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## ***ACCESS DISPUTE RESOLUTION COMMITTEE***

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### **Determination No. AD15**

(Hearing held at Kings Cross on 11<sup>th</sup> March 1998,  
determination delivered on 18th March 1998)

1. The Committee was asked by the Train Operator, Great Eastern Railway Limited (GER), to direct Railtrack to amend the documented Rules of the Plan for the East Anglia Zone, and delete the differentials between the arrival times shown in the Working Timetable, and those advertised in the Great Britain Passenger Railway Timetable (or such other document as is subsumed in the definition of Passenger Timetable as given in Access Condition D).
2. The Committee noted that the joint submission from the parties was ostensibly a matter for the Timetabling Sub-Committee in accordance with Access Condition D3.4.5, being a disputed “decision of Railtrack not to make an amendment” requested by GER, but that
  - 2.1. the materiality of the matter arises from the contention from Railtrack that, if this change to the Rules of the Plan is made, Schedule 8 performance falls to be calculated differently, or on a different basis;
  - 2.2. this sort of question, of direct interpretation of how different parts of a contract work and interact, falls under the ADRC rather than the Timetabling Sub-Committee; and therefore that
  - 2.3. the Committee Secretariat had considered that this case is one that ought initially to be heard at ADRC, as the body responsible in accordance with Access Dispute Resolution Rule A4.7, in order to determine the question of jurisdiction.
3. In reviewing this matter of jurisdiction, the Committee addressed the following considerations:
  - 3.1. what is the relative significance of the Schedule 8 and Rules of the Plan issues, and which should drive the order, and place, of final determination?
  - 3.2. are there specific matters of interpretation of Schedule 8 raised, and do these have a defined linkage with the proposed amendment to the Rules of the Plan?
  - 3.3. should ADRC decide to make a determination on some, or even all, of the matters in question, (taking account of the options for further appeal open to the dissatisfied party, and the Committees’ invariable concern not to impede rights of access to the Regulator)? or
  - 3.4. should ADRC only give direction to the parties on the place of necessary further hearings?

4. The Committee noted that the locus of the Timetabling Sub-Committee to hear a reference relating to Rules of the Plan is as defined in Access Condition D3.4.5; by which the Timetabling Sub-Committee
  - 4.1. has the final word (other than any appeal to the Regulator) on whether or not proposed amendments to the Rules of the Plan should be accepted; but
  - 4.2. has no power to determine a matter concerning the interpretation of Schedule 8.
5. The Committee decided that any consideration of the content of Rules of the Plan should be remitted to the Timetabling Sub-Committee, but that that sub-committee's deliberations, and any subsequent appeal to the Regulator, needed to be informed by a decision on how the operation of Schedule 8 would, or would not, be affected by the proposed amendment. The Committee therefore decided to consider the matter of the interpretation of Schedule 8, noting that, in the Submission it was recorded that "the parties strongly disagree as to whether and, if so, how the performance regime is relevant to this dispute."
6. The Committee examined evidence as to the way in which the Schedule 8 template Performance Regime, incorporated into GER's Track Access Agreement, had been put into operation, and noted the following particularities:
  - 6.1. with effect from the first 1.4.94 Track Access agreement, the Rules of the Plan that had been incorporated by reference in Schedule 4 did include provisions for certain trains to be the subject of specified differentials. These differentials, which the Committee elected to refer to as "buffer-stop differentials", meant that the trains affected were booked, in the Working Timetable, to arrive at destination at certain times, but that the times published in the Passenger Timetable were to be later by the amount of the differential;
  - 6.2. these "buffer stop differentials" had been carried forward through successive amendments of the Rules of the Plan, unchallenged, but that GER were seeking their elimination from the next possible timetable (the original dispute arose in relation to the Summer 1998 Timetable);
  - 6.3. existing practice, in relation to the operating documents produced, is that the Working Timetable records the time of arrival at final destination that appears in the Passenger Timetable, by means of a symbol that indicates that the advertised time of arrival is x minutes later than the booked time of arrival ("x" is a number of minutes designated by a symbol whose meaning is recorded in the index to the Working Timetable and which reflects the requirements of the Rules of the Plan);
  - 6.4. existing practice in relation to the operation of TRUST and PEARS is that TRUST is used to monitor delay, as compared with effective planned times of arrival (i.e. the Applicable Timetable), whereas PEARS calculates lateness as compared with the later times in the Passenger Timetable;

