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## **An ACCESS DISPUTE PANEL of the ACCESS DISPUTES COMMITTEE**

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### **Determination in respect of reference ADP30**

*(following a Hearing held at Central House, Euston on 13th February 2008)*

#### **The Panel**

**Bill Davidson:** appointed representative of Network Rail

**Tony Deighan** (Eurostar) : elected representative for non-Franchised Passenger Class

**Nick Hortin** (South Eastern) : elected representative for Franchised Passenger Class, Band 2

**Nigel Oatway** (EWS): elected representative for Non-Passenger Class, Band 1

Panel Chairman: **Sir Anthony Holland**

#### **The Parties**

##### **for First Capital Connect Ltd ("FCC")**

**Phil Hudson** Head of Performance

**Lee Robinson** Performance Services Manager

**Steve Kelly** Production Manager, Fleet

##### **for Network Rail Infrastructure Ltd ("Network Rail")**

**Susie Homan** Customer Relationship Executive (FCC)

**Alan Woods** Senior Delay Resolution Co-ordinator

#### **Brief Summary of Dispute, and the jurisdiction of the Panel**

1. The Panel was asked, in a joint reference from First Capital Connect Ltd. ("FCC") and Network Rail Infrastructure Limited ("Network Rail") to determine whether the delay resulting from the blocking of the Down Fast Main Line between Elstree Tunnel and Radlett Junction by a temporarily incapacitated Class 319 train should be attributed to Network Rail or the Train Operator. On the basis of the information relayed to the signalling centre by the driver of the train, Network Rail had attributed the delay to the Train Operator, FCC. FCC had subsequently submitted information relating to damage to the rolling stock, which, it contended, on an engineering analysis, supported a conclusion that the attribution should be to Network Rail as the owner of the infrastructure.
2. Specifically the Panel is asked to determine:
  - (a) *"If the responsibility of this incident has been correctly attributed. If not*
  - (b) *to determine the correct attribution".*
3. Although the reference is primarily about determining the attribution, that attribution is significant, in the context of the Template Passenger Track Access Contract because, based upon that attribution, calculation is made of the liquidated damage due from one party to the other in accordance with the Schedule 8 Performance regime.

4. Overall 3K21 incurred a 14 minute delay; other services incurred a total of 136 minutes reactionary delay. The Panel was not given an exact cash value in Schedule 8 terms for these particular delays, but it was estimated that it would be around £7,000.
5. The case was referred to the Panel under two separate heads;
  - 5.1. by both parties, as a reference brought under Condition B2.4.4 of the Network Code; and
  - 5.2. by FCC, as a reference brought under Schedule 8 paragraph 16 of FCC's Track Access Contract. The right of FCC to bring the reference under this provision was contested by Network Rail.
6. The Panel acknowledges its jurisdiction in cases brought under either of these sets of provisions.
  - 6.1. Network Code Part B provides for the parties, when they cannot agree an attribution to seek the guidance of the Delay Attribution Board, "*on the appropriate application of the Delay Attribution Guide*" (Condition B2.4.3), and then, if this guidance does not provide the parties with a basis for agreement, to "*refer the matter to the relevant ADRR Panel in accordance with the Access Dispute Resolution Rules*" (Condition B2.4.4).
  - 6.2. Schedule 8 of the FCC Track Access Contract provides (at paragraph 16) that disputes, including those that relate to the "*Statement of allocated responsibility*" (paragraph 6), shall be progressively escalated through the parties, before "*either party may require that the matter be resolved by the relevant ADRR Panel*" (paragraph 16.1 (d)).
  - 6.3. The Panel notes that neither party is representing that the other has incorrectly carried out any of the procedural provisions of Part B; however, Network Rail contends that FCC has not properly complied with the provisions of Schedule 8 paragraph 16.1 (a) to (d).
  - 6.4. The Panel considered that there is sufficient interdependence between the provisions of the Delay Attribution process and the Schedule 8 process for translating Delay Attribution into Schedule 8 payments that it should address the arguments advanced via either channel of reference.
7. The Panel noted that its function in disputes that have previously been the subject of guidance from the DAB is to act as the first dispute resolution body. As such it hears the arguments from the parties as if there had been no earlier guidance from the DAB; the DAB guidance may inform its deliberations, but, in the sense of ADR Rule A1.17, does not directly constitute a "*persuasive authority*".
8. The Panel noted that some of the arguments advanced by the parties related to establishing chains of causality for the incident. The Panel considered that its jurisdiction into such matters of causality extended only so far as was necessary to enable it to determine the correct attribution for Delay. Where a party wishes to assert or contest chains of causality for the purposes of establishing wider matters of liability, the dispute resolution process relevant to such a course is as laid down in Clause 13 of the Track Access Contract, which is normally by recourse to *Arbitration "in accordance with the Access Dispute Resolution Rules in force at the time of the reference"*. The Panel considers that, were either party to initiate such an Arbitration to establish causality and liability, this Panel's findings, in relation to this dispute over a matter of attribution, would not have any "*persuasive authority*" for that Arbitrator..
9. Nevertheless, the Panel considers that in determining the appropriate application of the comparatively straightforward rules of Delay Attribution, it should confine its judgement to what

appears to be the correct application of the Delay Attribution Guide, and not speculate in areas that might be represented as prejudicing or pre-disposing other proceedings.

