

IN THE MATTER OF
A REFERRAL BY RAIL EXPRESS SYSTEMS LIMITED TO THE ACCESS
DISPUTES COMMITTEE REGARDING A REQUEST FOR ACCESS TO
WEMBLEY CENTRAL STATION ON 28 FEBRUARY 2010

LUL'S SUBMISSION AS DIRECTED BY THE ACCESS DISPUTES COMMITTEE
ON 2 MARCH 2010

Introduction

This document is LUL's Submission following the ADC's Notice of 2 March 2010.

In this submission, London Underground Limited is referred to as "**LUL**" and Rail Express Systems Limited as "**RES**". Wembley Central Station is referred to as the "**Station**".

The reference to "**Joint Bundle**" is to the set of appendices which the parties have jointly co-operated in to produce and which is attached to RES' Submission dated 8 March 2010 ("**RES' Submission**") and references to "JB[X]" are to specific page numbers of the Joint Bundle.

The reference to "**LUL Bundle**" is to the appendix which accompanies the LUL Submission and references to "LUL[X]" are to specific page numbers of the LUL Bundle.

This submission is divided into the following sections

1. Background
2. Jurisdictional matters
3. LUL's response to RES's Submission
4. LUL's position
5. Conclusion

SECTION 1 - BACKGROUND

Referral

On 3 February 2010, RES made a referral of a dispute by way of letter to the Access Disputes Committee ("**ADC**") copied to LUL ("**Referral**") (LUL[84-85]). It was stated to be in accordance with Condition H5 of the National Stations Access Conditions 1996 and noted the parties are party to a contract regulating access (the detail of which is set out below, and which is referred to as the Access Agreement).

On 5 February 2010 the ADC sent a Notice to LUL, acknowledging receipt of the Referral and stating "*I gather that RES has decided against operating the proposed trains on 28*

February 2010, but that the issue nevertheless remains in dispute so that train plans can be established for future major events at Wembley stadium” (LUL [86]).

Also on 5 February 2010, the ADC sent a Notice to the parties stating that an Access Disputes Panel (“ADP”) had been convened and further communications have followed (LUL [87]).

LUL’s efforts to resolve amicably

LUL believes the matter is capable of resolution and that the issues can be resolved amicably and without the need for a hearing LUL has invited RES to enter into further discussions.

The parties met on 24 February 2010. LUL’s aim was for the parties to discuss what each could do to help the other so that future access requests would be more easily dealt with. LUL outlined its usual way of working with other charter companies and explained how it works with other stakeholders and interested parties whose land is impacted by such, or similar, arrangements, even if it has no jurisdiction (as RES puts it) over such land (further explained in Section 4 below for the benefit of the ADP), so that events run smoothly for all concerned. LUL proposed a checklist, which could act as “guidelines” and asked RES what range of measures it would consider taking to manage the likely increased risk (the extent of which, and measures to combat, would obviously depend a number of factors – see Section 4 below).

LUL offered to provide RES with examples of its contingency plan and a plan agreed with another charter access company, which it did on 9 March 2010 (LUL[57]). LUL also sent the draft checklist referred to above.

LUL’s latest correspondence continues its attempts to do so following direction from the Chairman of the ADP for the parties to continue discussions (LUL[93]). LUL has followed up by telephone (12 March 2010) to try to resolve the matter, but without success LUL has been informed by RES that it has no particular concerns about the checklist and agrees that to all intents and purposes the checklist represents a sensible working arrangement. RES is now stating that, if the checklist can be agreed in advance of any access request, access should automatically be granted provided the checklist is filled in. This is the case even though it accepts that some of the information for the checklist is event-specific and the information sought may require further measures or arrangements to be made. Further, it informed LUL that it intends to pursue the matter to a hearing in any event. LUL’s view is that this is unnecessary.

RES promised to give LUL copies of access request forms put forward by RES in requesting access at other stations, together with details of the operational arrangements requested by those Station Facility Owners. One example for Cardiff station was supplied on 9 March. The document supplied contained train arrival and departure times but no other information.

Station and vicinity

(a) Station

The Station is one of 14 Network Rail stations which LUL took over from Silverlink in November 2007 by way of regulated lease from Network Rail. The lease area map (LUL[19]) shows the Station footprint (i.e. LUL's demise) in yellow.

