
An ACCESS DISPUTES PANEL of the ACCESS DISPUTES COMMITTEE

Determination in respect of reference ADP16

(following a Hearing held at Kings Cross on 12th April 2006)

The Panel

John Boon: appointed representative of Network Rail
Lindsay Durham: elected representative for Non-Passenger Class, Band 2
Nick Hortin: elected representative for Franchised Passenger Class, Band 2
Mike Price: elected representative for Franchised Passenger Class, Band 1

Panel Chairman: **Sir Anthony Holland**

The Claimant: First Great Western (FGW) and First Great Western Link (FGWL)

The Respondent: Network Rail Infrastructure Limited ("Network Rail")

Brief Summary of the Dispute

1. The dispute was brought to the Panel at the initiative of the three access parties, having been previously considered by the Delay Attribution Board in accordance with Network Code Condition B2.4.3. It concerned the view of the two Train Operators that, because both Train Operators are owned by the same company (First Group), the principle established in the previous Panel Determination ADP07 should not apply in certain circumstances.
2. In ADP07 the Panel had determined the case brought by Arriva Train Wales (which related to the situation that arises when the first Train Operator hands over a train ("the arriving service") to the next operator, sufficiently delayed that the next leg of the journey ("the continuing service") inevitably departs late), as follows:
 18. *The Panel therefore finds that, in the circumstance where a single train, or set of train crew, operates a through service utilising the Track Access rights of more than one Train Operator,*
 - 18.1. *allocation of the responsibility for delay at any boundary point shall be determined as between Network Rail, and the Train Operator whose Track Access Right supports the continuing service;*
 - 18.2. *such an allocation shall be unaffected by the existence of any contracts or agreements between the Train Operators concerned;*

- 18.3 *such an allocation shall be unaffected by any attribution back to root cause of delay relating to the arriving service (whether in relation to the DAG, or to the allocation of delay as between Network Rail and the Train Operator of the arriving train, under the terms of that Train Operator's Track Access Agreement). For purposes of delay attribution services do not give rise to TOC on TOC delays at the point at which an arriving service operated by one Train Operator becomes a continuing service operated by another;*
- 18.4. *where the responsibility for delay to a train is allocated to a Train Operator, that responsibility shall be assessed in terms of the provisions of the Track Access Agreement that contains the rights to run that train over the relevant section of route;*
- 18.5. *there is no entitlement for the Train Operator, in such a specific circumstance, to require Network Rail to levy performance payments (under Schedule 8), from another Train Operator.*
3. Network Rail had applied this principle of delay attribution in the various circumstances where a train subject to rights in the FGWL Track Access Agreement had suffered a late start from Paddington, as the rolling stock (which was owned by FGW) had been delayed on an inbound service subject to rights in the FGW Track Access Agreement (and vice versa).
 4. It was the contention of FGW and FGWL, that, since First Group had acquired the FGWL franchise, and had, as a consequence introduced a co-ordinated "wider benefits " timetable with effect from December 2004, delay attribution in such circumstances should not follow the principles set out in ADP07, but should be on a basis as if FGW and FGWL were not two legal entities, but a single access party with but a single Track Access Agreement with Network Rail.
 5. The parties had listed, by incident number, some 66 incidents where, it was contended by the Train Operators, delay should not have been attributed in accordance with ADP07's determination. With one exception (incident 328090 of 19th December 2005), no details were given of the individual incidents, the Panel being asked to determine the dispute as a matter of general principle.
 6. In the generic case, the point at issue was whether delay to the service departing Paddington should be attributed in accordance with the provisions of the Schedule 8 of the Track Access Agreement containing the right to operate that service, or should take account of the attribution made under the separate Schedule 8 of the Track Access Agreement containing the right to operate the earlier service arriving at Paddington. The Train Operators were not contesting those incidents where the Delay to the inbound service was the responsibility of the Train Operator, but they did contend that if that inbound delay was the responsibility of Network Rail, that attribution should be carried over to the attribution in respect of the departing service.
 7. Network Rail had been of the view that the attribution of Delay in respect of the service starting from Paddington should be handled by analogy with that for a "continuing service" in determination ADP07, and that therefore Delay was attributed solely by reference to the Schedule 8 of the Track Access Agreement containing the right to operate that departing service.