### **Some preliminary issues of definition; the relevant contractual provisions**

10. In relation to the provisions of Network Code Part B, and Schedule 8 of the Track Access Contract, the Panel's attention was drawn to the following definitions as relevant to its determination:

#### **10.1. Access Dispute Resolution Rules**

##### ***"Precedent***

A1.17 *In reaching its determination, the Panel shall:*

(a) *take note of its prior determinations (and those of any predecessor body) and of any other relevant tribunal other than a superior tribunal, as persuasive authority but need not be bound by the same;*

(b) *be bound by any relevant decision of any superior tribunal (but only, in the case of the Award of an Arbitrator appointed under Part C of these rules where that Award has been previously published to industry parties under rule C1.31 or published on the access disputes website)."*

##### ***"Determinations and Remedies***

A1.18 *The Panel shall reach its determination on the basis of the legal entitlements of the dispute parties and upon no other basis".*

#### **10.2. Network Code Part A and Definitions**

*Condition A1.1 General Interpretation*

(g) *Any agreement, instrument, licence, standard, timetable, code, or other document referred to in this code or entered into, approved, authorised, accepted or issued by a person pursuant to this code shall be construed, at the particular time, as a reference to that agreement, instrument, licence, standard, timetable, code, or other document, as it may then have been amended varies, supplemented or novated"*

(h) *Conflict*

*In the event of any conflict of interpretation between this code and an Access Agreement (not including this code) the following order of precedence shall apply:*

*(1) this code; and*

*(2) the Access Agreement"*

#### **10.3. Network Code Part B:**

*"Delay Attribution Guide "* means, subject to Condition A.1(g), the document which provides guidance on the attribution of delay across the Network, entitled "Delay Attribution Guide" as issued by Railtrack PLC (in railway administration) on 1<sup>st</sup> September 2002" [this provision was first incorporated into the Network Code on 18<sup>th</sup> June 2003]

[Condition B] **“1.3 the Delay Attribution Guide**

*The Delay Attribution Guide is incorporated into and shall form a part of this Network Code. ...*. [this provision was first incorporated into the Network Code on 18<sup>th</sup> June 2003]

[Condition B] **“2.2 Information relating to causes of delay or cancellations”**

*“Network Rail shall, when determining and recording the persons and causes which are responsible for train delays and cancellations, have due regard to all information which is relevant in the circumstances, including the following:*

- (a) *information from any computerised or other recording system which Network Rail may, for the time being, be permitted to use for the purposes of a particular Access Agreement;*
- (b) *information supplied by signallers and other persons duly authorised to participate in the signalling of trains;*
- (c) *information supplied by any operator of trains, whether such information is within its knowledge or based on information supplied by other operators of railway assets;*
- (d) *information supplied by Network Rail, whether such information is within Network Rail’s knowledge or based on information supplied by persons engaged or acting on behalf of, or otherwise in accordance with or subject to the instructions of, Network Rail or other operators of railway assets; and*
- (e) *information and guidance set out in the Delay Attribution Guide.”* [this provision (e) was first added into the Network Code on 18<sup>th</sup> June 2003, provisions (a) to (d) appear in the Railtrack Track Access Conditions 1994, dated 1<sup>st</sup> April 1994)

10.4. **Delay Attribution Guide:** the disputed Codes [the applicable version of the DAG in relation to this dispute is that dated 28<sup>th</sup> January 2007]

**“4.12 Fleet Equipment Problems:**

4.12.1 *Incidents to be given the appropriate M Code and attributed to the Train Operator whose train has suffered a failure or similar problem (M##\*)”;*

in this case, the coding attributed was MEG1, where EG is the Train Operator code for FCC, and M1 = “Coach failure/defect/attention other”

**“4.24 Safety Problems reported by staff or public**

4.24.1 *All Railway Industry Staff have a duty to report Safety problems that will or appear to affect the safe operations of trains or the infrastructure. ... This section reflects the responsibilities of organisations to ensure that such reports are acted upon and investigation may reveal that the problem may no longer be apparent.*

4.24.2 .Likely Circumstances: [extract from table]