To aid the ADP, LUL[20-29] contains photographs showing the Station layout. By way of brief description, there are 7 platforms, as follows:

- Platform 1 – Northbound or “Down” (a) Bakerloo Line to Harrow & Wealdstone and (b) London Overground to Watford Junction;
- Platform 2 - Southbound or “Up” (a) Bakerloo Line to Elephant & Castle and (b) London Overground to London Euston;
- Platform 3 - Northbound/Down Fast line – rarely used as requires special arrangements to gain access. This platform is not used on an event day because it can only be accessed via platform 2, which is the busiest platform on an event day;
- Platform 4 - Southbound/Up Fast line – rarely used. Access to this platform is via a side entrance off Platform 5;
- Platform 5 - Northbound/Down Slow line – used for an hourly Southern service Monday – Saturday and for 4 daily London Midland services. On event days this platform is used post event for London Midland services stopping additionally at Wembley Central;
- Platform 6 - Southbound/Up Slow line – used for an hourly Southern service Monday – Saturday and for 4 daily London Midland services. On event days this platform is used pre- event for London Midland services stopping additionally at Wembley Central; and
- Platform 7 - this is a disused platform.

Access to and egress from the platforms is by 3 means: to platforms 1, 2 and 3 via the booking hall area through the gateline; and to platforms 4 to 7 via 2 separate access gates off the plaza area (which is to the front of the Station, between the Station entrance and the Wembley High Road pedestrian footpath) - 1 gate leads to platforms 4 and 5 and the other gate to platforms 6 and 7. The access and egress routes and unmodernised Station layout can be complicated for passengers not familiar with it, and the Station is carefully managed so that passenger flow continues and to minimise obstructions.

At the opposite end of the Station there is an overbridge (commonly referred to as the event bridge), which is utilised on event days. It was constructed to improve the Station's ability to manage crowds on event days, its main purpose being to provide safe secondary access points post event to platforms 1 and 2

(b) Vicinity

Network Rail owns the land outside of the demise of the lease. Such land includes the plaza area and the land above the Station, which is being developed into flats, retail units and office accommodation by St Modwen Developments Limited ("**St Modwen**") pursuant to a development agreement. As the plaza is accessed by the public, and leads from the highway to the Station access/egress points, and to ensure those points and the retail units around the plaza are not obstructed unduly, LUL co-operates with them and Brent Council

Photographs at LUL[20-21] show this.

The reopening of the Wembley National Stadium

In planning for the reopening of the Wembley National Stadium ("**WNS**") in 2007 works were undertaken to each of Wembley's three stations in order to improve the area's ability to both manage the Stadium's capacity and to support wider regeneration (via an Asset Protection Agreement entered into between the London Development Association ("**LDA**") and Network Rail in 2004). The programme was due to be carried out in 2 phases. Phase 1 works included certain enhancement works within the Station demise and other works to the surrounding area as leased to St Modwen.

As part of phase 1, the overbridge referred to above was constructed. Some snagging items still remain and are factored into planning event day management.

Other proposed works not yet carried out include a customer lift being brought into use on Platform 1 and water ingress prevention throughout the Station (which causes ongoing damage and Station asset failures). Those factors are also taken into account in event planning as they impact on safety.

In the surrounding area, works have had an impact on event management, including the demolition of a retail building in the plaza area) and works to repave the plaza area. Access to the Station frequently changed in order to accommodate the progress of the works.

Phase 2 works are currently on hold. In the meantime, access arrangements may need to alter in line with other ongoing works.

Access Agreement (JB10-49)

LUL entered into a regulated Charter Station Access Agreement dated 8 November 2007 ("**Access Agreement**") with Rail Express Systems Limited ("**RES**") under which, broadly, RES has a right to request access to the Station by following a prescribed procedure and LUL must consider the request.

The ADP is referred to clause 3.3, Schedule 3 and the Appendix to Schedule 3 ("**Order**").

National Stations Access Conditions 1996 ("Access Conditions**") (JB50-58, extracts only)**

The Access Conditions are incorporated into the Access Agreement by virtue of clause 4 of the Access Agreement.

