
ACCESS DISPUTE RESOLUTION COMMITTEE

Determination No. AD27

(Hearing held at Kings Cross on 19th December 2001)

[Note: no determinations were issued in respect of references nos. AD24 & 26, which were settled by the parties without recourse to hearings; reference no. AD25 is currently stayed; the previous published determination is no. AD23]

1. The Committee was asked by the parties, Great Eastern Railway Ltd (trading as First Great Eastern (FGE)) and Railtrack, to rule as to which was the correct interpretation to be placed on the wording of the Revised Template paragraph 5 of Schedule 8, as it affected two specific incidents at Chelmsford, and at Colchester.
2. The Committee noted with regret that, of the two incidents, the one at Chelmsford related to trespass onto tracks by a female who attempted, unsuccessfully, to take her own life, and the one at Colchester to a successful suicide by a male who jumped under a train from a platform.
3. The concern of the parties in bringing the reference was that they could not agree which party should bear the responsibility for the attributed delay to trains resulting from the incidents.
 - 3.1. In respect of the incident at Chelmsford, the parties differed in their view of attribution principally because of the probability that the female in question had gained access to the tracks through Chelmsford station.
 - 3.2. In respect of the incident at Colchester, the person was killed because he was struck by FGE's train, as it ran alongside the platform.
 - 3.3. Railtrack considers that the Train Operator should be allocated responsibility for each of the above incidents because, in the terms of paragraph 5.3(a)(iii) of the new Schedule 8, the incidents were caused "*wholly or mainly...by circumstances ... affecting rolling stock operated by the Train Operator...originating in connection with or at the station*".
 - 3.4. The Train Operator considers that Railtrack should be allocated responsibility for each of the above incidents, because
 - 3.4.1. in the terms of paragraph 5.2 (c) of the new Schedule 8, the incidents were caused "*wholly or mainly... (whether or not Railtrack is at fault) by any act, omission or circumstance originating from or affecting the Network (including its operation)*);
 - 3.4.2. such would have been the case under the former Schedule 8, and, in their view, the revisions to Schedule 8 do not change this.
4. The Committee reviewed its locus in relation to disputes of this nature:
 - 4.1. it 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 these incidents;
 - 4.2. its locus to hear the matter of the interpretation of Schedule 8 was as defined in clause 11.3 of the Track Access Agreement;

- 4.3. both AD3 and AD16 had stated 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).*”.
5. The Committee noted that, at the centre of the dispute, were the changes to the wording of paragraph 5 of Schedule 8, that had been introduced at the direction of the Regulator, as part of the Periodic Review of Railtrack’s Access Charges. It noted in particular that
 - 5.1. the changed wording had been introduced early in the consultation processes for the Periodic Review, but had not been the subject of responses or comments from the parties;
 - 5.2. FGE believed that the principal outcome of the initiative had been to clarify previous wording, and did not change the contractual force of previous arrangements, in particular in relation to delay attribution;
 - 5.3. Railtrack believed that the changes achieved a gain in clarity, but that that clarity served to remove ambiguity, where the previous arrangements had been open to varying interpretation; and that therefore
 - 5.4. the crux of the dispute was whether or not the revised contract wording had been properly translated into delay attribution.
6. The Committee noted further that both parties had sought to reinforce their arguments by reference to the inputs to, and outputs from, the recalibration (of Schedule 8 payments) that had been undertaken in the run-up to the Periodic Review. The Committee considered that
 - 6.1. on the basis of the evidence presented, the recalibration exercise did not materially assist it in interpreting the intent of the current contract wording;
 - 6.2. the extent to which the recalibration did provide the parties with the relevant funding to meet the various interpretations of the current contract wording was also not clear; but that in any case
 - 6.3. when asked to interpret the intent of contract wording the Committee is not influenced, in its assessment of that intent, by considerations of the relative means of the parties to meet the consequences of its determinations; and that therefore
 - 6.4. it would not give any further weight to the arguments advanced about re-calibration.
7. The Committee considered the contested parts of revised paragraph 5 of Schedule 8, both in relation to the differences from the previous version, and as words intended to be self-explanatory in their own right. The Committee started from the common understanding of these parties that, prior to the introduction of the new Schedule 8 on 1st April 2001,
 - 7.1. delays arising as a consequence of trespass, including suicide, on any part of the Network over which FGE operated services, had generally been attributed to Railtrack, for some years;
 - 7.2. determination AD16, which related to a case of accidental death, in the area of a station, had laid down that “*a Train Operator’s duties as an operator of stations are entirely discrete from its role as “an operator of trains”.*”.