No.	Circumstances	Delay Code	Incident attribution
g.	Infrastructure Maintainer / Network Rail staff confirm presence of reported obstruction	JX	Infrastructure Maintainer (IQ**) or Network Rail (IQ##* as below
h.	<b>Network Rail and Operator agree that a train has struck an unidentified obstruction on the line and Infrastructure Maintainer were required to attend (not vandalism).</b>	JX	Infrastructure Maintainer (IQ**)
i.	<b>Network Rail and Operator agree that a train has struck an unidentified obstruction on the line and Infrastructure Maintainer were not required to attend (not vandalism).</b>	JX	Network Rail (IQ##*)
j.	<b>Operator's staff confirm that there is a defect with traction or rolling stock</b>	Appropriate M Code	Operator of train concerned (M###*)
....			
m.	Network Rail staff unable to find reported infrastructure related safety problem	IZ as appropriate to reported problem	Infrastructure Maintainer (ID**)

10.5. Schedule 8 provisions: [FCC Schedule 8 Redacted]

**"5 Allocation of responsibility for Minutes Delay and Cancelled Stops**

5.1 Assessment of incidents causing Minutes Delay and Cancelled Stops

(a) In assessing the cause of any Minutes Delay or Cancelled Stop, there shall be taken into account all incidents contributing thereto including:

- (i) the extent to which each party has taken reasonable steps to avoid and/or mitigate the effects of the incidents;...

....

5.2. Network Rail responsibility incidents

Responsibility for Minutes Delay and Cancelled Stops on a day caused by incidents for which Network Rail is allocated responsibility pursuant to this paragraph 5.2 shall be allocated to Network Rail. Unless and to the extent otherwise agreed, Network Rail shall be allocated responsibility for an incident other than a planned incident (as defined in paragraph 5.7), if that incident is caused wholly or mainly:

- (a) breach by Network Rail of any of its obligations under this contract; or
- (b) (whether or not Network Rail is at fault) by circumstances within the control of Network Rail in its capacity as operator of the Network; or

- (c) (whether or not Network Rail is at fault) by any act, omission or circumstance originating from or affecting the Network (including its operation), including, subject to paragraph 5.3(b)(i), any incident in connection with rolling stock on the Network for which any train operator other than the Train Operator would be allocated responsibility if it were the Train Operator under this contract."

### 5.3. Train Operator responsibility incidents

Responsibility for Minutes Delay and Cancelled Stops on a day caused by incidents for which the Train Operator is allocated responsibility pursuant to this paragraph 5.2 shall be allocated to the Train Operator. "... Unless and to the extent otherwise agreed, the Train Operator shall be allocated responsibility for an incident other than a planned incident (as defined in paragraph 5.7) if that incident:

(a) is caused wholly or mainly:

- (i) by breach by the Train Operator of any of its obligations under this contract; or
- (ii) (whether or not the Train Operator is at fault) by circumstances within the control of the Train Operator in its capacity as an operator of trains; or
- (iii) (whether or not the Train Operator is at fault) by any act, omission or circumstance originating from or affecting rolling stock operated by or on behalf of the Train Operator (including its operation), including any such act, omission or circumstance originating in connection with or at any station (other than in connection with signalling under the control of Network Rail at that station or physical works undertaken by Network Rail at that station), any light maintenance depot or any network other than the Network; or...

(b)...."

## The Panel's findings in respect of facts

### Events on the day: - Out on the Track

11. On 26<sup>th</sup> April 2007, at approximately 07:30 3K21 the 0705 empty coaching stock train travelling from Moorgate to Bedford came to an unplanned stop on the Down Fast line between Elstree Tunnel and Radlett Junction in proximity to OLE structure F2111. The driver contacted the signaller at Panel 3 West Hampstead and advised that the unit had a "massive air-leak".
12. In a second conversation with the signaller, following further investigation, the driver advised of a "complete break in the pipe. I've lost every ounce of air" ... "from my door reservoir".
13. In the course of the conversation the Signaller connected the Driver's call to Cauldwell depot, from where the Driver was given technical advice. In the course of the exchange, and in response to the Fitter's questioning, the Driver made the following statements
  - 13.1. "Yeh, my door, right, by the side of the coach, the leading coach, by the reservoir, the door reservoir, there, is, um, a complete gap, there's like a valve completely come off, there's air pouring out" and.
  - 13.2. "No, I haven't struck anything at all, ... . I just come through the tunnel and it went whoosh and that was it".
14. On the basis of further questioning the Fitter was able to
  - 14.1. identify that the point at which air was escaping was from where a Norgren filter (normally fitted to the door system), was missing from the leading coach, and

- 14.2. to advise the Driver how to isolate part of the air system for the doors sufficient to allow the train to regain working pressures and proceed to Bedford for examination.
15. Network Rail coded the incident (TRUST Reference 949912) to the responsibility of FCC. An initial incorrect responsible Manager code, was challenged and quickly amended to read Failure Code "M6 – EMU failure/defect/attention: other" and Responsible Manager Code "MEGI Thameslink Hired 319".

