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## ***ACCESS DISPUTE RESOLUTION COMMITTEE***

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### **Determination No. AD16**

(Hearing at Kings Cross, 8<sup>th</sup> May 1998)

1. The Committee was asked by Central Trains to rule that-
  - 1.1 Railtrack, in relation to delays to trains operated by Central Trains Limited (CTL), following an incident at Marston Green Station, had attributed responsibility for those delays in a way that was inconsistent with the Schedule 8 Performance Regime (which in CTL's case conforms with the Passenger Franchise Template); and that
  - 1.2 Railtrack, in its translation of the Schedule 8 Performance Regime into the TRUST Delay Attribution Guide (Trust DA Guide), may have misdirected itself in relation to the attribution of delays resulting specifically from a fatality at a station.
2. The Committee noted with regret that the delays in question had been occasioned by the death of a young man who had been intending to catch a train.
3. The Committee emphasised that its response to this reference related solely to questions of delay attribution for the purposes of the Performance Regime, and that any decision of the Committee, on this matter of delay, should not be construed as having any significance for any other aspect of this accident, for example, in regard to the potential liability of one or more of the parties towards the deceased.
4. The Committee noted that the reference was the subject of a joint submission brought only after exhaustive use, by the parties, of all agreed procedures for obtaining agreement on a disputed attribution; furthermore that, whilst the money at stake in the specific dispute was of the order of £7,000, the parties were aware of other potential disputes that related to comparable circumstances, and had also resulted in disputed attributions.
5. The Committee accepted the representations of the parties that its locus to hear the matter of the interpretation of Schedule 8 (para 1.1 above), was as defined in clause 11.3 of the Track Access Agreement. In regard to the Trust DA Guide (para 1.2 above) the Committee took note that, with a previous dispute, it had opined,

*"... that, although the Trust DA process is not directly part of the Track Access Agreement, it is the means by which parties have agreed that the requirement of Track Access Condition B, and Passenger Track Access Agreement Schedule 8, should be implemented, and that therefore disputes as to the applicability, or interpretation, of the Trust DA Fault Attribution system, do fall to be resolved by reference to the Access Disputes Resolution Committee."*

*[Determination AD3 of 23.2.96].*

The Committee decided that this interpretation of its locus in relation to the Trust DA guide was appropriate to this current dispute.
6. The Committee noted that this earlier Determination also addressed the point raised in 3 above, and had concluded that

*"Any determination in relation to Fault Attribution in relation to train delay should relate solely to that matter and should not be interpreted as implying any ruling on responsibility for damage (e.g. in relation to the indemnities contained in Section 8 of the Passenger Track Access Agreement)."*

7. The Committee reviewed the facts of the incident:
  - 7.1 the deceased had gained access to the station as an intending passenger on a Birmingham bound (Down direction) CTL train; having, for reasons uncertain, descended onto the tracks, he was thought to have seen the CTL train approaching, and stepped across to the other line where he had been hit and killed by a Southbound Virgin (Up direction) train;
  - 7.2 trains on both lines had been stopped for the time taken to examine the lines and to determine the whereabouts of the victim's remains; for a period, whilst trains were detained at Marston Green, and then when services first resumed, special arrangements were made at Marston Green for passengers, to reduce their chance of seeing disturbing sights.
8. The Committee concluded that, of the points made by the parties, the following were at the heart of the dispute in question:
  - 8.1 during the time that services were disrupted, any passengers who wished to commence or finish journeys at Marston Green Station were not prevented from so doing. Normal train running was resumed after an interval that all parties recognised as an efficient minimum.
  - 8.2 Marston Green station is leased and managed by CTL, but "*Central believes that its position as Station Operator at Marston Green is not relevant to this dispute*".
  - 8.3 the Committee was not asked to address any difference of views as between Virgin and Railtrack as to the attribution of fault; nor as between CTL and Railtrack as to CTL's discharge of its duties as Station Facility Operator.
  - 8.4 in attributing responsibility for the consequential delay to CTL trains, Railtrack had considered that these were the circumstances to which Schedule 8 paragraph 5.7 related, and therefore were the joint responsibility of CTL and Railtrack; this was therefore the basis on which attribution in TRUST was made, and calculated in PEARS, Railtrack being of the view that, under the circumstances of the case, this was both right, and provided an appropriate incentive mechanism to the parties.
  - 8.5 CTL's contention is that the operative clause in this case should be Schedule 8, paragraph 5.4(c)(iii), and that that would require attribution to be 100% to Railtrack; however the Trust DA guide, in its current form, does not provide a definition or code to permit this allocation in such circumstances.
9. The Committee considered further each of these points and came to the following conclusions:
  - 9.1 The Committee considered that, in relation to the question of incentivisation of the parties, certain principles had been set out in Determination AD3, namely

*"5. a test of reasonableness of endeavours, where two parties are involved, must relate to the relative opportunity, and authority, of the two parties to take action to counter a particular threat.*

....

