
ACCESS DISPUTE RESOLUTION COMMITTEE

**MINUTES of MEETING No. 24
Held on 17th July 1997**

Present:

Bryan Driver, Chairman
Grahame Cooper (Railtrack)
David Franks (Thames Trains)
Nigel Fulford (Great Western Trains)
Geoff Knight (Railtrack)
Bob Urie (Regional Railways North East)
Michael Woods (Eurostar (U.K.))

In attendance:

Chris Blackman (Secretary)
Martin Shrubsole (Alternate Secretary)

Apologies:

Ian Osborne (Freightliner)
Barry Graham (English Welsh & Scottish Railway)

24/1 Minutes of meeting No.23

The minutes of meeting no.23 held on 30th June 1997 were approved. The Chairman signed a copy of the minutes as a true record of the proceedings.

24/2 Matters arising

Minute 23/4

It was agreed that a copy of the approved statement of accounts should be circulated with the minutes of meeting no.23.

24/3 Consideration of Determination No.[AD]1

The Committee reviewed the papers from Railtrack, and from its legal advisors Wragge & Co. regarding certain aspects of the Committee's Determination No.1, and the possibility of the need for an amendment to Access Condition G.

Members were initially concerned that it might be seen as inappropriate to debate a possible amendment to Access Condition G at a meeting that was also going to consider questions of jurisdiction in relation to a Network Change Dispute. On the

other hand, members recognised that the issue in question had arisen because, whilst ADRC, and subsequently the Network and Vehicle Change Committee, had been clear in decisions they had made, and those decisions had not been challenged by any of the Parties affected, there was still potential for a dispute over the implied interpretation of Access Condition G6.1 in particular.

The Committee reminded itself that its previous determinations had related to disputes where one Party had believed that a matter warranted consideration under the Network Change procedures, but the other had not. Determination [AD]1 had clarified the position namely that disputes about the applicability of Access Condition G should be resolved by reference to the Network and Vehicle Change Committee.

Having reviewed the papers before it the Committee agreed that it had no wish to change its position in regard to the earlier determinations, nor did it wish to modify its future position. The Committee noted that the force of the legal advice was that:

- a) the Committee had interpreted the phrase in Condition G6.1 “if any Access Party is dissatisfied as to any matter concerning the operation of the procedure in this Part G” as including the circumstance where one Party *'is dissatisfied that the other had failed to initiate the procedure'*; and
- b) for the avoidance of doubt there was merit in making this specific interpretation appear on the face of the Access Condition.

The Committee resolved that:

- i. given that lawyers had identified a possibility of doubt, there was merit that that be removed;
- ii. it was satisfied with its previous interpretation, and that it would continue to apply the same interpretation; however
- iii. a suitable "for the avoidance of doubt" amendment to Access Condition G6.1 would be helpful.

The Committee asked the Secretary to liaise with Railtrack in order to ensure that a suitable submission was tabled, by Railtrack, to the Class Representative Committee, in order to ensure this possible source of future misunderstanding was eliminated. The Committee noted that, for consistency, an amendment to G6.1 ought properly to be reflected in similar amendments to Access Condition F, and the Major Projects provisions of Access Condition D.

24/4 Considerations of Locus and Procedure in relation to two submissions from Connex South Central

The Committee noted that its object in this discussion was to identify whether or not it had a role to play in the resolution of two disputes tabled by Connex South Central, one relating to Schedule 8, and the other to a possible Network Change. The Committee noted that Connex South Central had made substantial submissions to support each dispute, and that extracts only of these submissions had been circulated to Committee members, for the specific purpose of enabling a discussion on locus in the process. No submissions on the merits of the case had been received from

Railtrack, although a note on process had been received. The Secretariat had been in discussions with both Parties and the designate clerk to the Committee had produced a brief for the Committee on the issues of the process involved. The Committee noted a point from the designate clerk that the initial brief had omitted to draw the Committee's attention to the fact that Connex South Central were no longer paying part of their Track Access accounts, but were instead paying money into escrow.