#### **Events on the day; - Back at the depot**

16. On return to Cauldwell depot the unit (319007) was examined and photographs taken by FCC of some apparent damage. The train had been travelling with the B cab leading, and, according to the photographs, the appearances of impact damage, reading from the front of the train backwards, are as follows
  - 16.1. leading end of Door reservoir tank (located in rear of leading passenger doors, say at mid point of carriage) , leading coach "impact mark"
  - 16.2. location for Norgren filter, suspension bracket mounted to the rear, and to one side of the door air reservoir tank ; suspension bracket for filter apparently pushed back from vertical: with, in addition an impact mark on the **rear** of the bracket, facing **away from** the direction of travel; FCC's commentary on this photograph stated that, in addition to this impact mark on the bracket (which was otherwise intact) there had been other damage, namely "Adapter split and internal guides broken". The Panel noted that
    - 16.2.1. the photographs of this location were not taken of the state of the train as it arrived on the depot, but only after a new adapter and Norgren filter had been installed; but that
    - 16.2.2. FCC was suggesting that the damage it had seen (but not otherwise photographed) was consistent with an impact that had ripped the Norgren filter out of the adapter.
  - 16.3. Heater equipment case (located just in advance of rear passenger doors); **leading external door handle sheared off;**
  - 16.4. other photographs were tabled as showing some marking on life guards, and other parts of the under frame, together with two photographs of 3<sup>rd</sup> rail pick-up shoes. These photos are not clearly labelled as to location, and as to what they are represented as showing.
17. No "black-box" down-load was/could be taken.
18. The Heater equipment case handle was replaced, and "*a replacement Norgren adaptor and filter assembly was sourced and fitted to the unit... . A leak check was carried out and none found*".

#### **The Contentions of the Parties**

19. The Panel was presented with a significant weight of documentation, but found that the contrasting assertions of the parties could be summarised as follows.
20. For FCC:
  - 20.1. the train had left Cauldwell depot at 05:04 that morning and had worked without incident from Bedford to Moorgate, and, as 3K21, was on the return Empty Coaching Stock (ECS) working to Bedford when the incident occurred;

- 20.2. during the previous night (25<sup>th</sup>/26<sup>th</sup> April) the unit in question (319007) had undergone a routine 'A' examination and therefore should reasonably be deemed to have been in good working order prior to the incident;
  - 20.3. the extent and nature of the damage observed initially by the Driver, and subsequently at the examination at the depot, was consistent with the train having struck some form of external object, which had then caused the observed damage to the train;
  - 20.4. such an object, FCC suggested, could only have come from the track bed, i.e. the Network;
  - 20.5. as there had been a possession for engineering activity affecting Elstree tunnel that night (25<sup>th</sup>/26<sup>th</sup> April), FCC further suggested that some obstruction had been left foul of the swept envelope of the Class 319 train, had been hit by a leading 3<sup>rd</sup> rail pick-up shoe, and had then been thrown up under the leading coach causing the damage noted, resulting in the loss of door air pressure that translated into a loss of Main Reservoir pressure sufficient to cause the brakes to apply, and to bring the train to a halt;
  - 20.6. although there had been other trains that had preceded 3K21 that morning, 319007 was the first train equipped for third rail electrification to pass since the possession had been given up;
  - 20.7. the Delay should therefore be attributed to the responsibility of Network Rail.
21. For Network Rail:
- 21.1. the Network was in perfect working order and a number of Down trains had already passed over the Down Fast line before the line was blocked by the failure to 3K21;
  - 21.2. the Driver of 3K21 had stated explicitly that his train had not hit an obstruction ("*I haven't struck anything at all*"), nor had the next train over the Down Fast line, which had been cautioned to look out for possible obstructions, reported any problem;
  - 21.3. the Delay Attribution process was primarily about allocating delay on a straightforward "us or them" basis, on the basis of the immediately relevant observed facts; it was not a process about establishing detailed chains of causality for specific incidents. In this case there were no delays until 3K21 stopped, and once 3K21 was on the move again the Network returned to normal working order, and therefore
  - 21.4. both the primary and reactionary delays had been properly attributed to FCC;
  - 21.5. the Delay Attribution Board, in its guidance note DAB-14, had also taken the view that this was the correct attribution.
22. The Panel was asked further to consider representations as to
- 22.1. whether the line in the area of Elstree Tunnel should have been examined on foot by a Mobile Operations Manager, in order to establish whether or not there had been a foreign body, and or whether the remains could be found of the Norgren filter;
  - 22.2. why the fact that the preceding Down trains had not encountered any problems/obstruction did not demonstrate that there had been no obstruction (the preceding trains did not carry shoe-gear, and had a smaller swept envelope at track level); and
  - 22.3. why the nature of the works undertaken in Elstree Tunnel during the night of 25<sup>th</sup>/26<sup>th</sup> April (surveying) were unlikely to have lead to any obstruction being left in the path of 3K21;