8. The parties acknowledged that there is provision within a Schedule 8 Performance Regime for the levels of payment to be adjusted after the event, to take account of special circumstances. However, it was the contention of the Train Operators that it was the attribution of Delay that impacted upon the respective reputations of the parties, and that therefore that attribution, in respect of late starts to “continuing services” should be undertaken as if, instead of two discrete Track Access Agreements, there had existed only one.
9. In the specific case of incident 328090 of 19th December 2005, an inbound service had been delayed by a Network Rail responsibility incident, such that it would not be able to take up its scheduled next working. In consequence, a decision taken in the Swindon Control Centre had identified an alternative inbound service, the stock of which should have been able to be turned round in time to minimise delay to the outbound service. Subsequently the second service was also delayed by a (separate) Network Rail responsibility incident, and the outbound service still suffered a consequential late start. In this incident, responsibility for all delay minutes had been allocated in accordance within the terms of the relevant Track Access Agreement, and in accordance with the principles of the ADP07 determination.

The Jurisdiction of the Panel

10. The Panel noted that its jurisdiction in respect of this case was as the previous Panel had set out in ADP07.

The Panel’s findings of fact

11. The “wider benefits” timetable introduced in December 2004, corresponded with undertakings given by First Group at the time of securing the control of the former Thames Trains franchise, the current FGWL. Inter-working of stock between the two franchises was required in order to be able to deliver the “wider benefits” timetable, but the extent of such inter-working was a function of policy decisions by the Train Operators.
12. Although the FGWL Track Access Agreement had been amended to entitle FGWL to operate HSTs and Adelantes on certain FGWL services, the FGW and FGWL Track Access Agreements remained entirely discrete and self-contained. Furthermore, the benchmark calculations associated with the Schedule 8 Performance regimes had not been subject to any revision.
13. FGW and FGWL are, at the time of the hearing, now both subsumed within a single franchise, but no change is to be made to the Track Access Agreements until they are replaced by a single Track Access Agreement, with effect from the start of the December 2006 Timetable.

The Panel’s determination

14. Taking account of the arguments advanced by the parties, and the previous determination ADP07, the Panel determined that
 - 14.1. the entitlements of the parties could only be determined by reference to the Track Access Agreement relating to the train in question, and in force at the time of any incident;

- 14.2. FGW and FGWL are, in relation to the disputed circumstances, discrete legal entities governed by independent Track Access Agreements;
- 14.3. arrangements between Train Operators to use rolling stock to mutual advantage are, within the terms of the Track Access Agreements, invisible, and therefore, as previously determined in ADP07, have no bearing upon the attribution of Delay. They are also arrangements that are made, and can be unmade, at the discretion of the Train Operators, and therefore are not factors to affect the interpretation of pre-existing Track Access Agreements;
- 14.4. by the same token, the fact of ownership of one or more Train Operators is “invisible” to the operation of any individual Track Access Agreement, and, within the “star model”, each Track Access Agreement stands in a comparable relationship with Network Rail and with all other Track Access Agreements irrespective;
- 14.5. Network Rail is correct to construe ADP07 as applicable to the generic case in this appeal, and to allocate delay to departing services solely in respect of the provisions of the operative Track Access Agreement. If the departing service departs on time there is no incident. Otherwise, if it departs late because no rolling stock is available (for whatever reason) at the booked departure time then it fulfils one of two criteria for which *“the Train Operator shall be allocated responsibility”*, namely that the *“incident [is one that]...”*
- 14.5.1. *causes delay to...the commencement of a Train’s journey, which is caused by the late running for any reason whatever of any rolling stock included in that Train when that rolling stock is operated by or on behalf of another train operator..” (Schedule 8 paragraph 5.3 (b) (ii)). OR*
- 14.5.2. *“is caused wholly or mainly by circumstances... (whether or not the Train Operator is at fault) within the control of the Train Operator in its capacity as an operator of trains” (Schedule 8 paragraph 5.3 (a) (ii)).*
- 14.6. the circumstances of incident 328090 of 19th December 2005 confirm that Network Rail’s application of the principles of ADP07 did not prevent the parties seeking to take appropriate action to mitigate the impact of disruption upon train passengers. Equally, the extent of the Delay attributed to the departing service was, in the event, still reduced by the effects of the mitigating action as compared with what might have resulted had no such action been taken. Whilst such special, and complex, circumstances might merit after the event consideration in respect of the calculation of Performance Regime payments, they do not undermine the general principles of Delay Attribution, or the specific principle set out in ADP07.
15. The Panel has complied with the requirements of Rule A1.72, and is satisfied that the determination, in all the circumstances set out above, is legally sound, and appropriate in form.

Sir Anthony Holland
Chairman