
An ACCESS DISPUTES PANEL of the ACCESS DISPUTES COMMITTEE

Determination in respect of reference ADP07
(following a Hearing held at Kings Cross on 6th July 2005)

The Panel

John Thompson: elected representative for Franchised Passenger Class, Band 1

Nigel Oatway: elected representative for Non-Passenger Class, Band 1

Julia Glenn: appointed representative of Network Rail

Tony Deighan: elected representative for Non-Franchised Passenger Class

Panel Chairman: **Sir Anthony Holland**

Brief Summary of the Dispute

The Claimant: Network Rail Infrastructure Limited

The Respondent: Arriva Trains Wales Limited

1. The dispute was brought to the Panel at the initiative of Network Rail, having been previously considered by the Delay Attribution Board in accordance with Network Code Condition B2.4.3. It concerned the special circumstances where, as a consequence of franchise re-mapping, medium distance through train services, that had at one time been operated throughout by a single Train Operator, were now, over part of the journey, operated by a different Train Operator.
2. The disagreement between the parties Network Rail and Arriva Trains Wales (ATW) (together with Wessex Trains as an interested party) 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. The parties had been unable to agree
 - 2.1. how the guidance given in the Delay Attribution Guide (DAG) should be applied in respect of delay to the continuing service consequential upon delay to the arriving service; and
 - 2.2. how, in these circumstances, responsibility for incidents (and therefore for payments under Schedule 8 of the Passenger Track Access Agreement), should be allocated as between the operator of the continuing service and Network Rail.

The Jurisdiction of the Panel

3. The Panel noted that the Network Code Condition B2.4 confers, on the parties to a Track Access Agreement, the right, where there is no agreement in respect of a particular issue of Delay Attribution,
 - 3.1. to seek the guidance of the Delay Attribution Board *“on the appropriate application of the Delay Attribution Guide”*; and
 - 3.2. *“If, within 14 days of guidance being received from the Board or any designated sub-committee pursuant to Condition B2.4.3, Network 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.” (Condition B2.4.4).*
4. The Panel noted further that disputes in respect of the application/ interpretation of Schedule 8 are (under the terms of paragraph 16 of that Schedule), to be referred to *“the Industry Committee”*.
5. Having reviewed the Papers the Disputes Chairman had issued, to the parties, directions, including

“that references to a Panel must, by the terms of the revised Access Dispute Resolution Rules (effective since 15th April 2005), be determined “on the basis of the legal entitlements of the dispute parties and upon no other basis” (Rule A1.18).

In this context, the attention of the Panel will be focussed on, amongst other things, the force of Network Code Condition B1.3, which states *“The Delay Attribution Guide is incorporated into and shall form part of this Network Code.”* as well as the provisions of Network Code Condition A1.1(h) which relates to the resolution of conflicts between the Network Code and the Track Access Agreement.”

The Panel’s findings of fact

6. Both parties agree that
 - 6.1. the DAG is incorporated into the Network Code, and that this imposes on the parties an obligation to take cognisance of its guidance in attributing delay minutes as between possible access parties and causes;
 - 6.2. the attribution of delay in respect of “LATE ARRIVAL OF INWARD WORKING” is subject to paragraph 4.17 of the DAG; this is, potentially, qualified by paragraph 4.38 “WAITING TRAINCREW”;
 - 6.3. Schedule 8 of the template Passenger Track Access Agreement was amended in 2001, as part of the Rail Regulator’s 2003 Access Charges Review and model clauses, and as a consequence states, at paragraph 5.3(b)(ii),

“Unless and to the extent otherwise agreed, the Train Operator shall be allocated responsibility for an incident other than a planned incident (as defined in paragraph 5.7) if that incident:....

(b) causes delay to:....

(ii) 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”.

- 6.4. Schedule 8 paragraph 5.3(b)(ii) can be construed as being in conflict with paragraphs 4.17 and 4.38 of the DAG, and that, in this matter, the DAG and Schedule 8 imply contradictory courses of action;
- 6.5. Network Code Condition A1.1(h) states that
- “Conflict*
- In the event of any conflict of interpretation between this Network Code and an Access Agreement (not including this Network Code) the following order of precedence shall apply:*
- (1) *this code ; and*
- (2) *the Access Agreement”.*
7. The parties attribute different significance to the above common ground. In practical terms
- 7.1. Network Rail argued that
- 7.1.1. the delay attribution process served a diagnostic process, which, whilst it might inform the contractual allocation process, did not determine it;
- 7.1.2. the contract terms (in Schedule 8) required that the Train Operator responsible (in Track Access terms) for the continuing service should be allocated the responsibility for any lateness at the commencement of that continuing service’s journey *“which is caused by the late running for any reason whatever of any rolling stock included in that Train”*; and that
- 7.1.3. where the delay to the continuing service arose because of a late inwards train-crew working, this should also be allocated, by analogy, to the responsibility of the Train Operator responsible for the continuing service.
- 7.2. ATW argued that the arrangement proposed by Network Rail was inequitable, as the reason for the late arrival of the inwards service could be an incident wholly attributable to Network Rail; or, if the original delay to the arriving service was attributable to that Train Operator, Network Rail would potentially be receiving compensation for the same incident through the provisions of two independent Track Access Agreements. ATW therefore argued that the allocation of responsibility should be on the basis of attribution to root cause, by analogy with the principle that would have applied before the Franchise re-mapping.