- 22.4. the construction, and mode of fitment, of the Norgren filter; in particular the professional judgement of Steve Kelly FCC's Fleet Production Manager, expressed in response to questioning, that
  - 22.4.1. had the locking ring that secures the filter into the adapter not been properly secured (e.g. might have been cross threaded or not adequately tightened) it would not have been practical for the air pressures necessary for the train to run from Bedford to Moorgate (and back to Elstree) to be sustained; there would have been leakage of pressure, and/or the filter would have become unsecured and ejected by the high air pressure within the door control system ; and that
  - 22.4.2. that FCC knew of no instances of a Norgren filter falling off in traffic.
- 22.5. other incidents on other parts of the Network that had been handled, and attributed differently and
- 22.6. the precedents that had been established in previous determinations of ADP (both those that the parties had considered of their own initiative, and those others that had been drawn to the parties' attention by the Disputes Secretary) had previously tended towards establishing a consistent principle that would allocate delays relating to train failures to the Train Operator.

## **The Panel's findings in respect of entitlements**

### ***general***

23. The Panel reminded itself that its jurisdiction in this matter was confined to establishing which of the circumstances (if any) contemplated in the Delay Attribution Guide most closely matched the events on the day, and therefore, by extension, which party should be accounted responsible for performance payments under Schedule 8. In particular, in considering the arguments in relation to the facts, and any relevant precedents, it acknowledged that
  - 23.1. either party's entitlement under Passenger Track Access Contract Schedule 8 is for a payment calculated according to the rules in Schedule 8 and following the attribution of delay in accordance with the provisions of Condition B 2.2, and, in particular the application of the Delay Attribution Guide; that said
  - 23.2. any payment made in this way is by way of a "liquidated damage" relating solely to the economic value of the delay, and subject to such an upper limit on liability as the working through of the rules of Schedule, 8 might provide; it is not in any way a proxy for any other consideration, such as the cost of repairing a vehicle, or of mobilising a Mobile Operations Manager; furthermore
  - 23.3. the Delay Attribution model does not, other than in very limited circumstances, admit to joint responsibility for delay, or for contributory fault. It is, in this respect a crude model which is not designed to support delicate nuances of fault; nevertheless
  - 23.4. the guidance within the Delay Attribution Guide does in some instances differentiate between codes where delays are in turn differentiated by cause. However
  - 23.5. in each case the cause justifying the code is one that has been established and agreed, and/or is self-evident; the structure of codes does not invite speculation on chains of causality relating to factors that did not contribute to the actual immediate delay.
24. All that said, the Delay Attribution process does not require any suspension of the due processes of common sense, nor can it discount the laws of physics, or ignore sound engineering analysis of observed evidence.

***the relevant precedents***

25. The Panel noted that the parties had advanced certain arguments by reference to AD29 and AD39. However, the force of such precedents had to be questioned because
  - 25.1. the event to which Determination AD29 related (13<sup>th</sup> June 2002), and the date of the hearing (24<sup>th</sup> April 2003) both pre-dated the incorporation of the Delay Attribution Guide into the Network Code (effective 18<sup>th</sup> June 2003).
  - 25.2. Determination AD39 (hearing of 5<sup>th</sup> October 2004) related to an incident that took place under the conditions before the change of status of the Delay Attribution Guide, i.e. on 11<sup>th</sup> March 2003. However
  - 25.3. since the re-formulation of the wording of Schedule 8 as part of the Model Clauses initiative, and the incorporation of the Delay Attribution Guide into the Network Code (18<sup>th</sup> June 2003), there had been four occasions when an Access Disputes Panel had issued determinations in respect of delay attribution, namely ADP07, ADP11, ADP16 and ADP19.
26. Successive Determinations (starting from the ADP07 hearing on 6<sup>th</sup> July 2005) have reflected a convention that the process of *"determining and recording the persons and causes which are responsible for train delays and cancellations"* (in compliance with Condition B2.2), gets summarised and expressed in terms of the coding included in the Delay Attribution Guide. Then, given the primacy that the Network Code (incorporating the Delay Attribution Guide) enjoys over the Track Access Contract (incorporating Schedule 8), by virtue of Condition A1.1(h), the allocation of delay for the purpose of calculating Schedule 8 Performance Regime payments, *should "have due regard to...(e) information and guidance set out in the Delay Attribution Guide"* (Condition B2.2).
27. This understanding was summarised in ADP07 (hearing on 6<sup>th</sup> July 2005), which built on earlier determinations to arrive at a practical way forward, as follows [and highlighted in grey]
9. *"... the Panel considered the relative status of Schedule 8 and the DAG, and concluded as follows.*
  - 9.1. *The incorporation of the DAG into the Network Code (Condition B1.3) means that its provisions must be taken into account, when, in accordance with the provisions of Network Code Condition B2, Network Rail is seeking to "determine and record the persons and causes which are responsible for the delay or cancellation and where more than one, so far as practicable, the extent to which each person or cause is so responsible" (Condition B2.1).*
  - 9.2. *The DAG is one of FIVE different sources of information, to which Network Rail is directed to pay attention in Network Code Condition B2.2*

