

Determination in respect of reference ADP19

(following a Hearing held at Central House, Euston on 11th October 2006)

The Panel

John Beer: elected representative for Franchised Passenger Class, Band 3
Tony Crabtree: elected representative for Franchised Passenger Class, Band 3
Nigel Oatway: elected representative for Non-Passenger Class, Band I
Mike Scott: appointed representative of Network Rail

Panel Chairman: **George Renwick**

Brief Summary of Dispute, and the jurisdiction of the Panel

1. The Panel was asked, in a joint reference from First ScotRail Limited ("FSR") and Network Rail Infrastructure Limited ("Network Rail"), to determine, in relation to a single example delay incident at Croy, on 26th September 2005 (i.e. occurring outwith the Autumn leaf fall season), the basis for attributing adhesion delays. FSR contended that for the purposes of the Schedule 8 Performance Regime, the delays should be split 50-50 between itself and Network Rail; Network Rail contended that the attribution should be 100% to FSR, and was administering the Schedule 8 Performance Regime on this basis.
2. FSR had challenged Network Rail's stance, and had invoked the provisions of Network Code Condition B2.4. The parties having failed to resolve their differences as between "*designated senior managers*" (B2.4.2), the matter had been put before the Delay Attribution Board (DAB), which had issued its Guidance DAB-13 on 31st July 2006. The parties, having been unable to agree on the attribution contained in that Guidance, have, in accordance with Condition B2.4.4 "*refer[red] the matter to the Industry Committee in accordance with the Access Dispute Resolution Rules*".
3. The parties advised the Panel that the single instance, the subject of this reference stood as proxy for "*a large number of other disputes of the same nature currently totalling in excess of ten thousand delay minutes*".

The Contentions of the Parties

4. FSR contended that the practice of attributing adhesion delays occurring outwith the Autumn leaf fall season on a 50/50 basis was one that had been accepted by Network Rail, and its predecessor Railtrack, and by FSR's predecessor ScotRail Railways (SRR), since 1997, and had continued to apply for some months after FSR had taken over the Franchise in 2004. The arrangement had ceased in June 2005 at the initiative of Network Rail.

5. FSR asserted that,
 - 5.1. the original basis for the previous 50/50 split was an agreement reached in 1997 (“the 1997 Agt”) between SRR and Railtrack, following an appeal to the Access Dispute Resolution Committee, and the issue of ADRC Determination 11 (AD11);
 - 5.2. the 1997 Agt had subsequently been absorbed, with modifications, into the formal 59th Supplementary Track Access Agreement (dated September 2000) (“Supplemental 59”). The modifications had not affected the principle of the 50/50 attribution in respect of adhesion delays occurring outwith the Autumn leaf fall season.
6. FSR acknowledged that, when it had taken over the franchise, and, with effect from December 2004, it signed a new Track Access Contract, that new Track Access Contract did not include any explicit carry-over of the arrangements in either the 1997 Agt, or Supplemental 59, nor had either agreement been novated from SRR to FSR.
7. However, FSR contended that the benchmarks in the Schedule 8 Performance Regime, in that new Track Access Contract, had been derived from the attributions applied during a reference period when the parties were applying a 50/50 attribution for adhesion delays occurring outwith the Autumn leaf fall season, and that to change that attribution subsequently would be inconsistent with those benchmarks. FSR were therefore of the view that the 50/50 attribution should be continued.
8. Network Rail acknowledged that, for the period following the implementation of the new Track Access Contract in December 2004 up to June 2005, it had, through oversight, continued to attribute the delays as if the previous arrangements still applied. However, Network Rail now contended that:
 - 8.1. The TRUST Delay Attribution Guide (DAG), as revised from December 2004, required delay in the specific instance under dispute to be attributed 100% to the Train Operator (i.e. FSR);
 - 8.2. there was no longer any explicit provision in the Track Access Contract governing delay attribution in such instance, nor had any other previous agreement been novated from SRR to FSR, and therefore all such arrangements should be considered to have lapsed;
 - 8.3. the revised DAG had only been introduced following extensive industry consultation; this would have given the opportunity for FSR (or SRR as the agent of the SRA) to make the case for the continuation of the 50/50 split, but Network Rail was not aware of any such case having been advanced by FSR.

The Panel’s preliminary appreciation of the matter in dispute

9. The Panel considered that, in respect of all the detail of this dispute, there was a need to bear in mind the clear distinction between the provisions of the Network Code, which are incorporated within and form a mandatory element of every Network Rail Track Access Contract approved by the Office of Rail Regulation, and the specific, and sometimes bespoke, provisions of the individual Track Access Contract with the individual Train Operator. In particular, the Panel differentiated
 - 9.1. the multilateral process set out in the DAG, and enforced by the contractual obligations set out in paragraphs 5 & 6 of Schedule 8 of the Track Access Agreement (TAA) by which the nature of an incident is determined, coded, and, along with any resulting Delay Minutes, is attributed to a responsible organisation (“the TRUST DA process”); from

- 9.2. the bilateral contractual mechanism by which relevant information from the TRUST DA process is converted, through the intermediary of the PEARS system, and subject to any other agreements between the parties, into payments due under the terms of the individual Train Operator's performance regime ("the money process"). In the case of FSR these were contained in Schedule 8 of its Passenger Track Access Agreement/Track Access Contract (paragraphs 7,8,9 and 10 of Schedule 8).
10. The Panel noted that there appeared to be no dispute between the parties as to the events on the day in question, nor as to the number of minutes of delay that had resulted. The point at issue related to how those minutes of delay should be translated into Performance Regime payments between the parties.