Members of the Committee declared interests as follows:

- Michael Woods, that he had been consulted by Network South Central at an early stage when they were exploring whether a case could be put before the Committee;
- Nigel Fulford confirmed that representatives of Connex South Central had contacted him as the elected representative for Band 2 of the Franchised Passenger Class, and that he had given advice and guidance on the Committee's procedures;
- Graham Cooper and Geoff Knight confirmed that as employees and shareholders in Railtrack they have an interest in the outcome of these disputes, and that Graham Cooper, in his normal professional capacity, had participated in the meeting between Railtrack Southern Zone and the Secretary and designate clerk to the Committee.

The Committee examined the possibility that these matters might be treated other than as Access Disputes, and came to the conclusion that the Parties, contractually, were required to refer the matters in dispute to the Access Dispute Resolution procedures.

The Committee noted that the matters in dispute involved sums of money significant to both Parties. It considered the proposition that, if neither Party to the disputes was likely to accept a decision, and if there was a higher level to be appealed to, the Committee should confine itself simply to inviting the Parties to go to the highest level. The Committee questioned whether it had any powers to void any part of the Access Conditions, or the Access Dispute Resolution Rules. Furthermore, whereas a dispute resolved in accordance with the rules requires that, for example, arbitration should be final and binding on the Parties, resolution sought outside the rules could well not have this force.

The Committee concluded that it did not have the right to relieve itself of its duty to hear references, that it should hear the full merits of any case brought to it for which it had a locus, and that it had the responsibility thereafter for determining the route for any consequential appeal.

The Committee considered the proposition that one hearing at ADRC could hear both the Schedule 8 dispute, and the Network Change dispute. The Committee noted that it had only just reasserted the principle that Network and Vehicle Change disputes, including disputes about whether or not a Network Change had occurred or was proposed, should be resolved at the Network and Vehicle Change Committee. Furthermore, as that sub-Committee's proceedings lead to the possibility of appeal to the Regulator, the ADRC must be careful that it does not at any stage deny a Party that route of appeal.

Nonetheless ADRC considered that the substance of the two disputes had such a large overlap, that, were the Parties to make a joint submission that they were satisfied that both disputes could be heard at the one hearing, this should be considered seriously.

The Committee acknowledged that there could be some problems associated with hearing the two disputes in separate Committees. This might be pragmatically addressed by hearing the Schedule 8 dispute first, making provision for a meeting of Network and Vehicle Change Committee perhaps two weeks later, and reminding the Parties of the merits of intermediate dialogue.

The Committee directed the Secretariat to organise a meeting of the ADRC on 28th and 29th August, with papers to be available for distribution to Committee Members by 14th August. This first meeting would be to hear the Schedule 8 dispute only, unless the Parties jointly propose that it be used to hear both disputes.

The Committee considered the question of legal representation by the Parties at the hearing, and the Chairman decided that he would exercise his powers to achieve the result that lawyers would be entitled to be present to advise their clients, but would not be entitled to address the Committee directly. The Committee asked that its own legal advisor should be present at the hearing on the same basis, i.e. to observe and give advice when sought, but not to participate.

The Committee further asked the Secretariat, in advising the Parties of the outcome of this meeting's deliberations, to remind the Parties of the benefits of easy to understand documentation and of joint submissions.

The Committee finally asked the Secretariat to assist the Parties in ensuring that:

- i. the Parties were basing their submissions on the appropriate version of the Access Conditions, relative to the period of the dispute; and
- ii. that as much information as possible be brought, jointly, to the Committee, to enable the Committee to understand what are the main factors explaining the change in performance level that is at the centre of this dispute.

24/5 Date of next meeting

Thursday 28th and Friday 29th August 1997 commencing at 10.00 in Room 230, East Side Offices at Kings Cross.