*"Network Rail shall, when determining and recording the persons and causes which are responsible for train delays and cancellations, have due regard to all information which is relevant in the circumstances, including the following:*

    - (a) information from any computerised or other recording system which Network Rail may, for the time being, be permitted to use for the purposes of a particular Access Agreement;*
    - (b) information supplied by signallers and other persons duly authorised to participate in the signalling of trains;*

- (c) *information supplied by any operator of trains, whether such information is within its knowledge or based on information supplied by other operators of railway assets;*
  - (d) *information supplied by Network Rail, whether such information is within Network Rail's knowledge or based on information supplied by persons engaged or acting on behalf of, or otherwise in accordance with or subject to the instructions of, Network Rail or other operators of railway assets; and*
  - (e) *information and guidance set out in the Delay Attribution Guide."*
- 9.3. *None of the other categories of information could be considered in any way to determine the nature of any party's legal entitlements, and there is no obvious reason why the DAG should be deemed to have a status that sets it above these other categories of information. It would be appropriate however to conclude that this process of "determining and recording the persons and causes which are responsible for train delays and cancellations", may provide the basic understanding against which legal entitlements might consequently be calibrated.*
- 9.4. *That said, the understanding is not derived from the DAG, but from the totality of the process set out in Condition B2.3, which is a multi-tier process for enabling the parties to reach a position that is either agreed, or determined.*
- 9.5. *In both cases the process serves to affirm the legal entitlements of the parties as set out in the various schedules of the Track Access Agreement, it does not redefine them.*
10. *The Panel therefore concluded that the conclusion that the former Access Dispute Resolution Committee had reached on the practical force of the DAG, in its Determination AD39, was still valid, and did not require to be reversed as a consequence of the amendment to Network Code Condition B1.3 to incorporate the DAG into the Network Code. Thus, the Panel's ... "standing in the case derived from the fact that delay attribution is first and foremost a matter of the application of the relevant section (in this case section 5 of Schedule 8) of the Track Access Agreement between the parties. The Delay Attribution Guide is a convenient accumulation of the case law in relation to Delay Attribution, but ... it relates to the way in which incidents that have occurred should, in accordance with the Track Access Agreement, be charged to the account of one or other party. It is not any part of a mechanism by which one or other party is held responsible in law for an incident". (AD39 paragraph 6)*
11. *The Panel therefore considered the applicability of the other findings of Determination AD39, which itself addressed the interpretation of the provisions of Schedule 8 paragraph 5.3. This determination had built on the earlier Determination AD27 and had made the following distinction between the functions of the DAG and the Track Access Agreement.*
- "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, nor are they within the province of the TRUST Delay Attribution Guide.*

*In respect of the current case, the Committee was of the view that, until the fire on the train was reported (at 23:56, by the local Fire brigade), there was no Delay Incident. Thereafter, there was Delay, and that Delay should properly all be attributed to the fact of the Fire on the Train, and not to any speculation as to how the fire came to be on the train. (AD39 paragraphs 8 and 9) "*

### **The Panel's findings in respect of entitlements**

28. In view of the significance that Network Rail (and DAB-14) attached to such precedents, and the obligation on the Panel (in Rule A1.17) to treat them as "*persuasive authority but need not be bound by the same*" the Panel considered
  - 28.1. what principle had been set by those precedents?
  - 28.2. was that principle applicable to the circumstances of the present case? And
    - 28.2.1. if so what conclusions did it suggest? Or
    - 28.2.2. if not, what distinguished it, and how did that affect the conclusions?
29. In ADP07, and in the subsequent ADP11 and ADP14, the issue was that, at a time when a train was scheduled to depart from a station (ADP07 or ADP14), or from a depot (ADP11), it was not fit so to do. In each case the Train Operator had sought to argue that the delayed departure resulted from a root cause some way removed from the actual delay incident. In each case the Panel had ruled that the delay had to be attributed simplistically:
  - 29.1. which bit of kit was not working/available to work, and therefore could not depart on time; i.e at the point where there was a change from no delay to some delay (in each of the cases in point, the rolling stock)?
  - 29.2. to whom did the bit of kit belong, and who had made the decisions in relation to the management or supervision practices that carried the risk that stock would be found to be unavailable at the beginning of a journey? In other words which party had created the latent potential for delay (in each case the "*Train Operator in its capacity as an operator of trains*")? therefore
  - 29.3. the Delay is to be coded and attributed to the Train Operator.
30. The Delay Attribution Board, in its DAB-14 consideration of the case of 3K21, followed this same logic and concluded that
  - *"The Board agreed unanimously that the prime cause of the delay was the failure of the unit 3K21.*
  - *In this case the Board could see no reason why the incident could be construed as anything other than a 'circumstance originating from or affecting rolling stock operated by or on behalf of the Train Operator..'*
  - *The Board understood that until the unit failed there was no delay incident.*
  - *"Any delay should be allocated to the fact of the unit failure and not to any speculation as to what had caused that failure." (DAB-14, paragraph 7.1 to 7.4).*
31. The Panel considered that the circumstances of this (3K21) case, whilst superficially comparable with those earlier cases and the principle that previous Panels had established, contained aspects which were sufficiently different to require the applicability of the principle to be tested. Specifically

