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

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### **Determination No. AD21**

(Hearing held at Kings Cross on 4<sup>th</sup> October 2000)

*[Note: no determinations were issued in respect of reference no.[AD]20 which was settled by the parties without recourse to a hearing; the previous published determination was no.[AD]19]*

1. The Committee was asked by South West Trains (SWT), in connection with a set of disputes relating to the application of the Station Access Agreements at eight separate stations, to direct Connex South Central (CSC), that the sum of Qualifying Expenditure at the stations in question in respect of the operation of Automatic Ticket Barriers and related matters, had been properly calculated, and that the amounts as invoiced for the year 1999/2000 were due to be paid in full.
2. The Committee noted that its standing in relation to each of the disputes, derived from the provisions of Station Access Condition H5, as set out in “***Station Access Documentation (National Station Access Conditions 1996 (England and Wales), Station Access Agreement, Franchise Lease and Franchise Letting Conditions (Version II)***”, and incorporated into each individual Station Access Agreement.
3. Furthermore, the Committee considered that it needed to emphasise, for the parties, that its jurisdiction relates to the Station Access Agreements to which the parties are signatories. Where either, or both, of the parties are seeking to pursue ends that are not served by the existing agreements then the Committee can only determine, in relation to the merits of such matters, to the extent that change is being sought using the change procedures incorporated into the agreements. Moreover, any determination by the Committee, on a matter of change, may still require the parties to reach a formal agreement on an appropriate amendment to the relevant Station Access Agreement, which is subject to approval by the Regulator.
4. The Committee noted that, as presented, the dispute related to five generic issues that divided the parties to differing degrees at the various stations, namely
  - 4.1. the number of staff to be employed to man recently installed automatic ticket barriers at nominated stations and charged to Qualifying Expenditure; the nominated stations being Clapham Junction, Guildford, Havant, Portsmouth & Southsea, Southampton Central and Wimbledon;
  - 4.2. the number of staff to be employed for station duties at nominated stations and charged to Qualifying Expenditure; the nominated stations being Bournemouth, Southampton Central and Wimbledon;
  - 4.3. the basis of assessment of Buildings and Maintenance costs at Brockenhurst station;

- 4.4. the right, if any, of a Relevant Operator to withhold payment of Qualifying Expenditure in circumstances where the basis of assessment is in dispute; and
  - 4.5. the right, if any, of the Station Facility Owner to receive interest in respect of Qualifying Expenditure paid after the due date.
5. The Committee reviewed these issues and noted that they fell into three distinct groups, in relation to the terms of the Station Access Agreements and the Station Access Conditions:
- 5.1. in relation to Automatic Ticket Barriers (4.1 above), had SWT, as Station Facility Owner, carried through the change procedures correctly, and was it correct in its interpretation of what therefore should be encompassed within Qualifying Expenditure?
  - 5.2. in relation to manning for station duties (4.2), and station maintenance costs (4.3), where CSC, as a Relevant User, was seeking to modify the terms of the operative Station Access Agreement, had CSC made appropriate use of contractual procedures, in order to present the merits of its case? Had the Station Facility Owner made the appropriate response?
  - 5.3. the issue of the withholding of payment of Qualifying Expenditure payments, and the entitlement of any receiving party to compensatory interest (4.4 and 4.5) was a matter of application of the terms of the respective agreements.
6. However, the Committee was of the view that, although their deliberations might be assisted by looking in general terms at those issues that presented across the range of stations, in practice each Station Access Agreement and associated Station Access Conditions was a discrete contract, not dependent upon any other. It followed therefore that the Committee would be required to make a separate determination, in relation to the substance of the matters in dispute, at each individual station.
7. The Committee gave careful consideration to the implications of Station Access Conditions C, F and H, as having a bearing on the scope of the judgements that it might make. In particular
- 7.1. the total of all the sums that divided the parties across the eight stations was £71,868; two cases accounted for over £45,000 of that;
  - 7.2. in respect of the financial year ending 31.3.2000, there were some £347,727 of invoiced station charges for these stations that CSC had not paid to SWT; i.e. the withholdings were approximately five times the sums in dispute;
  - 7.3. there appeared to be, on both sides, an imperfect application of the provisions of Station Access Condition C, both as regards the promotion of change, and the procedures to be followed where change is contested;
  - 7.4. there had been a considerable lapse of time between the Committee first receiving advice of a dispute, and presentation of sufficient documents as to permit a hearing to proceed;