- 6.5. the lateness benchmarks for Schedule 8 had originally been calculated on the basis of data that measured lateness in relation to the Passenger Timetable (i.e. in accordance with the convention now in force with PEARS), and not in relation to the Working Timetable (i.e. the Applicable Timetable used to inform TRUST); and that
- 6.6. there was no disagreement between the parties as to the sums of money that had been calculated or paid during past operation of the Performance Regime.
7. The Committee noted that the situation set out (in 6) above was one that was recognised by both parties, and did not appear to imply any practice that was at odds with the letter of any provision of the Track Access agreement; furthermore, given the period of operation of the Track Access Agreement, they were deemed to be agreed arrangements, which could only be changed by the application of the formal change procedures set out in the Access Conditions, or an explicit change to the Track Access Agreement in accordance with Section 22 of the Railways Act.
8. The Committee noted that, since the commencement of the current Track Access Agreement, amendments to line-speeds and running times had been incorporated in Rules of the Plan, and reflected in Working Timetables, without necessitating any revision of the Schedule 8 Performance Regime.
9. The Committee noted the definition of Rules of the Plan, namely “*rules regulating, for any part of the Network, the standard timings and other matters necessary to enable trains to be scheduled into the Working Timetable applicable to that part of the Network*”, and considered that a “buffer-stop differential”, whether applied to one or all trains, does not appear to influence the capability of the network. Therefore the Committee could see no reason why a “buffer-stop differential” required the force of inclusion within the Rules of the Plan.
10. With these understandings, the Committee
  - 10.1. decided that any decision as to whether, in future, a Passenger Timetable should show different times for arrival at final destination from those in the Working Timetable, was a matter for the commercial judgement of the Train Operator alone, where it related to matters of passenger perception and not to achieving any real difference in operational reliability; the Train Operator should include such requirements in his timetable bid;
  - 10.2. concluded that achieving alignment of the Passenger Timetable and Working Timetable, where these had not previously been aligned, would potentially affect the calculation of sums payable under the Performance Regime; however there was nothing in the Track Access Agreement that placed any explicit restraint on achieving this alignment, or required that such a re-alignment should precipitate any consequential re-adjustment to Schedule 8; and therefore

- 10.3. any such re-alignment, like any change to the Rules of the Plan, must meet tests of reasonableness in relation to the feasibility of running trains to the resultant running times; any dispute as to such feasibility to be determined by the Timetabling Sub-Committee.
11. Taking all of the foregoing considerations into account, the Committee determined that, because the matters at issue all stemmed from items included in the current Rules of the Plan, and which the parties had previously been happy to accept should be recorded in the Rules of the Plan, then, if GER wished to achieve a change, that change should be progressed in accordance with the arrangements in Access Condition D3.4, including, if the parties are unable to agree, reference to the Timetabling Sub-Committee in accordance with D3.4.5. For the avoidance of doubt, the Committee acknowledged that, although there had been a need to bring (with some delay) this dispute to ADRC, the principle of the dispute had originally been advised to the Secretariat within the time scale envisaged in D3.4.5; therefore, it ruled that, should the matter go to Timetabling Sub-Committee, that sub-committee should accept it as a matter raised within the relevant time limits.
12. In suggesting that the parties progress this matter in this way, the Committee
  - 12.1. drew attention to previous rulings on related matters contained in Timetabling Sub-Committee Determinations 5 and 9, insofar as these relate to the onus of proof, where one party wishes to effect change, and
  - 12.2. suggested that, in the event that a reference were made to Timetabling Sub-Committee, that Committee would be the appropriate body to determine whether a particular “buffer stop differential” was justified in the light of the definition of Rules of the Plan.

Bryan Driver,  
Chairman,  
Access Dispute Resolution Committee