- 31.1. 3K21 was not at the outset of a journey, and Unit 319007 was apparently running normally up to a certain point, but then became disabled, causing the delay. Action by the Driver, on the advice of the Fitter enabled the train to proceed after 14 minutes, and throughout all that time the train was indisputably "*within the control of the Train Operator in its capacity as an operator of trains*"; however,
- 31.2. subsequent investigation produced evidence that unit 319007 had not just "failed" but had suffered the loss of two components, i.e.
  - 31.2.1. the Heater Equipment Case handle, which had been broken off, but which would not have caused the train to come to a stand, and
  - 31.2.2. the Norgren filter, which had disappeared, and which disappearance, would and did bring the train to a stand.
- 31.3. components should not ordinarily just become detached from a train, and that account should be taken of
  - 31.3.1. the documentation of the "A" examination of the train the previous night;
  - 31.3.2. the completion of the journeys to Moorgate, and back as far as Elstree Tunnel; and
  - 31.3.3. the evidence of impact damage that could explain how those components became detached.
32. The Panel therefore considered the propositions that
  - 32.1. the train had encountered a "foreign body";
  - 32.2. the "foreign body" had been the instrument that damaged the two components;
  - 32.3. that the "foreign body" was potentially not "*within the control of the Train Operator in its capacity as an operator of trains*", and that therefore
  - 32.4. the unambiguous attribution of the delay to the Train Operator was therefore "unsafe" or indeed "wrong".
33. The Panel considered that the evidence required it to admit to the concept of the "foreign body" as a contributory cause to the "train failure". Such a "foreign body" might result from a number of circumstances including
  - 33.1. one component becoming detached, and subsequently causing the damage to others;
  - 33.2. an obstruction on the line, foul of the swept envelope, which was struck and projected up into the area where damage occurred. possibly
    - 33.2.1. as a sequel to the possession; or
    - 33.2.2. as a consequence of an act of vandalism; or
    - 33.2.3. fallen from a train passing on an alternative line.
34. The Panel noted that
  - 34.1. the information passed from the train at the time of the incident had been explicit; the driver did not consider that his train had struck any obstruction. Network Rail had carried out such safety procedures as it deemed appropriate before resuming normal running, but these had not included any on foot inspection in order to try to locate any key items;

- 34.2. FCC had not asked for any such inspection to be carried out, even though it had subsequently sought to represent that Network Rail should not have relied upon the advice of its Driver;
  - 34.3. no object had been found or produced to support any conclusion as to the nature or provenance of any foreign body;
  - 34.4. no trace had been found of the missing components; nevertheless
  - 34.5. FCC have speculated that the evidence it has presented might demonstrate that Network Rail failed to establish that the line through Elstree Tunnel was fit for the resumption of traffic, after the overnight possession was given up, and that 3K21 hit an object left behind when the possession was given up.
35. The Panel considered the proposition that the time of transition from no delay to delay should be counted as the time of damage, and found that the train only came to a stand because the failure/ disappearance of the Norgren filter resulted in a loss of air pressure sufficient to lead to a brake application. The Panel took into account that;
- 35.1. none of the other damage would have caused the train to stop, and
  - 35.2. it was not clear that the Norgren filter, if struck, would necessarily have disintegrated immediately or whether it would have been weakened and subsequently disintegrated because of the stresses of internal air pressure.
36. Finally the Panel considered what alternative delay attribution coding might be applicable other than that so far given. It noted that FCC had drawn attention to a number of codes which relate to trains coming into contact with obstructions, and had also provided details of other incidents where delay had been attributed using such codes. The Panel considered that all that such instances demonstrated was that
- 36.1. Network Rail was not unwilling to accept such attributions where it considered that the facts warranted it,
  - 36.2. that Network Rail acts upon information given that a train has struck an obstruction, and
  - 36.3. in third rail electrified areas there is a good engineering justification for carrying out an on the ground inspection in cases where there is a report of a train striking an obstruction or losing a collector shoe, because such an incident may be indicative of a misalignment of the third rail.
37. In the current case
- 37.1. Codes attributed in response to provisions 4.24.2 (g), (h) and (i) are all predicated on either the confirmed presence of an obstruction (g) or that Network Rail and Operator **agree** [emphasis added] that a train has struck an unidentified obstruction on the line. In this case these codes would be inappropriate because there is no such agreement;
  - 37.2. Codes attributed in response to provision 4.24.2 (j) are applicable where "Operator's staff confirm that there is a defect with traction or rolling stock". The code MEGI falls into this category
  - 37.3. there are no instances of guidance within the Delay Attribution Guide which require the attribution of delay to be recoded away from the party with self evident responsibility for an activity, towards another, on the basis of a speculative chain of causality unless that other party acquiesces in that attribution.

