
An ACCESS DISPUTES PANEL of the ACCESS DISPUTES COMMITTEE

Determination in respect of reference ADP11

(following a Hearing held at Novotel, Euston on 14th November 2005)

The Panel

Julia Glenn: appointed representative of Network Rail
Mike Leadbetter: elected representative for Non-Passenger Class, Band 2
Bil McGregor: elected representative for Franchised Passenger Class, Band 1
Alan Wilson: elected representative for Franchised Passenger Class, Band 3

Panel Chairman: **Sir Anthony Holland**

The Claimant: New Southern Railway Limited ("Southern")

The Respondent: Network Rail Infrastructure Limited ("Network Rail").

Brief Summary of the Dispute

1. The dispute was brought to the Panel at the initiative of Southern, having been previously considered by the Delay Attribution Board in accordance with Network Code Condition B2.4.3. It concerned the attribution of responsibility for delay, in accordance with the provisions of Schedule 8 of the Track Access Contract, where a train of class 377 has been delayed leaving a depot, because of the need for a "LIM key reset". For the purpose of establishing the principles involved, the Panel was directed to the exemplary instance where, on 19th August 2004, 2A21 06:19 Brighton to Victoria was delayed by 15 minutes leaving Lovers Walk depot; the Panel was advised that there were more than 60 other comparable instances.
2. The disagreement between the parties arose because Class 377 trains, operated by Southern, had been delayed at the start of the working day when it was discovered that the Line Interference Monitor (LIM) had, during the previous day of operation encountered an instance of a 200Hz frequency electric current, and, as a consequence, when this encounter was revealed during an overnight diagnostic analysis, it had resulted in a shutdown of the train's control system, requiring a LIM key reset. The time required to carry out the necessary procedures to reset the LIM key, and restore the train to working order, took longer than the time between discovery of the problem and the scheduled time of departure.
3. In consequence the parties were in dispute over the allocation of the resultant delay minutes, within the conventions of Schedule 8 of the Track Access Agreement.
 - 3.1. Southern were of the view that the LIM key on a class 377 only required to be reset because it had shut down as a consequence of detecting an abnormal electrical frequency (200Hz) in part of the Network, and that therefore resultant delay should be attributed to the Network operator ("*circumstances within the control of Network Rail in its capacity as operator of the Network*" (Schedule 8 paragraph 5.2.(b)));

- 3.2. Network Rail, whilst conceding that there was evidence of the existence of such an abnormal electrical frequency in a limited part of the Network, noted that it had no adverse impact upon stock other than class 377, that the sensitivity of the class 377 to such a frequency was a function of the design and calibration of the LIM installed in each train, and that therefore resultant delay should be attributed to the Train Operator (“...circumstances within the control of the Train Operator in its capacity as an operator of trains”). (Schedule 8 paragraph 5.3.(a)(ii))

The Jurisdiction of the Panel

4. 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,
 - 4.1. to seek the guidance of the Delay Attribution Board “on the appropriate application of the Delay Attribution Guide”; and
 - 4.2. “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).
5. 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”.
6. In this instance the parties had obtained the guidance of the Delay Attribution Board, but this guidance had not been accepted by Southern as an appropriate basis for resolving their differences.
7. Significantly, although the dispute, as presented, appeared to relate to the administration of Delay Attribution, and of Schedule 8, several of the supporting arguments related to the technical and safety Vehicle Acceptance procedures and/or the commercial Vehicle Change Part F process necessary for the implementation of the introduction of Class 377. The Panel was clear that the technical merit of the Vehicle Acceptance procedure was a matter beyond its competence. If, however, as in this case, the point at issue is that the manner of operating that process has in some way changed the access party’s entitlements under the Track Access Contract and the Network Code, then that matter of entitlements is a legitimate object of the jurisdiction of the Panel, as part of the disputes resolution provisions contained in both Network Code Part B2 and Part F5.

The Panel’s findings of fact

8. New Rolling Stock, such as Class 377 Electrostars, cannot be permitted to operate services on the Network until there has been compliance with both the commercial Vehicle Change procedure (Network Code Part F) and technical certification (“Vehicle Acceptance”) by the Network Rail Acceptance Board (NRAB, formally Rolling Stock Acceptance Board).

