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

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### **Determination No. AD23**

(Hearing held at Kings Cross on 28<sup>th</sup> March 2001)

***[Note: no determination was issued in respect of reference no. [AD]22 which was settled by the parties without recourse to a hearing; the previous published determination was no. [AD]21]***

1. West Anglia Great Northern Railway Limited (WAGN) - considering that the level of service that it had been possible to offer to passengers in Period 9 (following the accident at Hatfield, and the consequential programme of remedial works) was so poor that the Train Operator, in accordance with its Passenger's Charter, was faced with "voiding" days, and granting Season Ticket extensions - asked the Committee to rule that Railtrack should be required, under the terms of paragraph 20 of Schedule 8 of the Track Access Agreement, to indemnify the Train Operator for the costs of granting any Season Ticket extensions in respect of 20 void days, for each of four Service groups.
2. The Committee was asked by Railtrack to rule that it had no liability to WAGN, on the grounds that
  - 2.1. it was not WAGN's custom and practice to grant Season Ticket extensions on days when no effective service was provided; and that, in any case
  - 2.2. the service on the days in question was supplemented by a bus link, and therefore does not fall into the category of a service for which Railtrack would be required to offer an indemnity; and that
  - 2.3. either of these grounds would justify Railtrack in its belief that it had no liability, under paragraph 20 of Schedule 8 of the Track Access Agreement, to indemnify the Train Operator in respect of Season Ticket extensions.
3. The Committee noted that its locus to hear the case derived from paragraph 23.2 of Schedule 8 and clause 11.3 of the Track Access Agreement.
4. The Committee noted that the dispute related to a period of extreme disruption throughout most of the network, in the course of which the whole industry, and the services that it offered its customers, was subject to much critical comment. That said, the Committee acknowledged that this dispute arose out of a difference in the respective interpretations of the contractual terms in force between the parties, in particular in regard to the Passenger's Charter, which is incorporated into the Track Access Agreement by reference. The Committee also took account of two other documents, not directly contractual, but submitted as evidence by the parties, namely:
  - 4.1. the BRB Guidelines for Operation [of the Passenger's Charter], which has the status that it set out, at the time of incorporation of Schedule 8 into the Track Access Agreement,

limits of discretion for Train Operating Company Directors in their interpretation of Passenger's Charter; and

- 4.2. Railtrack Procedure 9, the Passenger's Charter, an internal Railtrack Document, describing the practical administrative arrangements to be agreed between a Train Operator and Railtrack.
5. The Committee considered that its determination needed to take into account questions in respect of
  - 5.1. matters of fact: the scale of the disruption, whether or not it met any specified tests of severity, and whether or not any palliatives, such as bus services, made a real difference to the actual travelling experience;
  - 5.2. matters of discretion, in the light of custom and practice: whether, in the circumstances,, and given the terms of the Passenger's Charters (both the original B.R, and later WAGN versions), WAGN were entitled, or indeed expected, to void days, and grant Season Ticket extensions; whether there is precedent for such action resulting in Railtrack meeting the costs of any compensation; and whether, if such a decision was an unusual course of action, this changed or removed any of Railtrack's liability to indemnify the Train Operator; and
  - 5.3. matters of contract: which is the more appropriate interpretation of paragraph 20 of Schedule 8 of the Track Access Agreement?
6. In respect of matters of fact, the Committee
  - 6.1. accepted the contention of WAGN, which was not challenged by Railtrack, that throughout Period 9 it had not been possible to schedule trains to a plausible Emergency Timetable:
  - 6.2. accepted the view that in such circumstances the test of the effectiveness of the service provided, the data on which the assessment of performance for purposes of Passenger's Charter should be by comparing the trains actually run with the published normal timetable;
    - 6.2.1. the performance figures presented for the Great Northern (GN) service groups, gave a false picture as compared with the strict requirements of Passenger's Charter, because a succession of temporary timetables had been loaded to TRUST (but in each case, without giving the 7 days notice to Customers necessary for such timetables to be the benchmark for Passenger's Charter calculations). There was no argument between the parties on this point.
    - 6.2.2. In respect of the West Anglia (WA) the data presented met directly the requirements of Passenger's Charter.
  - 6.3. accepted that the services provided on any of the disputed days in Period 9 fell well below any acceptable standard. In particular, they fell well short of a threshold that had been set out in the BRB Guidelines for Operation "*TOC Directors can declare days when no effective service was provided as a void day. No effective service is defined as*

*either less than 70% punctuality or less than 90% of scheduled trains run*” (the “70/90 test”). The parties were agreed that this document, and in particular this test, is still accepted as of relevance for the administration of Passenger's Charter, and Schedule 8 of the Track Access Agreement.