- 7.5. there had been attempts to achieve a “meeting of minds” between the parties, but there was a perception that the differences between the parties related to some fundamental philosophic difference in management approach.
8. The Committee was of the view that any difference of philosophy was not of direct significance. It became apparent to the Committee, in the course of its deliberations, that the parties were not making a clear distinction between
  - 8.1. disagreements about what should or should not be included in the lists of Common Station Amenities and Services, or how the detailed specifications for those services should be expressed; and
  - 8.2. differences of view as to whether resources (numbers of staff etc.), were being used efficiently, by the Station Facility Owner, in providing those services.
9. The Committee was satisfied that the provisions of the existing contracts are adequate to handle these distinctions (in 8.1 and 8.2 above) in that
  - 9.1. where it is a question of changing the nature or specifications of services, Station Access Condition C provides adequate procedures to allow any party, whether the Station Facility Owner, or a Relevant User, to promote a change in Common Station Amenities and Services, or, where such change might have adverse impacts, to contest such change. This includes, where the parties cannot agree, a route into dispute resolution, defined by reference to the Access Dispute Resolution Rules. This route is associated with observance of due process in respect of the issuing of notices, consultations with affected parties, acceptance of proposals, either explicitly or tacitly, or the raising of formal objections within laid down time-scales; and
  - 9.2. matters of efficient, or otherwise, use of resources, in fulfilling specifications, may be brought into focus by other means, such as station inspections, or audits; within reason the Station Facility Owner will bear the final responsibility for determining how specifications are honoured, although, in the extreme case, a party might still pursue a case through Station Access Condition H5.
10. The Committee considered that, in all the matters in this reference, there was an issue of a change to one or other element of the Common Services, as compared with the way in which they had been previously defined, in particular, at the time of the first signing of the Station Access Agreements. The main concern of the Committee would therefore be to establish whether the parties had made appropriate use of Station Access Condition C in order either to promote change, or to protect their interests by opposing a change. The Committee noted that should it become apparent that the merits of a particular change was at issue, then resolving the question of merits fell, not to the Committee, but, in accordance with Station Access Condition C4.4 and H5.4, to arbitration.
11. That said, the Committee was clear that, once that process for dispute resolution has been exhausted, or, alternatively, one party has failed to exercise its responsibilities in respect of that process and allowed a proposal to go by default, the obligations of both Station Facility Owner and User still remain to be discharged; there is little scope for either party to withdraw from their obligations, whether to assure safety of operations, supply services to other Users, or to pay properly assessed accounts.

12. The Committee was therefore very concerned to ensure that, in this particular reference, it should not be drawn into determining issues which the terms of the Station Access Agreements and Station Access Conditions implied should be considered as having been settled. In particular, the Committee was firm in its view that, if an issue of change had been properly processed by one party, and the other party had not, at the due time, exercised any contractual rights to protect its interests, that other party could not, by withholding due payments, obtain a “second bite” chance to get its arguments heard.
13. Similarly, where there was evidence that payments were being withheld as an alternative to seeking a settlement using the processes enshrined in Station Access Conditions C and H, the Committee could not countenance making any determination that would appear to short-circuit these processes.
14. After hearing submissions, and receiving evidence from the parties, the Committee was surprised to discover that the parties were still unclear as to the true value of the sums at stake between them, at each location. The parties were therefore instructed to provide a joint summary of the “Amounts of money in dispute”. It was only on receiving this joint summary (dated 10th October 2000) that the magnitude of the dispute (as set out in paragraph 7.1 above) became apparent. In handing down its determinations on each individual station the Committee chose to base its final assessment, of the sums owed by one party to another, on the sums identified in that summary; the Committee did not undertake any independent calculations.
15. The Committee noted that, in respect of the general issue of the installation of Automatic Ticket Barriers, there was a question as to whether they fell within the general category of Common Station Amenities and Services, or that more specific category, defined in Annex 3 “Common Station Amenities and Common Station Services which may be changed only by Unanimous Agreement of all Users” (Station Access Conditions). After considering the text of Annex 3 for the agreements in question, and the general text of Annex 1 to the Station Access Conditions the Committee concluded that
  - 15.1. Automatic Ticket Barriers do not fall into the category “Common Station Amenities and Common Station Services which may be changed only by Unanimous Agreement of all Users” as defined in Annex 3;
  - 15.2. Automatic Ticket Barriers do not necessarily fall into the category “Common Station Amenities and Common Station Services” as defined in Annex 1. However it appeared, and was acknowledged by both parties, that advice had been sought and obtained from the Regulator, to the effect that station Users were at liberty to agree that such equipment could be counted as “Common Station Amenities and Common Station Services”. The effect of such inclusion is that
    - 15.2.1. costs associated with Automatic Ticket Barriers at agreed locations may be treated as Qualifying Expenditure, and charged out to Users;
    - 15.2.2. the changes to the Equipment Inventory can be implemented within the scope of the Regulator’s General Approval;
  - 15.3. there is no necessity for Automatic Ticket Barriers to be manned by more than a certain minimum staff, who are required, under the terms of Station Access