9. As part of the Vehicle Acceptance procedure, the Train Operator, in conjunction with the rolling stock manufacturer, is required to demonstrate that the new rolling stock will not introduce any electrical frequencies that are inimical to the safe operation of the Network. Where frequencies are detected that have safety critical implications for Network operations (e.g. with potential impact upon signalling systems), the requirement is that the train's LIM should shut the train down immediately, and should require to run through a diagnostic process, and be reset, before the train can resume service. The circumstances where an exceedance of a prescribed frequency norm requires an immediate shut down of the train are categorised as "Red Line" exceedances.
10. In the Class 377 trains the Control system (ADDT) monitors the full range of electrical frequencies, and so permits the monitoring of other frequencies that, whilst without consequence for the safe operation of the Network, may have implications for the operation of the rolling stock. With the approval of the NRAB, the equipment in the Class 377 has been calibrated in respect of a range of thresholds for other frequencies that are not critical to the safety of the Network. If any of these other thresholds is crossed, it is categorised as a "Blue Line" exceedance. In such circumstances the LIM does not shut the train down immediately; the shut down instead follows a diagnostic check which would typically be scheduled to run during the night when the unit was stabled.
11. Because of the role played by the ADDT and LIM in the monitoring of Red Line exceedances, introduction of Blue Line measures, or subsequent modifications to any of the calibrations, even if only affecting "Blue Line" measures, whilst matters for the Train Operator/ Rolling stock manufacturer to propose, have to be submitted by the Train Operator/vehicle manufacturer for approval, by the VAB, before they can be implemented.
12. In this instance, which is considered representative of over 60 such disputed cases, the LIM had shut down after detecting a frequency of 200Hz in the system. In the course of lengthy investigations, where there had been significant exchanges of information between the parties, the following factors had been identified;
 - 12.1. Frequencies of 200Hz were detected in the conductor rail in the Selhurst area. The ADDT system records evidence that the sets that have experienced LIM shut down have been exposed to this "Blue Line" exceedance in this area;
 - 12.2. despite extensive tests, Network Rail has been unable to establish the source of such 200Hz frequencies. Network Rail however maintains that this 200Hz frequency
 - 12.2.1. does not derive from the rectification arrangements for supplying DC current to the third rail;
 - 12.2.2. has been considerably reduced in significance since the opening of a further sub-station in the area as part of the Power Upgrade programme;
 - 12.2.3. does not appear to result from any frequencies that have been identified as generated by other types of stock used in the area; and
 - 12.2.4. does not appear to have had any adverse impact upon the operation of the seven other types of stock in use in the area.

- 12.3. the “Blue Line” thresholds in the LIM can be adjusted/re-programmed (subject to NRAB approval) to remove the sensitivity of the Class 377 to this frequency. The rolling stock manufacturer has designed, and obtained approval for, a software modification (characterised by the claimant as a “baffle”), which means that the Class 377 software no longer responds to the 200Hz exceedance.