8. The Committee noted that the critical textual changes were as follows:

Former Text: Schedule 8	Revised Text: Schedule 8
<p>“5.4...Subject to paragraph 5.7 Railtrack shall be allocated responsibility for an incident...if that incident is wholly or mainly</p> <ul style="list-style-type: none"> (a) caused by breach by Railtrack of any of its obligations under this agreement (b) caused by circumstances within the control of Railtrack (whether or not Railtrack is at fault) in its capacity as operator of the Network; or (c) caused (whether or not Railtrack is at fault) by or in connection with the Network ...including <ul style="list-style-type: none"> (i) the operation of the Network; and (ii) ..., any incident in connection with rolling stock on the Network, for which any train operator other than the Train Operator would be allocated responsibility if it were the Train Operator under this Agreement; and... (iii) any act, omission or circumstance in connection with the Network originating in connection with any station.” 	<p>“5.2 <i>Railtrack Responsibility Incidents</i> Responsibility for Minutes Delay and Cancelled Stops on a day caused by incidents for which Railtrack is allocated responsibility pursuant to this paragraph 5.2 shall be allocated to Railtrack. Unless and to the extent otherwise agreed, Railtrack shall be allocated responsibility for an incident...if that incident is caused wholly or mainly:</p> <ul style="list-style-type: none"> (a) by breach by Railtrack of any of its obligations under this agreement (b) (whether or not Railtrack is at fault) by circumstances within the control of Railtrack in its capacity as operator of the Network; or (c) (whether or not Railtrack is at fault) by any act, omission or circumstance originating from or affecting the Network (including its operation), including..., any incident in connection with rolling stock on the Network, for which any train operator other than the Train Operator would be allocated responsibility if it were the Train Operator under this Agreement.”
<p>“5.5 ...the Train Operator shall be allocated responsibility for an incident...if that incident is wholly or mainly:</p> <ul style="list-style-type: none"> (a) caused by breach by the Train Operator of any of its obligations under this Agreement (b) 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; or (c) caused (whether or not the Train Operator is at fault) by or in connection with any rolling stock operated by or on behalf of the Train Operator pursuant to any permission to use all or any part of the Network granted under an agreement between Railtrack and the Train Operator or any act, omission or circumstance in connection with such rolling stock (whether or not originating in connection with such rolling stock), including: <ul style="list-style-type: none"> (i) the operation of such rolling stock; and (ii) any act, omission or circumstance in connection with such rolling stock originating in connection with any station (other than in connection with signalling under the control of Railtrack at that station)” 	<p>“5.3 <i>Train Operator Responsibility Incidents</i> Responsibility for Minutes Delay and Cancelled Stops on a day caused by incidents for which the Train Operator is allocated responsibility pursuant to this paragraph 5.3 shall be allocated to the Train Operator. Unless and to the extent otherwise agreed, the Train Operator shall be allocated responsibility for an incident...if that incident</p> <ul style="list-style-type: none"> (a) is caused wholly or mainly: <ul style="list-style-type: none"> (i) by breach by the Train Operator of any of its obligations under this Agreement (ii) (whether or not the Train Operator is at fault) by circumstances within the control of the Train Operator in its capacity as an operator of trains; or (iii) (whether or not the Train Operator is at fault) by any act, omission or circumstance originating from or affecting rolling stock operated by or on behalf of the Train Operator (including its operation), including any such act, omission or circumstance originating in connection with or at any station (other than in connection with signalling under the control of Railtrack at that station or physical works undertaken by Railtrack at that station)....”