38. Taken altogether, the Panel concluded that
- 38.1. it was not required to probe any further than to establish a plausible attribution that took account of the damage that the unit had suffered;
  - 38.2. the operation of the Delay Attribution process, and of Schedule 8, does not require the establishment of detailed chains of causality, and is not about the allocation of liability; it merely requires, in respect of the Delay Attribution process, that Delay be attributed to one of the parties involved, and in respect of Schedule 8, to one of the parties to the relevant Track Access Contract, in each case on the basis of the greater **probability** of responsibility;
  - 38.3. ensuring that components do not, of their own accord become detached from a unit in traffic is unquestionably "*within the control of the Train Operator in its capacity as an operator of trains*";
  - 38.4. ensuring that there are not objects on the Network that can be struck by trains is "*within the control of Network Rail in its capacity as operator of the Network*."
39. The Panel was of one mind that the circumstances of this case were different to those that had established the precedent discussed above, principally because it relates to a train failure in traffic, combined with evidence, and unchallenged engineering analysis that the failure is a function of damage by a "foreign body".
40. However, the Panel members were divided in the conclusions that they drew from the evidence of damage;
- 40.1. **Bill Davidson** considered that
    - 40.1.1. there was lack of evidence of the train striking an object on the journey in question and that the most plausible reason for the train coming to a stand about 1.5 miles outside the tunnel was that the Norgren filter became detached because it had not been completely secured or was cross threaded;
    - 40.1.2. that any other damage to the train may be a consequence of being struck by some other unrelated object, but in this case that other damage did not contribute to bringing the train to a stand; and that therefore
    - 40.1.3. the attribution to the Train Operator remained the appropriate one
  - 40.2. **Tony Deighan, Nick Hortin and Nigel Oatway** considered that:
    - 40.2.1. the damage to the train was most likely to have been caused by the train striking an external object (i.e. not the Norgren filter) originating from the trackbed (and thus from the Network), whether or not in the Elstree tunnel area, and that therefore,
    - 40.2.2. the attribution to the Train Operator should be withdrawn and an appropriate coding substituted reflecting that finding that attributes the delay to Network Rail.
41. In circumstances where "*the Panel is not able to reach a unanimous decision*", Access Dispute Resolution Rule A1.70 requires that "*the Panel Chairman shall make a determination of the dispute...*". The Panel Chairman, in this instance, finds that, on the balance of probability the evidence presented to the Panel, and the reasoning set out above, supports the conclusion reached by **Tony Deighan, Nick Hortin and Nigel Oatway**, rather than that reached by **Bill Davidson**.

**The Panel's Determination:**

42. For all the foregoing reasons therefore, the Determination made in the name of the Panel is that
- 42.1. **3K21 was immobilised, and incurred both direct and reactionary delay because a part of the air system for the doors of the leading coach, and caused a loss of air pressure, resulting in an emergency brake application and the train coming to a stand.**
  - 42.2. **the provisions of Condition B2.2, combined with the provisions of the Delay Attribution Guide, taken at face value, would initially result in this incident being allocated, within the terms of Schedule 8 of the Passenger Track Access Contract as a Train Operator Responsibility incident , as caused "*(whether or not the Train Operator is at fault) by any act, omission or circumstance originating from or affecting rolling stock operated by or on behalf of the Train Operator (including its operation)*";**
  - 42.3. **in the light of the manner in which information was passed between the parties at the time of the incident, there are no grounds for suggesting that any action was left undone which might have led to further information being available;**
  - 42.4. **the damage to the train that resulted in the train stopping out of course, and incurring the delay, could not, on the balance of probability, be the result of other than the train having struck an object , lying foul of the swept envelope;**
  - 42.5. **whilst the operation of the Delay Attribution Guide does not require the parties to carry out a forensic consideration of any chain of causality, except to the extent that the Guide differentiates between causes of incidents in the coding structure, it is determined that this incident should be coded in a way that reflects that the responsibility for keeping the swept envelope clear of extraneous objects ( whatever their provenance) lies with Network Rail;**
  - 42.6. **this finding is without prejudice to any other conclusions of any other body considering for example issues of liability for damage.**
43. In relation to Access Dispute Resolution Rule A1.72(l), the Panel determines that, if either party wishes to contest the findings of this Panel then they are invited to submit the matter to Arbitration , whether in accordance with the explicit provisions of Schedule 8, or as implied by the provisions of Part B, and Clause 13 of the Track Access Contract.
44. 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  
Panel Chairman

14<sup>th</sup> March 2008