adopting a more structured framework for assessing

penalties, which looked at the breach on two dimensions: severity and impact, and agreed that this should be considered in a further paper.

33. The Board noted the decision of the High Court to quash a £1 million penalty imposed by Postcomm on Royal Mail for breach of its licence because Postcomm had failed to follow its published Statement of Policy in relation to Financial Penalties. ORR agreed that there would need to be exceptional circumstances for it to diverge from its published policy. There was no immediate need to amend ORR's policy statement but it would be reviewed in the autumn in the light of any appeal by Postcomm, the approach being adopted by other regulators, and ORR's experience of imposing penalties since the penalties statement was written.

34. The Board would receive a further paper in September 2007 on an internal review of the processes for taking licence breach, penalties and enforcement action, in the light of operational experience and the implications of the Postcomm judgement and any subsequent appeal.

Item 13: Policy approach to review of Network Rail's licences

35. ORR had recently completed Phase 1 of the review of Network Rail's network licence, making non-material changes to bring it, and the station licence, into line with current legislation and removing obsolete clauses.

36. ORR now intended to look at the licence as a whole to consolidate and restructure it into clear, purpose-driven obligations that would be easier to monitor and enforce. This would also ensure that it was compatible with current policies and practices, including a number of conditions that may require material modifications as part of the 2008 Periodic Review and in light of other workstreams in ORR and in the industry. The Board supported the approach and key policy issues, and noted the proposed areas for further review.

37. The executive planned to complete the review and to informally consult on the drafting of modifications by the end of February 2008. The Board would be asked to agree the content of the formal consultation in April 2008 for publication in June alongside the PR08 draft determination, followed by the statutory consultation of 28 days alongside the final determination at the end of October. Modifications would therefore be made before Christmas 2008, although some may not take effect until 1 April 2009, alongside the periodic review.

Item 14: Board committee minutes

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

Remuneration Committee: 22 May 2007

39. The non-executive members of the Board noted the draft minutes of the Remuneration Committee, which had recommended Senior Civil Service pay

awards and a permanent contract for the Chief Executive, to the Board (see item 4 above).

Safety Regulation Committee: 17 May 2007

40. The Board noted the draft minutes of the meeting on 17 May 2007.

Periodic Review Committee: 29 May 2007

41. The Board noted a summary note of the meeting on 29 May 2007.

Audit Committee: 5 June 2007

42. The Board noted the draft minutes of the meeting on 5 June 2007, which included its annual report to the Board and recommendations on approval of the annual accounts (see item 8 above).

Item 15: Any other business

43. None.

Item 16: Date of next meeting

44. The next ordinary meeting of the Board would be held on 17 July 2007 in London.

**Chris Bolt
Chairman**

Minutes approved by the Board on 17 July 2007