<p>“5.7. Railtrack and the Train Operator shall be allocated joint responsibility for:</p> <p>(a) any incident caused by or in connection with an act, omission or circumstance originating in connection with a station which:</p> <p>(i) is an act, omission or circumstance in connection with the Network which prevents the passage of a Train into or through that station at the time it is Scheduled to pass into or through that station; and</p> <p>(ii) prevents the access of passengers through the station to or from the Train; or</p> <p>(b) any identified incident in respect of which Railtrack and the Train Operator are equally responsible and for which neither Railtrack or the Train Operator is allocated responsibility under paragraph 5.4 or 5.5.”</p>	<p>“5.4 <i>Joint Responsibility Incidents</i></p> <p>(a) Railtrack and the Train Operator shall be allocated joint responsibility for:</p> <p>(i) any incident ... caused by or in connection with an act, omission or circumstance originating in connection with a station which:</p> <p>(1) is an act, omission or circumstance in connection with the Network which prevents a Train entering or passing through a station at the time it is scheduled to do so; and</p> <p>(2) prevents the access of passengers through the station to or from the Train</p> <p>and paragraphs 5.2 and 5.3 shall not apply to any such incident; or</p> <p>(ii) any identified incident in respect of which Railtrack and the Train Operator are equally responsible and for which neither Railtrack or the Train Operator is allocated responsibility under paragraph 5.2 or 5.3</p> <p>(b) Unless and to the extent otherwise agreed, Minutes Delay or Cancelled Stops caused by incidents for which Railtrack and the Train Operator are allocated joint responsibility pursuant to sub-paragraph 5.4(a) shall be allocated 50% to Railtrack and 50% to the Train Operator.”</p>
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9. In relation to the arguments advanced by the parties, the Committee paid particular attention to the following aspects of the new wording:

9.1. the force of replacing “*by or in connection with*” (Former Text 5.4 and 5.5) with “*originating from or affecting*” (Revised Text 5.2 and 5.3); and

9.2. the construction to be placed on the fact that

9.2.1. whereas the words “*any act, omission or circumstance in connection with such rolling stock originating in connection with any station (other than in connection with signalling under the control of Railtrack at that station)*” (Former Text 5.5), are to a degree echoed in “*any act, omission or circumstance originating from or affecting rolling stock operated by or on behalf of the Train Operator (including its operation), including any such act, omission or circumstance originating in connection with or at any station (other than in connection with signalling under the control of Railtrack at that station or physical works undertaken by Railtrack at that station)*” (Revised Text 5.3);

9.2.2. the words “*(iii) any act, omission or circumstance in connection with the Network originating in connection with any station.*” (Former Text 5.4) have no counterpart in Revised Text 5.2.

9.3. the arrangement of paragraphs and sub-paragraphs, and the extent to which that arrangement implied that some propositions were subordinate to others;