The Panel's findings in respect of facts and the sequence of events

11. The Panel found that

11.1. this subject area had previously been addressed, by the Access Disputes Resolution Committee, in its Determination no 11 ("AD11") dated 13th January 1997, when the parties had sought and been given a determination on "*how instances of water on the line, giving rise to adhesion problems that lead to delayed trains, should be dealt with in relation to the Fault Attribution process and the operation of Schedule 8 of the ScotRail Passenger Track Access Agreement*". (AD11)

11.2. at the time of AD11, the Delay Attribution Guide was not a document with contractual status: it was an internal Railtrack document produced to assist the clerical process of attributing delays to cause, as the first step on the way to determining levels of performance payments between Railtrack and the individual Train Operator. A principle of the Performance Regime was that "*It is not appropriate to attribute fault to an external "force majeure" because the Passenger Track Access Agreement is framed in a way which does not admit, for the purposes of monitoring of train performance, any concept of "force majeure"; all forms of train delay must, by definition, be attributed either to the Train Operator named in the individual Track Access Agreement, or to Railtrack. This does not however, prevent specified delays from being attributed on an allocation of shared responsibility.*" (AD11 paragraph 2)

11.3. AD11 had determined, therefore, that

- i. incidents of delay resulting from loss of adhesion caused by water on the line could not be attributed wholly either to Railtrack or to the Train Operator.*
- ii. the parties to this case should seek to agree to share the responsibility for such incidents (for the purposes of Trust DA Fault Attribution) by means of a freely reached prior commercial agreement.*
- iii. any such commercial agreement must ensure that it does not create any incentive on either party to neglect its safety responsibilities.*
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- vi to the extent that any agreement reached in response to this Determination is not catered for in the Trust Attribution Guide, that agreement, as stemming from the Track Access Agreement, should take precedence over the Guide, the Guide having no contractual force."*

- 11.4. As a sequel to that determination, ScotRail Railways (“SRR”) (the then incumbent of the ScotRail franchise), and Railtrack had, in June 1997, agreed a process for handling “*the Fault Attribution process and the operation of Schedule 8*”, under which “*we attribute adhesion related delays*” in accordance with preset proportions. In relation to the “Sandite Season”, the agreed formula was for the accountability to be shared “*90% Railtrack, 10% Scotrail*” in High Risk sites, and “*50% Railtrack, 50% Scotrail*” at Low Risk sites. In relation to the circumstances applicable to the specific case in dispute (“*Other times of year*”), the agreed formula was also for the accountability to be shared “*50% Railtrack, 50% Scotrail*” (letter of 17th June 1997, Railtrack to SRR (“1997 Agt”));
- 11.5. in 2000, SRR and Railtrack concluded the 59th Supplemental agreement to their Track Access Agreement (“Supplemental 59”). The main purpose of Supplemental 59 was to provide a funding mechanism to enable class 158 and class 318 trains to be equipped with sanding equipment and that on class 170 and Class 334 trains to be modified. Railtrack therefore would pay, through an abatement of Track Access charges, a share of the increased vehicle leasing charges, and would in return benefit from a reduced level of responsibility for adhesion delays, because “*The parties agree that the attribution for delay caused by exceptional rail head conditions at high risk sites for low adhesion in Scotland and for other areas of adhesion problems will be split 50/50 from the Effective Date [24th September 2000].* Supplemental 59 does not make explicit reference to 1997 Agt, but the practical impact of Supplemental 59 was that, thereafter **all** instances of “*adhesion related delays*” were dealt with on a standard 50/50 basis;
- 11.6. in June 2003, Part B of the Network Code was amended, and, in consequence, “*the Delay Attribution Guide is incorporated into and shall form part of these Access Conditions*” (Condition B1.3) and the “*information and guidance set out in the DAG*” was added to the list of sources of information to which “*Railtrack shall, when determining and recording the persons and causes which are responsible for train delays and cancellations, have due regard...*” (Condition B2.2). The same amendment to the Network Code created the Delay Attribution Board;
- 11.7. the provisions of the 1st September 2002 version of the DAG, (that current at the time of its incorporation into the Network Code), stated at paragraph 4.3.2 “*ADRC Determination Number 11 ruled that certain types of adhesion incidents should be shared between Railtrack and Train Operators in a pre-agreed proportion. This allocation will be made after the initial coding of incidents in real time...*”;
- 11.8. in practical day-to-day operations, minutes of delay from “*instances of water on the line, giving rise to adhesion problems that lead to delayed trains*” were attributed through the TRUST DA process on the basis of the guidance in the applicable version of the DAG. The money process was adjusted to give effect to the 1997 Agt, and subsequently Supplemental 59;
- 11.9. when, in 2004, FSR replaced SRR as the franchisee for ScotRail services, the previous Track Access Agreement, incorporating Supplemental 59, lapsed in due course, and was replaced by a new Track Access Contract. At the same time, the rolling stock was made the subject of new lease agreements with all charges being borne by the new lessee; the new Track Access Contract contained no provisions analogous with those in the previous Supplemental 59 either in respect of an abatement of Track Access charges, or in reference to attribution of adhesion incidents;