*8. account needs to be taken of the economic signals and incentives within the attribution process; for example, parties responsible for ensuring adequate policing of premises should be required to accept the penalties where events occur that showed policing to have been ineffective."*

The Committee considered that it should assume that the Schedule 8 Performance Regime incorporated these principles, in relation to the attribution of delay to trains, and that, in order to achieve incentivisation, the parties should apply the letter of the agreement.

- 9.2 Paragraph 5.3 of Schedule 8 requires that *“In assessing the causes of any Minutes Delay...there shall be taken into account all incidents contributing thereto including:*

*a) the extent to which each party has taken reasonable steps to avoid and/or mitigate the effects of the incidents contributing thereto, having regard to the responses of that party to similar types of incidents occurring prior to the Commencement Date;...”*

The Committee considered that, in view of the particular circumstances of this case and of the promptness with which services had been restored, they could identify no further actions which either party could have taken to avoid or mitigate the effects of this incident. On this basis, the Committee considered that the provisions of Schedule 8 paragraph 5.3 should have no effect on the subsequent attribution.

- 9.3 The Committee considered the force of Schedule 8, paragraph 5.5(b), and the question whether a Train Operator’s duties as an operator of stations should be understood to be included within *“its capacity as an operator of trains”*, in which case an argument could be advanced for the attribution for the delays to be 100% to CTL (because they could be said to be *“caused by circumstances within the control of the Train Operator (whether or not the Train Operator is at fault) in its capacity as an operator of trains”* Schedule 8, paragraph 5.5(b)). The Committee decided that a Train Operator’s duties as an operator of stations are entirely discrete from its role as *“an operator of trains”*, and that paragraph 5.5(b) was not therefore applicable.

- 9.4 in relation to Railtrack’s assertion that joint attribution should apply under the terms of Schedule 8, paragraph 5.7, the Committee opined as follows:

9.4.1 paragraph 5.7(a) imposes two tests, namely that the schedules of trains should be disrupted (5.7(a)(i)), **and** that the incident *“ prevents the access of passengers through the station to or from the train)”* (5.7(a)(ii)),

9.4.2 in the light of the facts as agreed at para. 8.1 above, the access of passengers through the station to or from the trains was not prevented, and therefore the case for joint attribution under Schedule 8, paragraph 5.7(a) falls;

9.4.3 joint attribution under Schedule 8, paragraph 5.7(b) only applies in circumstances where *“ ... neither Railtrack nor the Train Operator is allocated responsibility under paragraph 5.4 or 5.5”*; whereas in this case

9.4.4 the incident in question falls logically within the terms of Schedule 8, paragraph 5.4(c)(iii), in that:

*“5.4 Railtrack shall be allocated responsibility...if that incident is wholly or mainly:...*

*(c) caused (whether or not Railtrack is at fault) by or in connection with the Network or any act, omission or circumstance in connection with the Network (whether or not originating in connection with the Network), including: ...*

*.....(iii) any act, omission or circumstance in connection with the Network originating in connection with any station.”; and*

- 9.4.5 in these circumstances the agreement allocates responsibility to Railtrack under paragraph 5.4 and therefore Schedule 8, paragraph 5.7(b) does not apply.
- 9.5 in any instance where the due interpretation of the letter of the contract (in this case Schedule 8) is not supported by the operative executive instructions (in this case the Trust DA guide), then the force of the contract should prevail over the executive instruction. The Committee decided that the Trust DA guide does not fully reflect the provisions of the contract insofar as there is, in Trust DA Guide section 4.10.2, no instruction that would direct the parties, in relation to the circumstances of this case, to attribute responsibility to Railtrack. The Committee recognises that a guide intended to be used for immediate attribution cannot necessarily cater for all circumstances that might arise: in such cases, when the initial attribution is disputed, the parties must rely on the terms of the contract (rather than the guide).
10. The Committee therefore **determined** that, in these specific circumstances of delay to CTL trains following the death of an intending passenger at Marston Green Station,
- 10.1 responsibility for delay should be 100% Railtrack's, and
- 10.2 Railtrack should review the appropriateness of the content of Trust DA Guide section 4.10.2.

**Bryan Driver**  
**Chairman**  
**Access Dispute Resolution Committee**