
ACCESS DISPUTE RESOLUTION COMMITTEE

Determination No. AD39

(Hearing held at Kings Cross on 5th October 2004)

[Note: the previous published determination is no. AD28]

1. The Committee was asked by the parties, Great Eastern Railway Ltd (trading as First Great Eastern (FGE)) and Network Rail, to rule as to which was the correct attribution, for delay attribution and Schedule 8 purposes, of an incident (Trust Reference 549080), in which both a train, and signalling cables, were damaged by a fire at Colchester, with significant consequential delay to trains.
2. The parties were in agreement as to the main facts of the case, namely that
 - 2.1. On Tuesday 11th March 2003, sometime between approximately 23:30 and 23:56, a train (312707) stabled in "Bridge Road" Colchester, caught fire. Two vehicles in the train were severely damaged;
 - 2.2. The source of the blaze, within the train, was a car tyre, which had, by some means, but presumed to be as a result of an act of vandalism, been introduced into the train and set on fire;
 - 2.3. Before it could be extinguished, the fire had caused signalling cables in the area to be damaged, causing other delay to services;
 - 2.4. The signalling cabling passed under the site of the fire, and could not be repaired before the train had been moved away;
 - 2.5. Temporary Block Working was instituted pending the completion of repairs;
 - 2.6. Repairs sufficient to allow Temporary Block Working to be withdrawn were not completed until 0425 on Thursday 13th March;
 - 2.7. There was no suggestion that there had been any failure on the part of any party to mitigate the impact of the incident, or that trains had suffered any sort of avoidable delay not attributable to the incident of the fire on the train;
 - 2.8. Delay minutes associated with the disputed incident totalled 1,897 minutes.
3. The Committee noted that the dispute was brought for its determination in pursuance to the arrangements set out in Track Access Condition B2.4.4, which states that "*If, within 14 days of guidance being received from the [Delay Attribution] BoardNetwork Rail and the Train Operator are unable to agree on the attribution, they shall refer the matter to the Industry Committee in accordance with the Access Dispute Resolution Rules*". The matter had been considered at the Delay Attribution Board; the guidance given at that Board, however, had not enabled the parties "*to agree on the attribution*".
4. The Committee noted that the parties had included, as an appendix to their joint submission, details of the findings of the Delay Attribution Board. The Committee noted that the findings of the Delay Attribution Board have, under the terms of Track Access Condition B2.4, the status of guidance and are not a determination. In the circumstances envisaged in Track Access Condition B2.4.4 the Industry Committee is not acting as a court of appeal, but as the determining body of first instance. In these circumstances the Committee considered that it neither could, nor should, give any cognizance to the outcome of any of the Delay Attribution Board's deliberations, and should rather confine itself to a consideration of the cases as made directly by the parties.

5. The Committee noted that the main point at issue related to the way in which “*The TRUST Incident concept allows allocation of instances of Minutes Delay...to a particular occurrence and attribution to a ‘responsible’ organisation*” (*Delay Attribution Guide (Sept 2002) para 2.6.1*). In their submissions, the parties had sought, on the one hand to develop arguments based upon identifying some sort of root cause for the incident (e.g.. an act of vandalism, a possible gap in an un-repaired fence, or a failure to lock the doors of the carriages etc. etc.), whilst, on the other hand to pray in aid some of the contractual conclusions reached in AD27.
6. The Committee considered that its standing in the case derived from the fact that delay attribution is first and foremost a matter of the application of the relevant section (in this case section 5 of Schedule 8) of the Track Access Agreement between the parties. The Delay Attribution Guide is a convenient accumulation of the case law in relation to Delay Attribution, but
 - 6.1. it is, in every case, subordinate to the provisions of the Track Access Agreement, and
 - 6.2. it relates to the way in which incidents that have occurred should, in accordance with the Track Access Agreement, be charged to the account of one or other party. It is not any part of a mechanism by which one or other party is held responsible in law for an incident.
7. In AD27, the Committee had looked at two instances of trespass, and had determined to which party those incidents should be allocated, by direct reference to the wordings of section 5 of Schedule 8 of the Track Access Agreement. The significance of the AD27 determination was that it established a simple principle, namely that until the trespass had been discovered there was no Delay Incident; only after its discovery was there a Delay Incident, which, because it was a matter “*originating from or affecting the Network*”, fell logically to be allocated to the responsibility of Network Rail.
8. The Committee considered that AD27 had established a distinction that was of direct relevance to this case, namely that the (largely mechanistic) process that, in accordance with the terms of the Track Access Agreement, attributes an Incident that causes Delay to one or other of the contracting parties, is something totally different in kind from the discovery and attribution of the cause of that Incident. Attribution to the right contracting party is a function of the operation of Schedule 8 in relation to quantified Delays that have occurred, and as such is the proper province of the TRUST Delay Attribution Guide. Establishing possible chains of causality, relates, speculatively, to matters which may or may not have lead to Delay, and which are not therefore themselves Delay Incidents; as such they have no part in the operation of Schedule 8, nor are they within the province of the TRUST Delay Attribution Guide.
9. In respect of the current case, the Committee was of the view that, until the fire on the train was reported (at 23:56, by the local Fire brigade), there was no Delay Incident. Thereafter, there was Delay, and that Delay should properly all be attributed to the fact of the Fire on the Train, and not to any speculation as to how the fire came to be on the train..
10. The Committee considered that this interpretation was fully consistent with the terms of para 5.3 (in particular (a)(iii))of Schedule 8 of the Track Access Agreement. This reads

“5.3 *Train Operator Responsibility Incidents*

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

 - (a) *is caused wholly or mainly:*
 - (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)....”* .

11. The Committee was pleased to note that the existing attributions within Section 4.11.1 of the Trust Delay Attribution Guide were also consistent with this interpretation.
12. The Committee could see no logical circumstance where a Fire on a Train, however started, could be construed as anything other than a “*circumstance originating from or affecting rolling stock operated by or on behalf of the Train Operator (including its operation)*”. Furthermore, and for the avoidance of doubt, given that the parties were agreed that there had not been any failures in the management of the aftermath of the fire that would warrant the creation of a second incident, all the 1,897 minutes of Delay noted above must also be allocated to the Fire on the Train.
13. The Committee therefore determined that responsibility, in relation to the operation of Schedule 8, for the 1,897 Minutes of Delay associated with the Fire on a Train at Colchester on 11th March 2003 should be allocated to First Great Eastern.

Sir Anthony Holland,

Chairman