
ACCESS DISPUTE RESOLUTION COMMITTEE

Determination No. 11

Hearing at Euston House on 13 January 1997

The Access Dispute Resolution Committee was asked to determine, in response to a joint submission from ScotRail Railways and Railtrack, 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.

The Committee gave some thought to its locus to make a Determination on this matter, and concluded that, although the Trust DA process is not directly part of the Track Access Agreement, it is the means by which parties have agreed that the requirements of Track Access Condition B and of the Track Access Agreement Schedule 8 should be implemented, and that therefore disputes as to the applicability or interpretation of the Trust DA Fault Attribution system do fall to be resolved by reference to the Access Dispute Resolution Committee.

In reaching a Determination the Committee took account of the following features:

1. Railtrack is responsible for providing a fit network in all weather and atmospheric conditions; by the same token the Train Operator is responsible for providing fit rolling stock and competent train crew in all weather and atmospheric conditions. Where the issue relates to the circumstances in which the presence of water at the wheel-rail interface is creating loss of adhesion it is unreasonable to allocate responsibility for that loss wholly to one party or the other.
2. 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.
3. There is an obligation on the parties to the Passenger Track Access Agreement "to take reasonable steps to avoid and/or mitigate the effects of incidents" (including loss of adhesion); this obligation must have "regard to the response of [the parties] to similar types of incidents occurring prior to the Commencement Date" [of the Agreement]. (Track Access Agreement Schedule 8 Clause 5.3a.)
4. Acts of mitigation can relate both to measures taken to reduce the likelihood of a loss of adhesion causing delay, and also to actions following such a delay and intended to reduce the consequential impact upon other trains or Train Operators.

5. Any decision about the relative attribution of fault for an incident needs to take account of the economic incentives on the parties implied by that attribution. It must also recognise that 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.
6. It is not inevitable that once an incident has been identified, and responsibility attributed and accepted, the total sum of delay that accrues to that incident should include all elements of reactionary delay.
7. All judgements about Fault Attribution have to recognise that this is intended to be a practical real-time process and therefore any judgement should not complicate the task of real-time Control Offices, by introducing distinctions that either add directly to the processes for administering the Trust DA system, or require onerous additional enquiries to be made.

The Committee therefore determined 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.
- iv. any such commercial agreement could include, without detriment to consideration 7 above, recognition of all or some of the following factors:
 - a) specific local problems taking account of the rolling stock and the route
 - b) differences between seasons
 - c) the relative effectiveness of measures of mitigation whether before or after the event
 - d) such other factors as the parties consider to be appropriate
- v. this Determination should not be construed as implying that the Committee has expressed any view on the relative proportion of attribution to be carried by either party in any given set of circumstances, nor that the Committee would be prepared to make such a Determination in future.
- 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.

Bryan Driver
Chairman of the Committee
13th January 1997