
ACCESS DISPUTE RESOLUTION COMMITTEE

Determination No. AD18

(Hearing at Kings Cross, 24th June 1999)

1. The Committee was asked by First North Western (FNW) Trains Company to rule that
 - 1.1. because Railtrack had notified, in the Rules of the Route, engineering allowances greater than those within Schedule 4 Part B (“schedule 4”) of the Track Access Agreement dated 28th March 1996 (as amended), FNW were entitled to compensation from Railtrack, and that
 - 1.2. any such compensation should be paid with effect from the start date of the matter complained of, and not from 2nd June 1998, the date of the complaint.
2. The Committee noted that the crux of the dispute related to the standing of Appendix 1, Diagram 1 “Regional Railways Northwest Schedule 4 EWD Engineering Allowance”, which is part of Schedule 4 to FNW’s Track Access Agreement, in relation to
 - 2.1. the definitions of Network Possessions and the Possessions Allowance,
 - 2.2. the applicable Rules of the Route, and
 - 2.3. the “Calculations in respect of Possessions” (Clause 6 of Schedule 4)and that Clause 6.3 of Schedule 4 defined that such disputes were, in the absence of agreement between the parties, to be referred to the Access Dispute Resolution Committee.
3. The Committee considered the particular words in paragraph 2.4 of FNW’s Schedule 4, and noted the following:
 - 3.1. the function of paragraph 2.4 is, on one hand, to confer on Railtrack a freedom to take Possessions without any obligation to pay the Train Operator compensation, and, on the other hand, to set an upper limit to that freedom. [i.e. ‘*“Possessions Allowance” means the Network Possessions which Railtrack is entitled to notify without making any payment to the Train Operator, as provided in paragraphs 2.4 and 2.8*’].
 - 3.2. the specific Possessions Allowance in FNW’s Schedule 4, is tabulated in Appendix I to the Schedule, and its supporting Notes and Diagram (Diagram 1 “Regional Railways Northwest Schedule 4 EWD Engineering Allowance”: hereafter referred to as Diagram 1). These are incorporated into the Agreement by references in paragraph 2.4 to “... *the taking of ... any Network Possession of a type specified in Column B of Appendix I ... or of any Network Possession specified in Diagram 1 of Appendix I ...*”. Sub-paragraph (a) refers to “*the total number of such Network Possessions ... does not exceed the relevant threshold specified in ... Column D of Appendix I or specified in Diagram 1 of Appendix I...*”.
 - 3.3. the principal difference between Appendix I and Diagram 1 is that
 - 3.3.1. in Appendix I the thresholds are defined in terms of number and duration of permitted Possessions allowed on a section of Route;

- 3.3.2. Diagram 1, which is a feature peculiar to FNW's Schedule 4, takes the form of a schematic map, similar in principle to the "Map of Standard Engineering Allowances" incorporated into Rules of the Route documents. General Note 13 to Appendix I states that *"Included within the Possessions Allowance are the number and type of Temporary Speed Restrictions permitted for each Route section in Diagram 1..."*. Diagram 1 sets thresholds because it *"indicates the additional journey time permitted in respect of, or in connection with, Possessions for the relevant Route sections..."*.
 - 3.4. Diagram 1 makes specific reference to the May 1995 Timetable as a benchmark for allocating the allowances listed. However, some of the engineering allowances specified in Diagram 1 are different from those that applied for that Timetable, and are, in turn, different from the allowances specified in the 1998/9 Rules of the Route.
 - 3.5. FNW's case relates to those instances where the Applicable Timetable, based on the allowances in the Rules of the Route, extends journey times by more than the amounts set out in Diagram 1. This is because FNW contend that words within paragraph 2.4 could be construed as implying that the allowances in Diagram 1 are themselves Network Possessions; and that therefore every incremental minute for every train included in the timetable is a Possession outside the Possessions Allowance, and should be reckoned into any calculation of Schedule 4 Compensation payments.
4. In seeking a resolution of the conflicting points made, the Committee expressed the view that the parties, in incorporating any particular provision within Schedule 4 (and its appendices), would have been seeking to serve two ends:
 - 4.1. to codify established past practice whereby the need for a predictable Timetable was reconciled with the need to permit engineering work; and
 - 4.2. to ensure that that codification set upper limits on the extent to which the service to customers could be affected by engineering work; limits beyond which the Train Operator should be entitled to Compensation from Railtrack.
5. The Committee reminded itself that the structure and content of the various appendices to Schedule 4 (to the extent that they were allowed any latitude by the 'Calibration Guide for Schedule 4 Template') had been for the parties to agree; whatever had been incorporated into FNW's Schedule 4, including Diagram 1, was to be understood as something to which both parties had attached contractual force. That said, the Committee noted that
 - 5.1. engineering allowances are listed in the Rules of the Route, and the procedures within Access Condition D are there to ensure that a Train Operator can challenge unacceptable proposals for change; and
 - 5.2. given that Diagram 1 existed, it had to serve as a contractual benchmark for any discussion, within those Access Condition D procedures, about the engineering allowances within any Applicable Rules of the Route.
6. The Committee addressed the representations from FNW that the engineering allowances illustrated in Diagram 1 (as opposed to actual Temporary Speed Restrictions) were themselves Network Possessions, and that each engineering allowance incorporated within the Timetable consumed a part of the Possessions Allowance. The Committee did not accept this contention on the grounds that