The Panel’s consideration of matters of contract

8. The Panel noted that when the Delay Attribution Board had considered the representations of the parties, its judgement, which had been submitted to the Panel for information, made reference to circumstances where *“a separate financial settlement should be agreed by the parties outside the Delay Attribution process, so as to put the parties in the position which the contract intended”*. The Panel considered that such a judgement, would not be *“on the basis of the legal entitlements of the dispute parties and upon no other basis” (Rule A1.18)*, and therefore not within the Panel’s competence to hear. Indeed the Panel was concerned to make its determination on the basis of the documents that exist, and have been approved by the Office of Rail Regulation, as opposed to on any other basis.

9. With this principle in mind, the Panel considered the relative status of Schedule 8 and the DAG, and concluded as follows.
- 9.1. The incorporation of the DAG into the Network Code (Condition B1.3) means that its provisions must be taken into account, when, in accordance with the provisions of Network Code Condition B2, Network Rail is seeking to “*determine and record the persons and causes which are responsible for the delay or cancellation and where more than one, so far as practicable, the extent to which each person or cause is so responsible*” (Condition B2.1).
- 9.2. The DAG is one of FIVE different sources of information, to which Network Rail is directed to pay attention in Network Code Condition B2.2
- “Network Rail shall, when determining and recording the persons and causes which are responsible for train delays and cancellations, have due regard to all information which is relevant in the circumstances, including the following:*
- (a) information from any computerised or other recording system which Network Rail may, for the time being, be permitted to use for the purposes of a particular Access Agreement;*
 - (b) information supplied by signallers and other persons duly authorised to participate in the signalling of trains;*
 - (c) information supplied by any operator of trains, whether such information is within its knowledge or based on information supplied by other operators of railway assets;*
 - (d) information supplied by Network Rail, whether such information is within Network Rail’s knowledge or based on information supplied by persons engaged or acting on behalf of, or otherwise in accordance with or subject to the instructions of, Network Rail or other operators of railway assets; and*
 - (e) information and guidance set out in the Delay Attribution Guide.”*
- 9.3. None of the other categories of information could be considered in any way to determine the nature of any party’s legal entitlements, and there is no obvious reason why the DAG should be deemed to have a status that sets it above these other categories of information. It would be appropriate however to conclude that this process of “*determining and recording the persons and causes which are responsible for train delays and cancellations*”, may provide the basic understanding against which legal entitlements might consequently be calibrated.
- 9.4. That said, the understanding is not derived from the DAG, but from the totality of the process set out in Condition B2.3, which is a multi-tier process for enabling the parties to reach a position that is either agreed, or determined.
- 9.5. In both cases the process serves to affirm the legal entitlements of the parties as set out in the various schedules of the Track Access Agreement, it does not redefine them.

10. The Panel therefore concluded that the conclusion that the former Access Dispute Resolution Committee had reached on the practical force of the DAG, in its Determination AD39, was still valid, and did not require to be reversed as a consequence of the amendment to Network Code Condition B1.3 to incorporate the DAG into the Network Code. Thus, the Panel's ...*"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...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"*. (AD39 paragraph 6)

11. The Panel therefore considered the applicability of the other findings of Determination AD39, which itself addressed the interpretation of the provisions of Schedule 8 paragraph 5.3. This determination had built on the earlier Determination AD27 and had made the following distinction between the functions of the DAG and the Track Access Agreement.

"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.

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. (AD39 paragraphs 8 and 9).

12. Applying this principle to Schedule 8 paragraph 5.3(b)(ii) leads to the following conclusions

12.1. because the arriving service and the continuing service are operated by separate Train Operators, the rights to operate are contained in separate and discrete Track Access Agreements;

12.2. only incidents relating to the arriving service are allocated in accordance with the terms of the arriving service Train Operator's Track Access Agreement, and, by the same token, incidents relating to the continuing service are only allocated under the continuing service Train Operator's Track Access Agreement;

12.3. if the continuing service departs on time, there is no incident; if it departs late because no rolling stock is available 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]..."*

12.3.1. *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

12.3.2. “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)).