For brevity LUL does not set out Condition H5 which has already been quoted by RES, but draws these to the ADP's attention (as not in the Joint Bundle):

- Condition L7.2 *"no party to a Relevant Agreement may recover or seek to recover from any other party to that agreement any amount in respect of any loss of revenue"*
- Condition L7.3 *"the remedies provided for in these Stations Access Conditions and the Access Dispute Resolution Rules shall be the sole remedies available"*
- Condition L7.4 *"no person shall be entitled to recover damages, abate its Access Charge or otherwise obtain reimbursement or restitution in respect of any claim under a Relevant Agreement"*.

Wembley Central Station Specific Annex Access Conditions dated 10 November 1995 ("WCSSA") (JB59-68, extracts only)

This gives effect to the requirements of the Access Conditions for station specific information.

Access Dispute Resolution Rules ("Rules") (LUL[1-18])

The Rules constitute the framework for determination of disputes by virtue of Condition H5.1 of the Access Conditions. The current version of the Rules is dated 1 February 2010.

For brevity, LUL does not set out the relevant provisions, but refers the ADP to Rules 1.1-1.80 inclusive, which set out the powers of the ADP and the relevant principles and procedures for determination of disputes.

SECTION 2 - JURISDICTIONAL MATTERS

LUL has certain jurisdictional concerns and has raised them with RES and addressed them in correspondence with the ADP following a request on 9 March 2010 (LUL [92-93]).

Basis of Referral – Is there a "Dispute", "Claim" and/ or a "Refusal"?

Condition H5.1 requires there to be a "dispute" or "claim" before a party is entitled to apply to the ADP for a ruling. If either of those is not satisfied the matter can go no further.

If the ADP considers there has been no "refusal", again the matter can go no further. If the ADP considers there is, it should then consider whether the refusal was "unreasonable" in the context of Schedule 3 of the Access Agreement.

LUL makes the following representations in support of its argument that there is no "dispute" or "claim" and there has been no "refusal":

- The contemporaneous documentation supported by LUL's brief narrative account (see Section 4 below) show that LUL and RES were in the midst of discussions about what arrangements RES should put in place in conjunction with LUL in order to effect the Access Request safely, when RES made the Referral. LUL was not given

the opportunity to make a decision. If the ADP disagrees, LUL does not consider it acted unreasonably or prevented RES from making commercial arrangements – it was clear what RES needed to do to alleviate reasonable LUL concerns.

- The parties are not in dispute about establishing “*train plans for future events*”, because, again, they are in the midst of discussions.

Remedy

It is unclear what remedy RES is asking of the ADP. The ADP does not appear to have a general discretion to issue guidelines for use in future requests. The Contract sets out the type of information which the requesting party is to submit and a period for discussion, during which the particular circumstances can be discussed and the deciding party can set out its reasonable requirements dependent on the individual circumstances of the event in question.

SECTION 3 – LUL’S RESPONSE TO RES’ SUBMISSION

In this section, LUL sets out specific responses to particular paragraphs of RES’ Submission, as requested by ADC in its Notice of 2 March 2010.

- Front Page – LUL does not understand why the document is marked “without prejudice”. It is not correct to describe it in that way when the Notice of 2 March made it clear that the submissions would be placed on the ADC’s website.
- Paragraph 4.1
 - LUL does not agree that there has been a “refusal”. See Section 2.
 - LUL does not understand the phrase “*not with standing the existence of*”. The Access Agreement sets out the terms and conditions upon which access may be refused or granted. See Section 1.
- Paragraphs 5.2.5 and 5.2.6 – see Section 4. LUL stated that it would be happy to propose to St Modwen any suggestions RES might have for use of the plaza area, as LUL has regular interaction with St Modwen, but that it would prefer any event plan proposals come via LUL to ensure co-ordination with other plans.

LUL agrees that there is no provision in the Access Agreement requiring crowd control measures to be agreed, but the Order envisages specific measures to form part of the Access Request. Schedule 3 paragraph 1.2, in requiring LUL to respond to an access request, allows LUL not to make a decision within the usual timeframe if it cannot reasonably do so. LUL’s position is that, given what is said in this submission about the Station and area works, and given that RES were well aware of issues arising from its previous charter stops, LUL’s actions were not unreasonable in the circumstances, nor that there was delay on LUL’s part, and RES ought to have approached LUL accordingly when making the request in the first place. LUL has agreed such measures with other TOCs and problems are minimised as a result.