- 11.10. none of the agreements relative to these issues, between SRR and Railtrack/Network Rail was novated in favour of FSR or replaced by any new agreement;
- 11.11. The new Track Access Contract between FSR and Network Rail came into force in December 2004. From that date to a time in June 2005, Network Rail continued to administer the money process in respect of adhesion problems at “*Other times of year*” on a 50-50 basis according to the principles first agreed in the 1997 Agt. Thereafter, Network Rail took the view that the money process should be aligned with the attribution of delay and therefore the payments between the parties should be aligned with the coding guidance in the DAG paragraph 4.3.8 – 3 (c); and that therefore
- 11.11.1. incidents should be coded MP and attributed to the Train Operator, and
- 11.11.2. any calculation of consequential Schedule 8 Performance Regime payments should be on the basis of this attribution and should not be subject to any further adjustment.

The Panel’s findings in respect of entitlements

12. The Panel found, in respect of the respective entitlements of the parties, that
- 12.1. the context of the ADRC’s determination, in AD11, that “*incidents of delay resulting from loss of adhesion caused by water on the line could not be attributed wholly either to Railtrack or to the Train Operator*” had been one where the current edition of the DAG did not have any contractual force, and was subordinate to the parties interpretation of Schedule 8 of the Track Access Agreement. AD11 provided the context for the parties to agree, in the 1997 Agt, a practical way forward, taking into account factors relevant to conditions in Scotland. The parties accordingly made appropriate arrangements;
- 12.2. by the time that FSR had assumed the ScotRail franchise, this context had changed, following both the change of status of the DAG to a document with contractual force, and the specific direction introduced in DAG paragraph 4.3.8 – 3 (c). In consequence, neither party had, any longer, any discretion as to how the minutes in question should be attributed, as a function of the Trust DA process;
- 12.3. this was not the case in respect of the money process, as the December 2004 version of the DAG contains continued reference to AD11, and describes clear options: “*If there is evidence of wetness on the rails (but not contamination) this will fall within the scope of ADRC Determination 11 and a view must be taken, in the particular case, as to whether the actual time-loss was reasonable in the circumstances. If the time loss is considered to be reasonably explained by the wetness of the rail, delays may, if the parties agree, go to the Neutral Zone or be dealt with in accordance with previous agreements*” [DAG 4.3.7 Note 3].
- 12.4. on this basis, there was no impediment to the parties, were they so agreed,
- 12.4.1. perpetuating the previous arrangements; or
- 12.4.2. agreeing a new procedure, taking advantage of the concept of the Neutral Zone, that would achieve a money outcome comparable with the provisions of either the 1997 Agt, or Supplemental 59.

- 12.5. the 1997 Agt and Supplemental 59 were both agreements entered into by SRR. As (whether by design or by oversight) the 1997 Agt was not subject to any novation from SRR to FSR and the provisions of Supplemental 59 lapsed upon expiry of SRR's Track Access Agreement in December 2004, neither FSR nor Network Rail has any ongoing rights under either agreement;
- 12.6. Network Rail, in continuing, from oversight, to administer the money process for 6 periods as if the provisions of the 1997 Agt still applied, had not created a course of conduct which evidenced acceptance of 50-50 attribution;
- 12.7. in respect of the contention of FSR that previous arrangements should not be changed because to do so would disturb the basis upon which benchmarks had been assessed, the Panel noted that this argument had also been raised in a previous case relating to the operation of the Performance Regime. In its Determination AD27 of December 2001, the Access Dispute Resolution Committee had expressed the view that "*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...it would not give any further weight to the arguments advanced about re-calibration.*" [AD27 paragraphs 6.3 and 6.4]. The Panel considered that
 - 12.7.1. this principle was relevant to this case; and that, in any event
 - 12.7.2. if either party considers that the context and circumstances upon which benchmarks were based are no longer appropriate, there are relevant provisions of Schedule 8 of the Track Access Contract that may be invoked in order to have those benchmarks reviewed.

The Panel's Determination

13. Taking all the foregoing considerations into account, the Panel determined that FSR does not have the benefit of any of the past provisions of the 1997 Agt nor of Supplemental 59 in respect of "*the basis for allocating adhesion delays*" occurring outwith the Autumn leaf –fall season, as these agreements have lapsed.
14. In the absence of any agreement between the parties to the contrary, the money process in respect of the attribution of adhesion delays occurring outwith the Autumn leaf-fall season, should be aligned with the coding arrived at by the application of DAG 4.3.8-3(c).
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.

George Renwick

Panel Chairman