12.4. in other words, at a boundary between services, and between Track Access Agreements, delay to the departure of any continuing service, as a consequence of lack of rolling stock, has contractually to be the responsibility of the Train Operator of the continuing service, and therefore, within the terms of the bilateral Track Access Agreement between that Train Operator and Network Rail, that is the basis upon which such delay is fed into any calculation of performance payments.

13. Finally the Panel considered two subsidiary questions, namely

13.1. should late departure of a continuing service as a consequence of delays to arriving train crew be treated as if Schedule 8 paragraph 5.3(b)(ii) also applied to train-crew, or should such delays be attributed back to root cause? And

13.2. should any allocations of responsibility be tempered by considerations that the stock and train crew are in one or other case being sub-contracted to the other Train Operator?

14. On this second point the Panel was disconcerted to hear that ATW was unaware of the terms of any vehicle or train crew hire agreements between itself and Wessex Trains (the operator, in many cases, of the “other” part of service), in particular in relation to matters of liability for failure. That said the Panel was clear that the means by which one Train Operator procures rolling stock is, in relation to the operation of the Track Access Agreement, invisible, and therefore of no consequence. Similar arguments apply to the provision of train crew.

15. If there had been no franchise re-mapping, accountability for failures of train crew or of rolling stock provision would, in the generality of cases, have been allocated to the Train Operator in conformity with Schedule 8, paragraph 5.3(a)(ii), both being matters “*within the control of the Train Operator in its capacity as an operator of trains*”. Franchise re-mapping, associated with the obligation to continue through services, using “shared” rolling stock, created the need for Schedule 8, paragraph 5.3(b)(ii), but only to eliminate a potential for dispute in such circumstances.

16. Franchise re-mapping does not create any obligation to perpetuate the use of “shared” train crew. The decision as to which operator’s train crew should operate a continuing service, is entirely a matter “*within the control of the Train Operator [with the Access Rights for the continuing service] in its capacity as an operator of trains*”. There is thus no requirement for any use by analogy of Schedule 8, paragraph 5.3(b)(ii), nor for any amendment to DAG paragraphs 4.17 or 4.38 to cater for the issues raised by the boundary between arriving and continuing services.

The Panel’s determination

17. Taking account of all the preceding factors, the Panel determined that

17.1. there is a separation between the delay attribution process, and the contractual process by which, under Schedule 8 of the Track Access Agreement, responsibility is allocated as between the Train Operator and Network Rail;

- 17.2. the delay attribution process may inform the process of allocation of responsibility, but, in circumstances where the delay attribution process (as in DAG paragraphs 4.17, or 4.38) recognises finer matters of causality that are not specifically recognised in the contract, it would not be reasonable to expect to re-interpret the contract to accommodate those nuances;
- 17.3. in any one Track Access Agreement the allocation of responsibility for delay can only be as between Network Rail, and the Train Operator that holds the access rights applicable to the delayed train;
- 17.4. the principle established in Determination AD39, where responsibility under Schedule 8 was allocated in relation to the circumstances at the time that the delay commenced, is applicable, by the same logic, to a consideration of the responsibility for delay in despatching a continuing service; thus
 - 17.4.1. until a train fails to depart on time from the first station to which the relevant access rights relate, there is no delay incident as regards that train;
 - 17.4.2. where a train that fails to depart on time because the requisite rolling stock or train crew are not available from the arriving service operated by another Train Operator, that delay, within the terms of the bilateral Track Access Agreement, can only be the responsibility of the Train Operator that owns the Track Access Right for the continuing service;
- 17.5. this principle is not disturbed by considerations as to whether the Train Operator owns, leases, or hires in (from a second Train Operator), the rolling stock in question, or by questions of the ultimate employer of the train crew scheduled to operate the train;
- 17.6. by the same token, whilst it may be true that the boundary between arriving and continuing services may result from service re-mapping, at the behest of the SRA, timetabling of such joined up services can be achieved by the inclusion, in a Bid, of the appropriate qualitative requirements, as set out in Network Code Condition D3.3. It does not otherwise require re-interpretation of the normal operation of the Timetable Change process;
- 17.7. it is quite possible that one Train Operator may have the benefit of third party arrangements with another that confers the right to use that other Train Operator's stock or personnel; for the purposes of the operation of the bilateral Track Access Agreement such agreements are invisible, and therefore cannot have any bearing on the translation of delay attribution into allocation of contractual responsibility.
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.
19. 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