

Joint Reference to Access Dispute
Panel

ADP16

Between

First Great Western / First Great Western Link

and

Network Rail Infrastructure Limited

1 DETAILS OF PARTIES

1.1 The names and addresses of the parties to the reference are as follows:-

- (a) First Great Western Link and First Great Western (the Claimant),
whose Registered Office is at

Milford House, 1 Milford Street, Swindon SN1 1HL ("First Group")

; and
- (b) Network Rail Infrastructure Limited (the Respondent),
whose Registered Office is at

40 Melton Street, London NW1 2EE ("Network Rail").

2 DETAILS OF REFERENCE

2.1 This matter is referred to an Access Disputes Panel ("the Panel") for determination in accordance with Condition B2.4.4 of the Network Code.

2.2 The Parties have together produced this joint reference and it includes:-

- (a) The subject matter of the dispute in Section 3;
- (b) A summary of the issues in dispute in Section 4;
- (c) A detailed explanation of the issues in dispute prepared by the claimant with a paragraph by paragraph response from the respondent(s) in Section 5;
- (d) Any further issues raised by the respondent in Section 6; and
- (e) The decisions of principle sought from the Panel in respect of legal entitlement and remedies in Section 7.

3 SUBJECT MATTER OF DISPUTE

- 3.1 This submission concerns the attribution of delays to departing services, caused by the late arrival of either rolling stock or traincrew, where those incoming services form or operate services by or on behalf of another Train Operating Company (TOC) and where the cause of the delay to the incoming service is not the responsibility of either TOC.
- 3.2 The TOCs concerned are First Great Western (FGW) and First Great Western Link (FGWL). These Operators share an owning group, and since 12 December 2004, have operated an Integrated joint timetable, but because of the franchising process, have two entirely separate Track Access Contracts (TAC). This issue will be resolved with the introduction of the Greater Western Franchise. However, the issue of separate TACs will remain until the timetable change in December 2006, when one new TAC will be introduced, covering the services currently being operated by FGW, FGWL and Wessex Trains. At such time, the relevant Schedule 8 agreements will be recalibrated.
- 3.3 A similar case, brought by Network Rail and Arriva Trains Wales, was heard by a Panel of the Access Disputes Committee on 6 July 2005 following guidance, DAB-2, from Delay Attribution Board (DAB). The determination of that hearing, ADP07, is attached as Appendix A.
- 3.4 This case has also been discussed at DAB, which issued further guidance, DAB-10. It is this guidance, which the Panel is now asked to review. Copies of the joint approach to DAB and DAB-10 are attached as Appendices B and C respectively.

4 SUMMARY OF DISPUTE

- 4.1 There is currently a considerable number of disputed incidents in TRUST, which relate to resources being shared between FGW and FGWL. Since First assumed responsibility for running the former Thames Trains franchise in April 2004 (now known as First Great Western Link), they have introduced an extensively modified integrated joint timetable known as the "Wider Benefits Timetable". One objective of the timetable was to introduce 125 mph rolling stock on the Paddington to Oxford and North Cotswold Services, the aim being to offer a much better service to customers and stakeholders.

- 4.2 As First Great Western Link does not lease any 125 mph rolling stock, the delivery of the customer benefit was through the inter-working of the Class 180 and HST fleets.
- 4.3 This has created a number of “shared service incidents” as described by Network Rail, principally involving FGW services arriving at London Paddington, with the rolling stock or traincrew then forming a FGWL service. Consequently, any delay to the inbound FGW service can cause a late departure of the outgoing FGWL service and it is these circumstances, which have led to the disputes.
- 4.4 These disputes have arisen as, under the circumstances outlined above, Network Rail have attributed all late departures caused by the late inward arrival of the previous service in accordance with determination ADP07, i.e. to FGWL or FGW as the case may be. First are of the view that ADP07 does not apply to incidents of this particular nature and have disputed the attribution accordingly. First consider that, as both TOCs share a common owning group and are planned in common, the delay should be attributed to the root cause of the late arrival.
- 4.5 It should be pointed out, for the avoidance of doubt, that only incidents for which Network Rail are responsible for the delay to the first train are included in this dispute. Delays that are a result of a failure of either FGW or FGWL have already been accepted, as they would have been within a First incident, and these delays have been appropriately coded within TRUST and within First’s Bugle performance system.