- Paragraph 5.2.8 - RES mentioned that they could provide 1 steward if needed, but could not confirm what they actually proposed to provide.

Further, RES does not mention this in its submission although it is so stated in its Access Request: it did not have confirmed times from Network Rail for the proposed train. LUL considers the position with track access a reasonable and relevant factor to consider when approached for an access request.

- Paragraph 5.2.10
 - “5 lost trains” - LUL does not understand this reference and knows nothing about any such 5 trains. LUL has not been given Notice of DBS’ wish for access in relation to these alleged operations. There has been no “prevention” on LUL’s part as it has not been approached. RES has not provided any details to LUL previously, or in its submission.
 - “Reason for the agreement” - this is RES’ subjective view and not a view shared by LUL.
- Paragraph 6 - LUL does not consider these issues are in “dispute”. See Section 2.
- Paragraph 6.1 – LUL agrees it has a duty to manage the Station as the Station Facility Owner under the Access Agreement. LUL does not consider it is responsible for managing RES’ passengers outside the Station because it is not LUL’s land. RES seems to suggest that LUL does not consider itself responsible for passengers inside the Station, which is not correct. LUL does have that duty. LUL and RES need to use to access requests as a way of addressing the interface between areas which LUL is, and is not, responsible for. Access requests cannot be considered without reference to the context of an event and the actual area in question.
- Paragraph 6.2 – LUL agrees it has a duty to provide common station services. However, LUL does not despatch trains for other TOCs because its staff are not competent to do so – they are competent in despatching Tube trains of the stock which runs through the Station. LU has arrangements for those TOCs to provide their own staff to despatch their own trains, which are a different stock and which have a different functionality. LUL staff attend the platforms to assist the TOCs with the safety of the platform and their customers. This is also the case at Euston and Watford Junction, where the Station Facility Owner (London Midland and Network Rail) does not despatch Virgin trains.

In addition, as part of past access requests, RES has agreed to do their own train despatch and has re-confirmed again in discussions about the checklist.

- Paragraph 6.3 – Schedule 3 states that LUL shall grant access and return the Order unless it “*reasonably determines it is unable to do so*”. LUL does not consider it has made a decision which was unreasonable, or that it has otherwise acted unreasonably. LU asked reasonable questions of RES and RES failed to answer them.

- Appendix 5 (JB80)

- Agenda item 3 - Mr Smith did not explain the call-off procedure. LUL explained it. Mr Smith set out his understanding of the SFO's obligations as set out in the Access Agreement and WCSSA.
- Item 4 - See above in relation to paragraph 5.2.10.
- Item 4 - See section 4 for LUL's recollection of the telephone conference.
- Item 5 – LUL's expressed reason for being wary of a generic template for event planning was because Mr Smith seemed to expect it to have fixed parameters, whereas LUL explained that common themes (identified in Section 4) could be put into a checklist, but, in its experience, flexibility was required for each access request to ensure safety.
- Item 6 - Mr Smith says he "offered to share all information relating to charters", but has only provided one example access request to date upon LUL's prompting (see Section 2 above).
- Mr Smith's statement that "*no specific details given by LUL as to their requirements*" is incorrect. Joan Saunders-Reece, the LUL Emergency Planning Manager, explained the required planning for an event at WNS which is likely to affect the Station. Stacey McManus, an LUL Group Station Manager and the person responsible for the Station, explained that train companies such as London Midland attend workshops with LUL to incorporate their arrangements for managing passengers into LUL's event plan.

SECTION 4 – LUL'S POSITION

In this section, LUL sets out its position as requested by ADC in its Notice of 2 March 2010.

This section comprises a detailed narrative explanation from Stacey McManus as to the events surrounding the Access Request, as well as setting out brief relevant information about the Station operating environment. In that regard, LUL notes the ADP has acknowledged LUL's statutory obligations and that it is limited to determining rights and obligations under the Access Agreement. LUL therefore only deals briefly with operational issues in order to illustrate how they link in necessarily with its obligation under the Access Agreement to "reasonably determine" an access request.