Condition Annex 1 sections 4.3 and 4.4, for purposes of ensuring that passengers can effect safe and prompt passage through the barrier line;

- 15.4. other Revenue Protection duties, including those manning Excess Fare windows, or providing other means of collecting fares such as SPORTIS machines, do not fall under the general definition of “Common Station Amenities and Common Station Services” and therefore the costs of any staff employed to perform such functions do not fall to be charged to Qualifying Expenditure.
16. The Committee therefore came to the conclusion, in respect of the dispute at Clapham Junction Station, where CSC was being charged Qualifying Expenditure of £86,299, of which £25,890 was in dispute, that
- 16.1. the proposal to introduce Automatic Ticket Barriers, and associated extra staffing, appeared initially to have been dealt with appropriately in accordance with Station Access Condition C; the User in question (CSC) had not raised objections to the proposals in accordance with the due processes laid down in Station Access Condition C4.5, and therefore the Proposals for Change had been formally accepted by the User (CSC) in conformance with Station Access Condition C4 (4.4 to 4.7);
- 16.2. the original Proposal for Change for this station had been based on the premise that SWT would meet all initial and on-going costs for the Automatic Ticket Barriers. At a later date, however, SWT had proposed that the Automatic Ticket Barriers be leased rather than purchased, and that all regular equipment lease and staffing payments should instead be charged as Qualifying Expenditure;
- 16.3. the amendment to the Proposal for Change was dealt with sufficiently informally, that, were it to be handled in this way again, it would be reasonable to assume that it had NOT been clearly handled in accordance with Station Access Condition C. However, once again CSC made no formal objection to the proposal, nor was any attempt made to ensure that any objection was properly handled in accordance with Station Access Conditions C and H. Significantly the invoices relative to these charges, for the Qualifying Expenditure year 1998/99, were paid, by CSC, and in full;
- 16.4. there had been no valid reason why CSC could not have protected its interests, in respect of both the original, and the amended Proposal for Change, by having recourse to the provisions of Station Access Condition C4, and serving a Notice of Objection within the Decision Period; and that
- 16.5. because CSC had not taken this action, and availed itself of the opportunity for the dispute to be the subject of arbitration (as required by Station Access Condition H5.4, in respect of a dispute arising out of Station Access Condition C4.4), CSC had accepted, by inattention, SWT’s broadening of the scope of Common Services, and therefore the charges for this station. In which case
- 16.6. contractually CSC was
- 16.6.1. obliged to continue payment of the full amount of Qualifying Expenditure (i.e. £86,299); and
- 16.6.2. only able to redress the situation, and arrive at a different definition of the scope of Common Services, if it instituted a Proposal for Change in its own right. However, this would not remove the need to pay the full amount of

Qualifying Expenditure until that Proposal for Change had been worked through to a conclusion;