- 9.4. in relation to “*Joint Responsibility Incidents*” whether
- 9.4.1. there was any practical significance, in relation to these incidents, of the amendments to the drafting;
- 9.4.2. in the cases in question, the circumstances either
- 9.4.2.1. fulfilled the criteria in relation to denial of use of stations (Former Text 5.7(a), or Revised Text 5.4(a)(i)); or
- 9.4.2.2. could reasonably be construed as “*Railtrack and the Train Operator are equally responsible*”.
10. In relation to the change from “*by or in connection with*” (Former Text) to “*originating from or affecting*” (Revised Text), the Committee was of the opinion that the revised wording was far more focussed: it implied either specific origin and causation (“*originating from*”), or a direct practical impact (“*affecting*”). These are narrower tests of significance than the simple association “*in connection with*”. Furthermore, the existence of two tests can simplify the task of making an allocation because, should an incident “*affect*” both Network and rolling stock, it may only “*originate*” with one or the other, and vice versa.
11. In relation to the references to stations in Former Text 5.4 and 5.5, and the unique reference in Revised Text 5.3 (but not in 5.2), the Committee noted that this change was considered, by Railtrack, to have brought with it a significant change of overall meaning. The Committee had to decide whether the deletion did actually change the meaning, or whether it owed most to a change in the style of drafting. The Committee took the view that
- 11.1. in Former Text 5.4 the reference to “*originating in connection with any station*” was vague, and appeared only to have been included in the interests of drafting symmetry, because, it also appeared, with cause, in Former Text 5.5(c)(ii); it was difficult to see to what actual circumstances it might relate;
- 11.2. if, in the Revised Text, the absence of such a phrase had significance, then it would follow that to re-introduce such a phrase would further change the meaning. Within the drafting conventions of the Revised Text, this would have implied a provision along the lines of “*any act, omission or circumstance originating from or affecting the Network (including its operation), including any such act, omission or circumstance originating in connection with or at any station*”. As the existing wording of Revised Text 5.2(c) already covers any such “*act, omission or circumstance*” it is reasonable to conclude that the specific reference to stations is omitted from 5.2, not because the meaning has changed, but because such wording would be otiose. Its omission, therefore, is merely confirmation of the consistent drafting of the Revised Text.
12. In relation to the matter of the construction and order of the relevant paragraphs and sub-paragraphs, the Committee noted that there is a hierarchy within the format used; whereas the full sense of a paragraph qualifies all the subordinate sub-paragraphs, an item incorporated into one sub-paragraph does not qualify other sub-paragraphs. Furthermore, items introduced in a sub-paragraph by “*including*” are, generally, intended to forestall disputes of interpretation that might otherwise arise.
- 12.1. Thus, in Revised Text 5.2 (c), the provision “*, including..., any incident in connection with rolling stock on the Network, for which any train operator other than the Train Operator would be allocated responsibility if it were the Train Operator under this Agreement*” serves to clarify that in this Track Access Agreement Railtrack, as Network operator, may stand accountable for the acts or omissions of other train operators (with whom this Train Operator has no relationship under this Agreement) to fulfil their contractual obligations to Railtrack, as defined in other agreements.

- 12.2. A similar construction placed on the provision in Revised Text 5.3(a)(iii), *“including any such act, omission or circumstance originating in connection with or at any station (other than in connection with signalling under the control of Railtrack at that station or physical works undertaken by Railtrack at that station)...”* would serve to clarify that in this Track Access Agreement the Train Operator may stand accountable for the acts or omissions of Station Operators (with whom Railtrack, as Network operator, has no relationship under this Track Access Agreement) to fulfil their contractual obligations to the Train Operator, as defined in other agreements.
- 12.3. That said, Revised Text 5.2(c) *“any act, omission or circumstance originating from or affecting the Network (including its operation)”*, in practical effect relates to the full range of Railtrack’s obligations to the Train Operator under the Track Access Agreement. Revised Text 5.3(a)(iii), by contrast, only relates to one aspect of the Train Operator’s obligations, vis. *“any act, omission or circumstance originating from or affecting rolling stock operated by or on behalf of the Train Operator (including its operation)”*.
13. In relation to *“Joint Responsibility Incidents”* the Committee was of the view that
- 13.1. the changes to the drafting were not material to the circumstances of the case;
- 13.2. neither case appeared to have fulfilled the criteria in relation to denial of use of stations (Former Text 5.7(a), or Revised Text 5.4(a)(i)); and
- 13.3. the test of *“equally responsible”* (Revised Text 5.4(a)(ii) is significantly different from that of *“wholly or mainly”* (Revised Text 5.2 and 5.3). *“Equally responsible”* implies near parity in the parties’ shares of credit or blame. It would not be reasonable to consider that, because one party bears a small portion of the credit or blame, its share of responsibility should therefore be deemed equal to that of the party *“wholly or mainly”* responsible. It follows therefore that allocation of delay should only be on a basis of equal shares where it is patently not possible to decide which party is *“wholly or mainly”* responsible.
14. The Committee noted, as factors bearing on the allocation of the *“wholly or mainly”* responsibility in both the current cases, that:
- 14.1. the Track Access Agreement (Clause 6.3.5) imposes on both parties the obligation to use *“reasonable endeavours to reduce trespass”*;
- 14.2. the Committee, in AD3, (and cited in AD16), had construed this obligation as follows:
- “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.”;*
- 14.3. in relation to the *“relative opportunity, and authority”* of the parties to prevent any trespass (whether or not as a precursor to suicide) the bulk of the *“opportunity, and authority”*, and therefore the responsibility for the prevention of trespass onto the Network must rest with *“Railtrack in its capacity as operator of the Network”*; and thus
- 14.4. should such trespass not be prevented, resultant delay to trains should generally be allocated to Railtrack in accordance with Revised Text 5.2 *“Unless and to the extent otherwise agreed, Railtrack shall be allocated responsibility for an incident....if that incident is caused wholly or mainly:*
- (a) ...
- (b) *(whether or not Railtrack is at fault) by circumstances within the control of Railtrack in its capacity as operator of the Network;*”;