6.4. did not accept Railtrack's argument, which was based on the words in the BR Passenger's Charter “*We will extend the validity of your season ticket for the days when we were unable to offer an effective train service and no alternative service, such as a bus link, was offered*” that because some bus links were provided, the service, at least on some service groups, should not be deemed “not effective” for the purposes of the application of the Passenger's Charter, and paragraph 20 of Schedule 8 of the Track Access Agreement. The Committee took the view that such an argument had to be subject to some test of reasonableness, relating to “whether the bus link amounted to an “*alternative service*”. However, Railtrack did recognise that their interpretation of the BRB Passenger's Charter was that there was no express requirement that the bus service must be such as would make the train service effective, and that it was unlikely that a bus link would ever be able to meet train punctuality and reliability targets. In this present case the buses provided, as referred to in the paper prepared by WAGN, for the Rail Passenger Council, as “Bus Replacement and shuttles” should not, as Railtrack contended, be construed as evidence that this was an effective alternative. The context and tone of the rest of the paper makes clear that this was no more than a statement of measures taken to mitigate the impact of disruption.

7. In respect of matters of discretion, the Committee noted that,

7.1. were it to find for WAGN in the case as presented, then there would be no immediate direct financial benefit to WAGN: the benefits would all be in the form of compensation passed onto Season Ticket holding Passengers, and the liabilities on Railtrack would fall due as Season Tickets were renewed.

7.2. even before the Hatfield incident, the service on three of the four service groups had declined to a level at which Passenger's Charter discounts had already been triggered. The Committee took the view that whilst it was sympathetic to the wish, by WAGN, that there should be some incremental level of compensation payable in respect of a still more awful level of service during Period 9, the level of performance during earlier periods had no bearing on the substance of the present case.

7.3. WAGN's action, in seeking a dialogue with Railtrack before making a declaration of void days, was no more, given the sums of money at stake, than prudent and courteous management.

8. In respect of the due interpretation of the contract, the Committee considered that, in order to decide in favour of WAGN, it would be necessary for them to satisfy themselves that the Train Operator met the tests set out in paragraphs 20.1 and 20.9 of Schedule 8 to the Track Access Agreement. On the other hand, to find in favour of Railtrack it would be necessary to accept a particular interpretation of paragraph 20.9, which Railtrack was suggesting meant that there was no possibility for the Train Operator to claim for any void days, whatever the level of poor performance.

9. Reviewing these paragraphs (and the correlating sections of the other supporting documents) in detail, the Committee concluded that
  - 9.1. in respect of paragraph 20.1(b), WAGN “*would have been required to offer ... extension or discount (as the case may be)... under the British Rail Passenger’s Charter as published in 1992*”:
    - 9.1.1. the obligation, in certain circumstances, to discount is clear cut, and is admitted by both parties;
    - 9.1.2. the obligation to grant extensions is also clearly stated in the Passenger’s Charter as arising on “*days when we were unable to offer an effective service*”; there is acceptance that this situation would only apply when the standard of service had fallen below the threshold of the “70/90 test”, and even then, only if a Train Operator decided to exercise a discretion to void days;
  - 9.2. in respect of paragraph 20.1 (a), WAGN “*is required to offer extension or discount (as the case may be) ...under the Passenger’s Charter then in force*”. There is no dispute between the parties in respect of the obligation to make discounts when the Moving Annual Averages of performance fall below set levels. However, in respect of “*extensions*” WAGN’s Passenger’s Charter makes explicit that this can arise as a result of the exercise, by WAGN, of a discretion: “*If there are days where no effective service can be run we may decide to exclude these days from the measured performance standards. If we exclude a day from our performance statistics we will either extend your season ticket by one day or give an equivalent refund for each day*”.
  - 9.3. in effect, in both the BR and the current WAGN Passenger’s Charters, there is a requirement that Passengers be compensated for severe service breakdown; however, whereas discounts only become payable as a result of a dip in a Moving Annual Average measure, extensions (or refunds) are given only after a Train Operator chooses to “void” the day or days in question.
10. There is an attraction, for the Train Operator, in that, when a day is voided for reasons of Railtrack fault, a gesture of recompense (an extension to a Season Ticket) can be made immediately, but at no cost to the Train Operator. For this reason there is scope for abuse; this is the reason for the protection offered to Railtrack by paragraph 20.9 of Schedule 8 of the Track Access Agreement. This lays down that “*...in determining whether the Train Operator is required to offer an extension or discount under a Passenger’s Charter due regard shall be had to the custom and practice of the Train Operator in connection with its Passenger’s Charter as at [the date this schedule came into force]...*”.
11. The Committee was much exercised in respect of the force of “*due regard shall be had to the custom and practice*” in this paragraph 20.9. In formulating its view it took account of the following considerations:

- 11.1. the parties were agreed that the relevant reference period for establishing custom and practice was the year ended 1<sup>st</sup> April 1996 (i.e. the twelve months leading up to the incorporation into the Track Access Agreement of Schedule 8);
- 11.2. there would be “*due regard ... to the custom and practice*” if the Train Operator responded to a set of circumstances in the same way that it had responded to a comparable set of circumstances during the reference period; however

- 11.3. during the reference period there was no occasion when no “*effective service*” was operated on a number of consecutive days, and only 6 days when a service was not “effective”, for reasons within the industry control, for a whole day, on one or both service groups. Although the data presented related to all peaks (morning or evening) that had not met the “70/90 test”, the Committee did not consider that poor service operated during a single peak (when normal service operated during the other peak) was an appropriate precedent for establishing custom and practice for the circumstances the subject of this dispute, an unbroken sequence of many days, each of which failed the “70/90 test”, often on both counts;
  - 11.4. of the 6 whole days without “*effective service*” in the reference period, two (3<sup>rd</sup> and 4<sup>th</sup> January 1996 on Great Northern) were such because the reliability fell to between 74% and 85%, two (again both on Great Northern) were because of poor punctuality (26<sup>th</sup> January 1996 (69.8% and 60.3%) and 21<sup>st</sup> February (49% and 66%)), and on two others (14<sup>th</sup> and 18<sup>th</sup> July 1995) there was no service at all because of industrial action by ASLEF;
  - 11.5. by contrast, during the 20 day period in dispute, punctuality, for purposes of assessing liability under Passenger's Charter, on West Anglia Inner Suburban services ranged between 9% and 38%, with the last figure, on the final day of the period, being the only day to beat 30%; on West Anglia Outer Suburban service, the final Friday reached 19% punctuality, but otherwise no day passed 9% and there were two days at 0%. The data presented for GN services did not permit the same level of direct analysis for the reasons given in paragraph 6.2.1 above; that said, the parties were agreed that the performance on GN had, in practice, been no better than on West Anglia.
  - 11.6. during the reference period WAGN had chosen to void the two days of the ASLEF strikes, but had not elected to void the other days.
12. The Committee considered the argument from Railtrack that the definition of a day on which there was no “effective service” was “purely a matter of statistics”, and that all days that failed the “70/90 test” were equivalent; and that therefore if a Train Operator had not voided days that narrowly failed the test, they had established a custom and practice with respect to all levels of failure. The Committee took the view that, for purposes of Passengers’ compensation, custom and practice could vary according to the severity of the disruption. On this basis WAGN's custom and practice appeared to be to grant extensions where there was no service (as on strike days) but not to grant extensions where the 70/90 test was narrowly failed during a period of generally good service.
  13. In effect the Committee required to find a reasonable and realistic answer to the question "How would WAGN have behaved under the BR Charter if the post-Hatfield circumstances had arisen in the reference period?", a question posed because performance on most, if not all, of the days in Period 9, was considerably worse than on any of the days (or even single peaks) in the reference period, apart from on the two days with no service, which had been voided.

14. The Committee therefore determined that
  - 14.1. the standard of performance during the period in dispute appeared to be so significantly worse than anything (except for the two strike days) during the reference period that it fell into a band of performance for which there could be no substantial evidence of WAGN's "*custom and practice*";
  - 14.2. as a consequence, Railtrack's assertion that the correct interpretation of the contract was that failure by WAGN to void days (other than the two strike days) during the reference period should mean that WAGN's custom and practice was not to void any days however bad, was unreasonable;
  - 14.3. however, the fact that WAGN has not generally voided days where performance has been better than no service means that the Committee, on the basis of the information presented, cannot confirm that WAGN has a necessary right to void all twenty days for all four service groups, and claim the benefit from Railtrack;
  - 14.4. the parties are therefore directed to review the data for the period in question, by reference to the performance data for the reference period, with a view to reaching agreement on what decisions, with regard to the voiding of days would have been taken by WAGN in the reference period if similar circumstances had arisen;
  - 14.5. Railtrack should then indemnify WAGN for the cost of season ticket extensions for those days which the parties agree would, in comparable circumstances under the BR Passenger's Charter, have been voided by WAGN.
15. If the parties are unable to reach a negotiated agreement in accordance with paragraph 14 above, they should return to the Committee to present their respective arguments for the basis on which days would have been (and therefore should be) voided, and the number of void days, for each Service Group, for which, as a consequence, Railtrack should be required to indemnify WAGN.

Bryan Driver,  
Chairman to the Committee