- 16.7. in reaching this conclusion, based fundamentally upon the failure of CSC to protect its own interests in accordance with the terms of the Station Access Conditions, the Committee was aware that there might be implications for other Users of the station, not directly involved in this reference.
17. The Committee came to the conclusion in respect of the dispute regarding manning of Automatic Ticket Barriers at Wimbledon Station, where CSC was being charged Qualifying Expenditure of £2,065, of which £975 was in dispute, that the same arguments applied as in relation to Clapham Junction, and that therefore CSC was obliged to continue payment of the full amount of Qualifying Expenditure (i.e. £2,065), (pending resolution of a Proposal for Change in its own right).
18. The Committee came to the conclusion in respect of the dispute regarding manning of Automatic Ticket Barriers at Guildford Station, where CSC was being charged Qualifying Expenditure of £2,534, of which £631 was in dispute, that CSC's actions at the time of the issuing of the notice could legitimately be construed as acceptance of the proposal, and therefore CSC should be required to pay the full amount of Qualifying Expenditure (i.e. £2,534).
19. The Committee came to the conclusion in respect of the dispute regarding manning of Automatic Ticket Barriers at Havant Station, where CSC was being charged Qualifying Expenditure of £32,899, of which £NIL was in dispute, that CSC had acted properly to protect its interests, but that, in this case, it would not make any difference to the level of Qualifying Expenditure payable.
20. The Committee came to the conclusion in respect of the dispute regarding manning of Automatic Ticket Barriers at Southampton Central Station, where CSC was being charged Qualifying Expenditure of £11,793 of which £NIL was in dispute, that, again, CSC had acted properly to protect its interests, but that, in this case, it would not make any difference to the level of Qualifying Expenditure payable.
21. The Committee came to the conclusion in respect of the dispute regarding manning of Automatic Ticket Barriers at Portsmouth & Southsea Station, where CSC was being charged Qualifying Expenditure of £15,899, of which £6,066 was in dispute, that
  - 21.1. CSC had protested this new charge in a way compliant with Station Access Condition C4,
  - 21.2. the procedures described in Station Access Condition C4.4 and Station Access Condition H5.4 should be interpreted as meaning that until the laid down dispute resolution procedure is completed "*a Proposal for Change shall not be accepted...*", and that therefore
  - 21.3. SWT should not, pending dispute resolution in accordance with Station Access Condition H5.4, charge the disputed £6,066 of Qualifying Expenditure.

22. In reaching all these conclusions, the Committee was keeping in mind its understanding of Station Access Condition H5.4 and taking care not to determine the merits of a dispute arising (under Station Access Condition C4.4) where the parties have made proper use of the full change procedure. However, the Committee, in determining what charges SWT might continue to raise as Qualifying Expenditure, was minded to draw to SWT's attention its conclusion, as at 15.4 above. Nothing in the immediately preceding paragraphs should be construed as implying that the Committee endorses SWT's broader view of what should be encompassed in the definition of Common Services, and therefore count as Qualifying Expenditure.
23. In relation to the contentions regarding levels of platform staffing at Bournemouth, Wimbledon and Southampton Central Stations, where the total of Qualifying Expenditure allocated to CSC was £12,890, £2,816 and £50,724 respectively, of which £5,371, £1,147 and £20,290 was in dispute, the Committee considered that
  - 23.1. CSC is seeking to persuade SWT that the specifications for train-side attendance services, that have been an integral part of the relevant Station Access Agreements since the date of signature, are over-generous, require too high a level of manning, and therefore should be changed. This can only be achieved through the use of the contractual change procedure; therefore
  - 23.2. the correct course of action open to CSC is for it to formulate, for each station, a Proposal for Change, in accordance with Station Access Condition C, and supporting the case for change on whatever evidence, Station Inspections or external benchmarking, CSC might consider relevant;
  - 23.3. the Station Facility Owner shall then process the proposal in accordance with Station Access Condition C1;
  - 23.4. if no agreement on the proposal results from discussion between the parties, then SWT, as an objector to the proposal, or CSC as the proposer of the change, shall proceed as in C4.2 or C4.4 as appropriate;
  - 23.5. the parties must note that, once again, the determination on the merits of a Proposal for Change contested under C4.4 falls to be decided by arbitration in accordance with Station Access Condition H5.4;
  - 23.6. pending the initiation and completion of the change process set out under Station Access Condition C, CSC is, under the terms of the respective Station Access Agreements, contractually bound to pay the Qualifying Expenditure for 1999/2000 as invoiced by SWT.
24. In respect of the Buildings and Maintenance charges at Brockenhurst, where CSC's assessed contribution is £2,821, of which £1,098 is the sum that separates the parties, the Committee noted that the charge was derived from a system of allocating maintenance costs for all SWT stations according to a formula. The Committee was not given any evidence to suggest that this system, which was associated with the formulae used in respect of track "litter picking", was any different from that that had determined the pricing of such services at the time of the signing of the Station Access Agreement for Brockenhurst. Equally, the Committee took the view that there were no particular reasons



for seeing that the present arrangement, in the overall, was either capricious or unfair. Indeed there was a risk that, were such a system to be revised, other than as part of an overhaul taking in all SWT stations and all Relevant Users, any local adjustments could introduce new distortions.