5 EXPLANATION OF EACH ISSUE IN DISPUTE WITH RESPONSE

5.1 First Group's Issue

5.1.1 This dispute has arisen, because Network Rail has followed the determination given in ADP07.

5.1.2 As well as relating to the permanent timetable the shared resource issue also occurs in times of disruption, when it is common for resources to be amended by the Control Centre, at short notice to minimise delay to its customers.

5.1.3 This alteration of resource diagrams between the two TOCs is undertaken to provide the best service possible to the customers. A number of shared resource incidents have occurred, where had the booked diagrams been adhered to, a shared resource incident would never have been created. However had the decision not been made in that case to alter the diagrams a worse service would have been offered to the travelling public.

5.1.4 For sake of completeness the following incidents all form part of this dispute.

117837, 134043, 142904, 241196, 259493, 271388, 284168, 321535, 353896, 367468, 367482, 426250, 442608, 525478, 528462, 817043, 979906, 979677, 983648, 56567, 125603, 180904, 211776, 241901, 281521, 281396, 379651, 382600, 30770, 30752, 108154, 100120, 100099, 100398, 100583, 143421, 280936, 277228, 290686, 320534, 342345, 342242, 367366, 382206, 423835, 458771, 717876, 732020, 736915, 810700, 849421, 898786, 920916, 987170, 13497, 45506, 56278, 182136, 207355, 207168, 206596, 241890, 267859, 281408, 287715, 329690. This list is correct following the January 2006 Level 3 meeting (for RSP10) between First and Network Rail.

5.1.5 Following the guidance given by DAB-10, First accepts that, the clauses stated in Schedule 8 do deal with the financial settlements between the TOCs and Network Rail.

5.1.6 But by accepting the attribution in TRUST the Train Operator would be admitting liability for an incident over which it has no control, or influence.

5.1.7 The following statement is made on page 3 of the Delay Attribution Guide under the “Statement of Good Practice”,

Track Access Parties and their employees involved in the Delay Attribution Process should work together to achieve the industry vision of Delay Attribution:

“For all parties to work together to achieve the core objective of delay attribution to accurately identify the prime cause of delay to train services for improvement purposes”,

Follow good practice in undertaking the process of delay attribution by:

i) accepting that the prime objective of delay attribution is to identify the prime cause of delay to train services for improvement purposes;

and

vi) working together to identify correctly the cause of an incident, no matter who that incident is attributed to, recognising that it may be necessary to re-attribute on the basis of new information;

5.1.8 By Network Rail attributing these incidents to either FGW or FGWL as the case may be, Network Rail is not taking cognisance of the clauses. The minutes of an incident are not being attributed to the root cause of the incident. FGW and FGWL maintain that these incidents should be attributed to Network Rail.

5.1.9 This has the effect of reducing Network Rail’s delay minutes and increasing the train operator’s minutes, for something that the latter is not in a position to control and influence, and therefore to address.

5.1.10 Under ADP07, which previously dealt with “shared services” the incident created, was for a through train changing TOC identity, where one operator handed the train to the next one, known as through trains. In this circumstance the passenger’s journey had been only delayed once but two separate incidents had been created in TRUST

5.1.11 However the case of DAB-10, does not deal with through trains as in the “Wider Benefits Timetable” there are no through trains.