Relevant information relating to RES' previous access requests

Previous access requests and events are relevant because the experiences help to inform plans for future events; they provide data which once evaluated can be built into plans and help to keep them up to date. They are also a learning tool from which to work in order to ensure all safety and other relevant aspects are covered which need to be, and which may not have been on the first instance of having a charter service during an event. For example, in relation to

an event on 19 April 2009, 2 RES services stopped at Wembley Central and RES' arrangements did not prevent or minimise overcrowding by its passengers at the Station front, which resulted in them blocking the Station's evacuation route and causing safety concerns and a temporary closure of Wembley High Road. As explained below, LUL referred to debriefs from that and other previous events when it asked RES to answer its concerns in relation to the Access Request.

Relationships with other Train Operating Companies ("TOC")

LUL has good working relationships with other TOCs – Southern, which stops at the Station regularly and provides staff to manage arrangements for their trains and customers; and London Midland with whom, early on in the parties' relationship, LUL held workshops to discuss arrangements required for safe accommodation of their services. The outputs from these workshops resulted in the following general arrangements:

- Their services stop in certain directions pre & post event;
- They provide crowd management staff for their own queuing system;
- They provide event plans incorporating contacts at key locations of Euston and Watford Junction);
- They provide an operationally competent team leader to manage their area and staff.
- Their representative attends the BTPWEP debrief meeting in order to address any issues arising from previous events and provide information for upcoming events;

These arrangements are reviewed on a regular basis for their suitability.

LUL has suggested a similar exercise take place with RES.

Planning for events – general overview

As the Station Facility Operator LUL is responsible for safe management of the Station on days when events are held at WNS where the Station is a key transport hub. LUL works with stakeholders, whose plans may impact on LUL and vice versa.

Good plans help to minimise risk and facilitate overall event management and equip staff to understand their role and function and how to manage expected and unexpected situations, including if something occurs on the day that impacts on the plan.

Each event is assessed on its own circumstances. Several factors have to be taken into account, evaluated and balanced in relation to access requests and some may compete. The key areas to be addressed by a charter train company wishing to stop at the Station would be access booking - track (Network Rail requirements) and Station (the Access Agreement); event planning and strategy; command structure and briefings; crowd management; communication; and secondary "on the day contingency" planning (e.g. if the train has a fault and no return train is available, what would happen? If the event goes into extra time, would

the train be rescheduled to depart at some later time?). These areas are broken down in more detail within the draft proposed access checklist. Not all areas would have to be comprehensively completed prior to a decision about an access request being made, as certain information may not be known or finalised, but LUL considers it reasonable to expect that the issues have been considered and possible options put forward.

LUL will routinely in conjunction with others' plans prepare event-specific documents, including a crowd congestion plan and an event plan.

In the case of the Station, additional relevant third party documents include the Wembley Three Station Strategy ("W3SS"), under which the 3 stations which feed WNS co-ordinate plans, and the Generic Operational Policing Plan, which helps to co-ordinate policing.

LUL attends various meetings with external stakeholders including Wembley Stadium, Brent Council, British Transport Police ("BTP") Metropolitan Police, Chiltern Trains, London Midland, Southern, Network Rail and London Overground. The purpose of the meetings is, broadly, to ensure that each organisation has operational and contingency plans which are fit for purpose, and which fit together so that each can achieve both its own operational objectives and have confidence in others' plans. Some are transport-specific.

The meetings also offer a general opportunity for those involved to discuss lessons learned from previous events, gather information and intelligence regarding future events, share best practice, share awareness of the resourcing and deployments for each event, review current protocols around the W3SS, the escorting of risk groups and station crowd management systems and review and revise contingency plans as necessary.

RES does not attend these meetings currently, but LUL cannot see any reason why it should not do so. This might help to reduce scope for misunderstandings in future.

In addition, LUL holds its own internal meetings to assess in more detail what appropriate measures are required. An event plan for the Station is then developed alongside a briefing document for event staff.

LUL's (Stacey McManus) Account concerning the Access Request

1. Prior to the Access Request, I received an email on 10 December 2009 (JB70) in which RES (Mr Smith) asked whether, now that the Station frontage works had completed, RES could run trains to the Station. I was made aware that senior managers within LUL were having discussions with RES about access on a wider basis and so I did not reply to the email. I understood that those discussions were still ongoing when RES sent a further email on 6 January 2010.
2. I now refer to the Access Request and to the subsequent emails, some of which are in JB69-70 and the remainder at LUL [30-32].