25. Therefore, the Committee directs CSC that, if it wishes to promote such a change in SWT's approach to the allocation of Buildings and Maintenance Expenditure, then it should do so in accordance with Station Access Condition C, it being the view of the Committee that a mooted change to a method of allocating costs fell within (b) of the definition of "Material Change Proposal". Pending the progressing of any such proposal in accordance with Station Access Condition C, CSC is contractually bound to pay SWT's charges as invoiced.
26. In respect of the general issue of the withholding of payments, the Committee is firm in its view that CSC has not at any stage had any valid grounds for withholding the £347,727 invoiced in respect of Qualifying Expenditure for these stations in 1999/2000. CSC should therefore, subject only to such stipulations as are made in paragraph 27 below, make immediate arrangements to pay all outstanding or withheld monies in relation to Qualifying Expenditure for 1999/2000. In addition, SWT is entitled, in accordance with Station Access Conditions F4, F5 and F6, to charge interest in respect of the time for which monies have been withheld.
27. The Committee is however concerned that the difficulties that the parties have found with providing the Committee with a clear picture of the sums owing, and in dispute, does not inspire confidence in the underlying accounting processes. Therefore the Committee requires
  - 27.1. SWT to submit new invoices to CSC in respect of all the sums outstanding in relation to Qualifying Expenditure for 1999/2000, and taking account of the force of this determination. In preparing these new invoices, which, except as below, should be for the full £347,727 agreed by the parties to be outstanding, plus appropriate interest, SWT should take specific cognisance of the following factors:
    - 27.1.1. no interest will be payable on sums owing by CSC to SWT in respect of the elapsed days between the date of this determination and the date of issuing the new invoices;
    - 27.1.2. the grounds for CSC to pay the disputed £6,066 in respect of Portsmouth & Southsea station have not been substantiated by SWT in accordance with due process, and therefore this sum is not payable;
    - 27.1.3. the grounds for the payment of the disputed sums in respect of Wimbledon, Clapham Junction and Guildford Stations, and totalling £27,496, have only been substantiated because CSC, by inattention, has created circumstances where such charges have been tacitly accepted;
    - 27.1.4. no case has been made, in accordance with due process, for a change to the train side attendance and station duties specifications at Bournemouth, Southampton Central or Wimbledon, and therefore there is no ground for

changing the basis for the calculation of Qualifying Expenditure, and the disputed sums totalling £26,808 shall fall to be paid by CSC;

27.1.5. no case has been made, in accordance with due process, for a change to the charge for Buildings and Maintenance at Brockenhurst, and the disputed sum totalling £1,098 shall fall to be paid by CSC;

27.1.6. all of the sums previously agreed by the parties as undisputed and due to be paid (and set out in a joint document dated 10<sup>th</sup> October 2000) shall fall to be paid by CSC;

27.1.7. for the avoidance of doubt, interest payable, by CSC to SWT, shall be calculated by reference to the sums owing as set out in this paragraph 27.1.

27.2. CSC to pay the invoices for Qualifying Expenditure 1999/2000 and compiled in compliance with this determination, without delay. For the avoidance of doubt,

27.2.1. CSC shall settle the invoices in full as received;

27.2.2. in the event that CSC considers that the invoices have not been prepared in a way that complies with the force of this determination, it shall refer the matter to the Secretary to this Committee, who shall have discretion to reconvene the Committee if necessary;

27.2.3. in the event that CSC is able to substantiate a claim for incorrect preparation of the new invoices in compliance with this determination, any adjustments to payments shall be treated in accordance with the principles set out in Station Access Conditions F4, and F5, and shall attract interest calculated in accordance with Station Access Condition F6.

28. The Committee is required to determine in accordance with Station Access Condition H5.1 which referral mechanism, pursuant to the Access Dispute Resolution Rules, the parties may have recourse to in circumstances where they might wish to appeal against the findings of this Committee. The Committee therefore determines that the referral mechanism in question shall be to Arbitration, as provided for in the Access Dispute Resolution Rules.

Bryan Driver,  
Chairman,  
Access Dispute Resolution Committee