- 5.1.12 The only time a shared resource incident is created is when an incoming train arrives at its destination late and causes the next working to depart its origin late, as a direct consequence of the late arrival of the inward working. In each case the inward and outward bound services are operated by a different TOC (FGW or FGWL) and have been delayed by NR. The majority of these incidents have occurred at Paddington station.
- 5.1.13 Under DAB10 there are two separate groups of customers that have each been separately delayed, those arriving at Paddington and those departing Paddington.
- 5.1.14 In the original submission to Delay Attribution Board (Appendix B), we highlighted incidents 810700 and 45506. Since the original submission paper was written there has been another incident that First believes would be useful in helping the panel reach a decision.
- 5.1.15 On the 19th December 2005 there was a points failure at Penzance (incident 328090), which delayed 1A85 06:57 Penzance to Paddington (FGW) service. 1A85 was 37 minutes late departing its origin. Normally 1A85 arrives Paddington at 12:20 which forms 1D31 the 12:51 Paddington to Oxford (FGWL) service. With 1A85 running late the decision was made by the Control Centre in Swindon to amend the set working at Paddington so that 1A85 would now work 1B37 13:15 Paddington to Cardiff, and the set that would normally work 1B37 service, the 12:37 arrival from Bristol (1A14) would now work 1D31. This decision was made on the basis that 1A14 was running on time so there would be no delay to 1D31. This was a decision made to minimise delay to passengers and in reaction to an infrastructure failure.
- 5.1.16 Unfortunately 1A14 was delayed by separate incident 329076, which related to a broken fishplate on the way into Paddington, this directly lead to a 14-minute late start on 1D31.
- 5.1.17 In the above case First had taken all reasonable steps to mitigate the delay caused to its services by Network Rail, but this still lead to a late start on 1D31. Had 1D31 been a FGW Service the 14-minute late start would have been correctly attributed to the Network Rail incidents. Also had 1D31 been a First Great Western service and the set workings at Paddington not been amended, Network Rail would have been quite within

their rights to create a failure to mitigate incident, on the basis that First had failed to mitigate delay and not stepped its resources up.

5.1.18 It is the view of both FGW and FGWL that Network Rail should accept the incidents listed above.

5.1.19 This view is formed is on the basis that by the First TOC's accepting the attribution they are admitting responsibility, and this could damage their reputation within the industry. This could happen as the only information that is publicly reported on, relates to delay minutes and not to the amounts of money that has passed between the Train Operators and Network Rail.

5.1.20 From December 2006 when there is one Track Access Contract for the Greater Western Franchise these incidents will not have occurred and Network Rail will accept the above incidents and the resulting minutes.

5.2 Network Rail's Response

5.2.1. First, in paragraphs 5.1.10, 5.1.11 and 5.1.12, argue that there is a difference between "shared services", "through services" and inward and outward bound services. Network Rail are of the opinion that the differences between the two are semantic only; the relevant contractual clause (paragraph 5.3 (b) (ii) of Schedule 8 to the TAC) relates to

"the commencement of a Train's journey, which is caused by the late running for any reason whatever of any rolling stock included in that Train when that rolling stock is operated by or on behalf of another train operator".

and thus Network Rail's view is that the determination in respect of ADP07 does apply in the scenarios disputed by FGW and FGWL. The two scenarios are identical in that in both cases the train has passed through a 'contractual boundary'.

5.2.2. Paragraph 18.1 of the determination states:-

"allocation of the responsibility for delay at any boundary point shall be determined as between Network Rail, and the Train Operator whose Track Access Right supports the continuing service"

and, notwithstanding that both TOCs are within the same group of companies and that the services are *planned* in common, FGW's and FGWL's services are supported by totally separate regulated and model-claused Track Access Contracts. Thus, allocation of the responsibility for the delay to the departure from Paddington (the boundary point under these

circumstances) rests with the “other” TOC (a totally separate Access Party under the terms of Part A, Paragraph 1.2 of the Network Code), the Train Operator whose Track Access Right supports the continuing service.

- 5.2.3 Network Rail understands the thrust of First Group’s argument on the attribution of incidents. However, Rule A1.18 states that “The Panel shall reach its determination on the basis of the legal entitlements of the dispute parties and upon no other basis”. The transfer of the former Thames Trains franchise to First Group was carried out without any other alteration to the contractual framework: there were no changes to the terms of Schedule 8 in either contract and therefore no change in the way in which responsibility for delays was to be determined.
- 5.2.4 Network Rail note that the Delay Attribution Statement of Good Practice states that it “is not intended to create contractual rights and obligations”. Network Rail adhere to the principles espoused in the statement, but cannot do so at the expense of existing contractual obligations with associated financial implications.
- 5.2.5 Network Rail disagree with FGW’s statement in paragraph 5.1.18 that they would have been within their rights to create a “failure to mitigate incident”. Contractually, Network Rail do not consider that they could hold one TOC (with one TAC) responsible for mitigating the delay of a second TOC (with a separate TAC).
- 5.2.6 The issue arises because two TOCs have chosen, for quite proper reasons, to provide services using each other’s rolling stock and train crew. That choice is no doubt dictated by First Group’s assessment of passenger benefits, but that does not alter the fact that the TOCs must accept the contractual and financial consequences of their decision.
- 5.2.7 First Group raise reputational issues regarding responsibility for delay incidents. It is clear to Network Rail that, whilst TRUST does indeed determine responsibility for delay incidents, in the context of Schedule 8 to the TAC, this is so as to be able to allocate financial responsibility for the dispute; indeed Schedule 8 is explicit that responsibility **does not** imply fault (paragraphs 5.2 and 5.3 of Schedule 8 to the TAC).