- 14.5. The Committee, again in AD3, had concluded that, in relation to acts of vandalism,
- “iii) All consequential delay, i.e. all delay other than to the train initially affected, is influenced by the actions taken by the infrastructure controller, in response to whatever report may be received from the crew of the original train affected.”*
- 14.6. given previous determinations that *“a Train Operator’s duties as an operator of stations are entirely discrete from its role as **“an operator of trains”**”*, any potential redress that Railtrack might choose to seek from a Station Operator can not be sought under the Track Access Agreement, but should be pursued elsewhere, including under the terms of any direct agreement between Railtrack and the Station Operator.
15. With regard to the incident at Chelmsford, taking particular account of the fact that the actual delay to trains occurred at a point at some remove from Chelmsford Station, the Committee concluded that
- 15.1. this was first and foremost a matter of trespass, as a result of which the Network was not available for the passage of trains;
- 15.2. as a result of instructions from Railtrack’s signalling staff, trains were being cautioned towards the trespasser. In these circumstances, it is not clear that any *“reasonable endeavours”* in relation to the reduction of trespass were open to FGE, in its role as Train Operator. In the event, the behaviour of the FGE train crew, in seeking to assure the safety of the female trespasser, and of the Network, was wholly consistent with any general duty of care, implied or explicit, within the Track Access Agreement;
- 15.3. it was logical, therefore to allocate responsibility for the delays in relation to the incident at Chelmsford, both initial and consequential, to Railtrack.
16. With regard to the incident at Colchester, the Committee posed itself the question whether the logic by which it had reached a view in respect of Chelmsford, should be modified because the delay occurred in the station area, and because the deceased apparently jumped from the station platform.
- 16.1. The Committee noted that the following points could be advanced to support such a decision (i.e. that the delays should be allocated to the Train Operator):
- 16.1.1. that, within the station, access to the track side could be construed as under the safe keeping of the Station Operator, and not Railtrack;
- 16.1.2. that, in this instance the Station Operator was also FGE, the Train Operator;
- 16.1.3. that the deceased was killed by contact with the train, and that, because until the moment of contact there was no delay, this incident may be considered to *“originate from or affect”* the rolling stock.
- 16.2. Against these assertions the Committee noted the following:
- 16.2.1. the Track Access Agreement grants to the Train Operator the right of trains to have access to the tracks within a station. Other rights, for example in relation to the access of passengers to trains are granted under the terms of the Station Access Agreement, between the Train Operator and the Station Operator;
- 16.2.2. at any one Station to which any one Train Operator may have access, the Station Operator may be any of
- 16.2.2.1. the Train Operator, in its discrete role as Station Operator;
- 16.2.2.2. Railtrack, in its role as Station Operator of Major Stations; OR
- 16.2.2.3. another train operator, in its role as Station Operator.