The Panel’s consideration of matters of contract

13. The Panel noted that the arguments of the parties related to two discrete, but interlinked, aspects of the Track Access Contract. Ostensibly, the main issue that the Panel required to address was the practical application of the terms of paragraph 5 of Schedule 8 of the Track Access Contract. However, Southern, in arguing its case, had also sought to suggest that it had an entitlement to a Network that would have no inimical impact upon its rolling stock.
14. In addressing these two arguments, the Panel was careful to confine its consideration to the legal entitlements of the parties, as defined by the contract, and not to seek to pass judgement on any of the other technical factors before it. The Panel therefore considered that the matters of contractual entitlement bore on the matter in dispute in the following terms.
15. The right to introduce new rolling stock to the system requires the parties (Network Rail and the Train Operator) to comply with the provisions of Network Code Part F, Vehicle Change.
 - 15.1. This compliance, which is “*without prejudice to the obligations of the Access Parties to comply with Railway Group Standards*” (Network Code F1.4) (e.g. fulfilment of NRAB stipulations) is fundamentally concerned with assuring Network Rail, and other Train Operator users of the Network, that the capabilities of the Network, as currently operated, will not be adversely affected by the operation of the new rolling stock; whence the emphasis, in the Vehicle Acceptance procedures, on ensuring that the new stock is compliant with all “Red line” criteria.
 - 15.2. It is always possible that the Network, as currently operated, is host to certain anomalies, such as stray electrical frequencies. If those anomalies have previously remained undetected, and/or have no evident impact upon the current operation of either the Network, or train services upon the Network, then they can reasonably be deemed to be part of the established contractual environment.
 - 15.3. Neither the operation of Part F, nor the associated NRAB procedures, can reasonably be construed as providing a Train Operator, seeking to introduce new stock, with a warranty that there are no such latent anomalies. New stock, utilising new technology, may “discover” the presence of such anomalies. If, as in this case, that “discovery” relates to those aspects of the design of the ADDT and LIM which relate to discretionary “Blue Lines” (rather than mandatory “Red Lines”), it is not reasonable for the operator of the new stock to expect to be indemnified against the impact of a phenomenon which, were it not for the design of the new stock, would have remained without significance.
16. In respect of the matter of the allocation of delay to the appropriate party, in accordance with the terms of Paragraph 5 of Schedule 8, the Panel noted that the parties had both, in their respective arguments, quoted from determination AD39 of the Access Dispute Resolution

Committee. The Panel, reviewing that earlier determination, considered that it had established two working principles in relation to Delay Attribution which were equally applicable to the current case, namely:

- 16.1. that Delay Attribution is about achieving a proportionate accountability for delay as between the Train Operator, Network Rail, or the parties jointly; it is not a forensic tracking down of the reasons why a specific delay might have occurred. *“The Committee considered that AD27 had established a distinction that was of direct relevance to this case, namely that the (largely mechanistic) process that, in accordance with the terms of the Track Access Agreement, attributes an Incident that causes Delay to one or other of the contracting parties, is something totally different in kind from the discovery and attribution of the cause of that Incident. 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, ...”*; and
 - 16.2. because delay only occurs once there is an actual incident, it should be attributed, as between the Train Operator and Network Rail, by reference to which body has the responsibility for the factor which makes the decisive difference between no Delay Incident and an actual Delay Incident.
17. In this case before the Panel, the technical considerations make it clear that, given the selected design characteristics of the Class 377 train, and the occasional presence of an abnormal 200Hz frequency in the area of Selhurst, then, if the two factors are taken together, there is the potential for delay to occur. However, no such delays have occurred, notwithstanding the presence of the 200Hz frequency, where other stock has been in use. It would not be unreasonable therefore to allocate responsibility for the actual delays that have occurred as a sequel to the introduction of Class 377, to the party responsible for the factor that has changed, namely Southern, the Train Operator.

The Panel’s determination

18. Taking account of all the preceding factors, the Panel determined that:
- 18.1. in any one Track Access Contract 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;
 - 18.2. 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 to a service leaving a stabling depot; thus
 - 18.2.1. until it is discovered that a train is not fit to depart on time from the stabling point to which the relevant access rights relate (e.g. because of the need to reset a LIM), there is no delay incident as regards that train;

- 18.2.2. where a train that fails to depart on time from the stabling point because the requisite rolling stock is not ready to depart, again because of a need for a LIM key reset, that delay, within the terms of the bilateral Track Access Contract, can only be the responsibility of the Train Operator;
- 18.3. this principle is not disturbed by considerations of the specific occurrence that triggered the LIM shutdown, nor of the manner in which the Train Operator complied with the Vehicle Acceptance procedure, nor by any respect in which the Train Operator may have misdirected itself as to the significance of that acceptance as giving assurances in respect of the wider performance of the Network; and that therefore
- 18.4. the delays arising out of the need for a LIM key reset on Class 377 trains as a consequence of the incorporation within those trains of a “Blue Line” sensitivity to a 200Hz frequency should be allocated to the Train Operator, Southern, in compliance with Schedule 8 Paragraph 5.3(a)(ii), *“in its capacity as an operator of trains”*.
19. The Panel is pleased to note that the guidance previously offered by the Delay Attribution Board is consistent with this determination.
20. 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