6 ANY FURTHER ISSUES RAISED

6.1 There are no further issues to be raised.

7 DECISION SOUGHT FROM THE PANEL

The Panel is asked to determine the correct attribution of disputed delays in respect of the situations outlined under section 5 of this paper.

8 SIGNATURES

For and on behalf of

First Group

Signed

Name

Position

Date

For and on behalf of

Network Rail

Signed

Name Nic Coome

Position Business Manager

Date

An ACCESS DISPUTES PANEL of the ACCESS DISPUTES COMMITTEE

Determination in respect of reference ADP07
(following a Hearing held at Kings Cross on 6th July 2005)

The Panel

John Thompson: elected representative for Franchised Passenger Class, Band 1

Nigel Oatway: elected representative for Non-Passenger Class, Band 1

Julia Glenn: appointed representative of Network Rail

Tony Deighan: elected representative for Non-Franchised Passenger Class

Panel Chairman: **Sir Anthony Holland**

Brief Summary of the Dispute

The Claimant: Network Rail Infrastructure Limited

The Respondent: Arriva Trains Wales Limited

1. The dispute was brought to the Panel at the initiative of Network Rail, having been previously considered by the Delay Attribution Board in accordance with Network Code Condition B2.4.3. It concerned the special circumstances where, as a consequence of franchise re-mapping, medium distance through train services, that had at one time been operated throughout by a single Train Operator, were now, over part of the journey, operated by a different Train Operator.
2. The disagreement between the parties Network Rail and Arriva Trains Wales (ATW) (together with Wessex Trains as an interested party) related to the situation that arises when the first Train Operator hands over a train ("the arriving service") to the next operator, sufficiently delayed that the next leg of the journey ("the continuing service") inevitably departs late. The parties had been unable to agree
 - 2.1. how the guidance given in the Delay Attribution Guide (DAG) should be applied in respect of delay to the continuing service consequential upon delay to the arriving service; and
 - 2.2. how, in these circumstances, responsibility for incidents (and therefore for payments under Schedule 8 of the Passenger Track Access Agreement), should be allocated as between the operator of the continuing service and Network Rail.

The Jurisdiction of the Panel

3. 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,
 - 3.1. to seek the guidance of the Delay Attribution Board “*on the appropriate application of the Delay Attribution Guide*”; and
 - 3.2. “*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).
4. 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*”.
5. Having reviewed the Papers the Disputes Chairman had issued, to the parties, directions, including

“that references to a Panel must, by the terms of the revised Access Dispute Resolution Rules (effective since 15th April 2005), be determined “*on the basis of the legal entitlements of the dispute parties and upon no other basis*” (Rule A1.18).

In this context, the attention of the Panel will be focussed on, amongst other things, the force of Network Code Condition B1.3, which states “*The Delay Attribution Guide is incorporated into and shall form part of this Network Code.*” as well as the provisions of Network Code Condition A1.1(h) which relates to the resolution of conflicts between the Network Code and the Track Access Agreement.”

The Panel’s findings of fact

6. Both parties agree that
 - 6.1. the DAG is incorporated into the Network Code, and that this imposes on the parties an obligation to take cognisance of its guidance in attributing delay minutes as between possible access parties and causes;
 - 6.2. the attribution of delay in respect of “LATE ARRIVAL OF INWARD WORKING” is subject to paragraph 4.17 of the DAG; this is, potentially, qualified by paragraph 4.38 “WAITING TRAINCREW”;
 - 6.3. Schedule 8 of the template Passenger Track Access Agreement was amended in 2001, as part of the Rail Regulator’s 2003 Access Charges Review and model clauses, and as a consequence states, at paragraph 5.3(b)(ii),

“*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:....*

(b) causes delay to:....