- 16.2.3. if the responsibility for delays within station areas is to be allocated in accordance with Schedule 8 of the Track Access Agreement, then it follows that that allocation should be made in terms that are consistent with the terms of the Track Access Agreement, irrespective of the Train Operator's down-stream relationship with a Station Operator. Any decision to make the Station Operator accountable, because the circumstances obtaining in 16.2.2.1 above applied, would not be sustainable in any of 16.2.2.2 and 16.2.2.3 above, because the other Station Operators would not be under any contractual obligation to Railtrack.
- 16.2.4. it is of the nature of stations that persons are in the immediate vicinity of the Network, and not separated from it by any barrier that can prevent trespass. This does not relieve other parties from making "*reasonable endeavours*" to preserve life or the safety of the Network, but nor does it make them "*equally*" or "*wholly or mainly*" responsible for any incident, or for any delay or consequential delay;
- 16.2.5. when there is trespass from the station onto the Network, whether resulting in contact with the train or not, "*Railtrack in its capacity as operator of the Network*", is the party charged with managing the response to that trespass, and the Train Operator works to Railtrack's instructions.
17. The Committee therefore determined, in relation to the interpretation of the Schedule 8 Revised Text, as follows
- 17.1. allocation of responsibility for delay as between the parties to the Track Access Agreement is on the basis of where the cause of the incident lies, "*wholly or mainly*" in relation to the responsibilities of the parties. This need not result in allocation wholly to one party, "*to the extent otherwise agreed*". However, failing such agreement, a shared allocation of delay is only appropriate in the circumstances defined in Revised Text 5.4(a)(i), or where "*Railtrack and the Train Operator are equally responsible*" (Revised Text 5.4(a)(ii))
- 17.2. there should be no ambiguity, or dissent as to the basis by which responsibility for delay should be allocated to comply with Revised Text 5.2 (a) and (b), and 5.3(a)(i) and (ii)
- 17.3. in relation to Revised Text 5.2(c), and 5.3(a)(iii)
- 17.3.1. the force of the change from "*in connection with*" to "*originating from or affecting*" is to create two tests of significance, for those circumstances not already categorised under 5.2(a) or (b), or the subparagraphs (a)(i) or (ii) of 5.3. Those tests can be expressed as "is the source of the incident, primarily the Network (i.e. 5.2(c)), or rolling stock (i.e. 5.3(a)(iii))?" OR "does the incident mostly impact upon the Network or the rolling stock?"
- 17.3.2. the subordinate provisions introduced by "*including*" relate in each case to an obligation that one party has for the other, an obligation that the one party can only discharge by means of its management of a discrete agreement with a third party. In each case, the Track Access Agreement does not confer on one party the right for direct dealings with the other party's third party.
- 17.3.3. the force of Former Text 5.4(a)(iii) ("*any act, omission or circumstance in connection with the Network originating in connection with any station.*") is not rendered into explicit words in Revised Text 5.2, because any possible sense from such wording is already conveyed in Revised Text 5.2(c).
- 17.3.4. Railtrack continues to carry the responsibility for some actions at stations, as defined in Revised Text 5.3(a)(iii) ("*...signalling under the control Railtrack at that station or physical works undertaken by Railtrack at that station*"), and therefore the textual changes should not be construed as having effected a change of allocation, in circumstances such as these, from the allocations that applied before the introduction of the Revised Text;

- 17.3.5. An act of trespass may be discovered before there is any loss of life, in which case it will be managed, by Railtrack, using train signalling etc., such that there is no such loss of life. Equally, and unfortunately, an act of trespass may not be discovered until there has been loss of life as a result of a collision between the trespasser and rolling stock. It appears illogical and distasteful to make the distinction that trespass without loss of life is “*originating from or affecting*” the Network, but that once there is loss of life it should be judged to be “*originating from or affecting*” rolling stock.
- 17.4. The changes of wording in the Revised Text do not create a different general intention, as compared with the wording of the Former Text. In particular, the wording of Revised Text 5.3(a)(iii) does NOT create a special sub-set of incidents that would otherwise fall to be treated under 5.2(b), or 5.2(c), but which are treated differently because they occur in the vicinity of a station. Therefore
- 17.4.1. In respect of the incident at Chelmsford, Railtrack “*in its capacity as operator of the Network*” should accept the allocation of responsibility under Revised Text 5.2(c);
- 17.4.2. In respect of the incident at Colchester, then, in respect of the dispute between the parties arising out of the terms of the Track Access Agreement, Railtrack “*in its capacity as operator of the Network*”, should accept the allocation of responsibility under Revised Text 5.2(c).
- 17.5. This determination is without prejudice to any claim for redress that Railtrack might seek to make against the Station Operator, including under any other agreement (i.e. NOT a Track Access Agreement) that may exist between Railtrack and the Station Operators of Chelmsford and Colchester Stations.

Bryan Driver
Chairman