3. The Access Request made on 19 January 2010 (JB69) was in the form of an email. It was not compliant with Schedule 3 and the Order. However, I had received, and dealt with, RES' previous access requests by email, at least initially.
4. In an effort to try to accommodate RES' request, despite very little factual information being provided and nothing by way of proposals to manage extra passengers, safety etc, all of which had been previously discussed and agreed to be a necessary part of future access requests, I asked RES to meet with me and other interested parties.
5. Diaries for a meeting could not be matched until 29 January 2010 so I arranged a conference call for the next day, 20 January 2010. I hoped this would save time later on by outlining what LUL's expectations for event day operation would be in order that RES could submit their proposals prior to the 29 January meeting and the meeting could be used to clarify any issues and raise queries, following which I expected to be able to decide quickly whether to grant or reject the Access Request. We had agreed that further planning, commitment and information was required from RES following previous events in 2009. RES' subsequent email of 19 January indicated that they knew what to expect as they referred to having read the notes from the debriefs of those events and would be happy to provide all the information LUL required. I therefore expected to receive RES' information in the conference call followed prior to the meeting by its written proposals, given the short timescales RES said it was working to.
6. At the conference call I again set out those matters. In addition, I offered to meet RES on site following the conference call and prior to the meeting to aid in preparing a plan for the proposed access but RES said it could not attend.
7. The meeting then took place on 29 January 2010 between LUL, RES, Virgin Trains (who had also expressed interest in access on 28 February 2010), BTP and Network Rail. In advance of the meeting, and following the discussions on 20 January 2010, I prepared a slide show of LUL's requirements and concerns (LUL[33-54]). In so doing, I considered the discussions about previous events. I made the presentation to all attendees at the meeting. I recall that access for 28 February 2010 was not refused at this meeting, but rather it was my and my colleagues', and others', understanding that RES would consider possible arrangements and send a proposed plan to me by 4 February 2010 which I would consider prior to any final decision being made. RES did not present any plans following the conference call. RES offered 1 steward, which in my previous experience of managing events at the Station since WNS reopened I thought an insufficient level of resource to safely manage RES' passengers. RES were unable to answer key questions, including: how would RES' customers know what to do post-event? Would RES have a holding/meeting point and, if so, how would information be communicated to their customers? How would RES manage this area? How would RES prevent their customers getting into incorrect queues and becoming obstacles to passenger flow? Who would lead arrangements onsite for RES' customers? Who from RES would communicate with the LUL event manager and how?

8. I have read Mr Smith's note of the meeting (JB71). In relation to point 2, RES did not propose how staff would manage their queue and it was unclear what their roles and responsibilities would be. In relation to point 3, RES did not have a time booked for their service, although I recall that the Virgin Trains representative advised that they no longer had a booking for the event such that RES might now be able to have their slot. In relation to point 4, no actual arrangements were proposed by RES to enable me to make a decision. I advised that any proposed arrangements should not impact on the retail units within the plaza area and that I met with St Modwen regularly. I asked that RES' proposal for managing their passengers in this area came through myself for that reason and to co-ordinate with the Station's event plan. I do not recall stating I would pass on contact details as I wanted information to come via myself. I deal with point 8 above as to where the meeting was left.
9. Following the meeting, therefore, I expected to receive further detailed information from RES within a week. That was never forthcoming. Instead, RES made the Referral. That came as a surprise to me, because I was not expecting it: I thought we were still in discussions and as far as I was concerned, I had not made a final decision whether to grant access or not. I accept I was minded not to grant access based on the information provided at that time by RES, as I had major concerns about how they would safely manage their passengers, as well as other matters which we had barely discussed, such as signage, stewards and barriers. RES had not come up with any proposals for how to deal with these matters, which in my experience would be the key factors to the smooth operation of the Station, especially on match days when passengers are going in different directions. I had thought that we were going to discuss the various issues again once RES had reflected on the meeting and the experience of the previous events.

CONCLUSION

The parties would be better served by agreeing, to the extent possible, a checklist of issues, factors and concerns which a party requesting access ought to address, as sought by LUL in the meetings following the previous events and, more recently, in the meetings of 29 January and 24 February 2010, and as followed up in recent correspondence from LUL.

LUL therefore asks the ADP to reject the Referral.

LUL's efforts to try to resolve this matter should be taken into consideration by the ADP in making any determination and on any question of costs.

Sarah Schütte

London Underground Legal Services

16 March 2010