- 6.1. this is not the common understanding of engineering allowances within the industry, nor is it one compatible with the principles in paragraph 4 above, or with the operation of the Rules of the Route procedures in Access Condition D;
 - 6.2. the words within the FNW Agreement (and which are peculiar to this Agreement) from which this argument is adduced are internally inconsistent and ambiguous; the Committee therefore does not consider that they support the argument; and,
 - 6.3. had this construction been clearly in the minds of the parties when they drafted the Agreement, then, given that the allowances in Rules of the Route have not aligned with Diagram 1 in previous timetables, the current dispute would have arisen much sooner.
7. Finally the Committee noted the acknowledgement by Railtrack that, because of the manner in which past records of Network Possessions actually taken had been kept and shared (as required by paragraph 6 of Schedule 4), there could have been circumstances where compensation properly due, in respect of such Network Possessions in excess of the Possessions Allowance, had not been paid; Railtrack were seeking to reach agreement on the appropriate sums due.
8. The Committee therefore determined that
- 8.1. the engineering allowances as listed specifically in Diagram 1 to Appendix I of Schedule 4 of the FNW Track Access Agreement are not themselves to be understood as Network Possessions; nor are they to be set against the Possessions Allowance when calculating any compensation payable under Schedule 4, just because they have been incorporated into the Timetable,
 - 8.2. the inclusion within the FNW Track Access Agreement of Diagram 1 does imply that the parties recognise, jointly, a contractual obligation in respect of the values for engineering allowances that might be set as a result of the Rules of the Route procedure;
 - 8.3. in seeking agreement on the Rules of the Route for future timetables, in accordance with the provisions of Access Condition D, the parties will need to take explicit account of the contractual obligations set out in Diagram 1 of Schedule 4 of FNW's Agreement.
 - 8.4. to the extent that, in future timetables, the agreed Rules of the Route engineering allowances, arrived at in accordance with the full provisions of Access Condition D, differ significantly from those in Diagram 1, then, given the special features of FNW's agreement, Railtrack, in any calculation of Schedule 4 compensation in respect of notified Possessions (including TSRs), should take into account those differences in respect of journey times over individual route sections;
 - 8.5. the calculations already in hand referred to in paragraph 7 above should be informed by the principle set out in 8.4 above, and for the period since 2nd June 1998; however
 - 8.6. taking account of the length of time during which no dispute had been notified by FNW under paragraph 6.2 of Schedule 4 (during which the parties could be construed as having been in agreement), and the extent to which it appeared that, in previous years, Diagram 1 had not been the subject of specific consideration in agreeing the Rules of the Route, then, there was no ground for FNW to receive any retrospective compensation under Schedule 4 in respect of the matters raised in this reference and the period before 2nd June 1998.

**Bryan Driver
Chairman
Access Dispute Resolution Committee**