(ii) *the commencement of a Train's journey, which is caused by the late running for any reason whatever of any rolling stock included in that Train when that rolling stock is operated by or on behalf of another train operator*".

6.4. Schedule 8 paragraph 5.3(b)(ii) can be construed as being in conflict with paragraphs 4.17 and 4.38 of the DAG, and that, in this matter, the DAG and Schedule 8 imply contradictory courses of action;

6.5. Network Code Condition A1.1(h) states that

"Conflict

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

- (1) *this code ; and*
- (2) *the Access Agreement*".

7. The parties attribute different significance to the above common ground. In practical terms

7.1. Network Rail argued that

7.1.1. the delay attribution process served a diagnostic process, which, whilst it might inform the contractual allocation process, did not determine it;

7.1.2. the contract terms (in Schedule 8) required that the Train Operator responsible (in Track Access terms) for the continuing service should be allocated the responsibility for any lateness at the commencement of that continuing service's journey "*which is caused by the late running for any reason whatever of any rolling stock included in that Train*"; and that

7.1.3. where the delay to the continuing service arose because of a late inwards train-crew working, this should also be allocated, by analogy, to the responsibility of the Train Operator responsible for the continuing service.

7.2. ATW argued that the arrangement proposed by Network Rail was inequitable, as the reason for the late arrival of the inwards service could be an incident wholly attributable to Network Rail; or, if the original delay to the arriving service was attributable to that Train Operator, Network Rail would potentially be receiving compensation for the same incident through the provisions of two independent Track Access Agreements. ATW therefore argued that the allocation of responsibility should be on the basis of attribution to root cause, by analogy with the principle that would have applied before the Franchise re-mapping.

The Panel's consideration of matters of contract

8. The Panel noted that when the Delay Attribution Board had considered the representations of the parties, its judgement, which had been submitted to the Panel for information, made reference to circumstances where "*a separate financial settlement should be agreed by the*

parties outside the Delay Attribution process, so as to put the parties in the position which the contract intended". The Panel considered that such a judgement, would not be "on the basis of the legal entitlements of the dispute parties and upon no other basis" (Rule A1.18), and therefore not within the Panel's competence to hear. Indeed the Panel was concerned to make its determination on the basis of the documents that exist, and have been approved by the Office of Rail Regulation, as opposed to on any other basis.

9. With this principle in mind, 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).*
12. Applying this principle to Schedule 8 paragraph 5.3(b)(ii) leads to the following conclusions
- 12.1. because the arriving service and the continuing service are operated by separate Train Operators, the rights to operate are contained in separate and discrete Track Access Agreements;
- 12.2. only incidents relating to the arriving service are allocated in accordance with the terms of the arriving service Train Operator's Track Access Agreement, and, by the same token, incidents relating to the continuing service are only allocated under the continuing service Train Operator's Track Access Agreement;

- 12.3. if the continuing service departs on time, there is no incident; if it departs late because no rolling stock is available at the booked departure time then it fulfils one of two criteria for which *“the Train Operator shall be allocated responsibility”*, namely that the *“incident [is one that]...”*
- 12.3.1. *causes delay to...the commencement of a Train’s journey, which is caused by the late running for any reason whatever of any rolling stock included in that Train when that rolling stock is operated by or on behalf of another train operator.”* (Schedule 8 paragraph 5.3(b)(ii)); OR
- 12.3.2. *“is caused wholly or mainly by circumstances... (whether or not the Train Operator is at fault) within the control of the Train Operator in its capacity as an operator of trains”* (Schedule 8 paragraph 5.3(a)(ii)).
- 12.4. in other words, at a boundary between services, and between Track Access Agreements, delay to the departure of any continuing service, as a consequence of lack of rolling stock, has contractually to be the responsibility of the Train Operator of the continuing service, and therefore, within the terms of the bilateral Track Access Agreement between that Train Operator and Network Rail, that is the basis upon which such delay is fed into any calculation of performance payments.
13. Finally the Panel considered two subsidiary questions, namely
- 13.1. should late departure of a continuing service as a consequence of delays to arriving train crew be treated as if Schedule 8 paragraph 5.3(b)(ii) also applied to train-crew, or should such delays be attributed back to root cause? And
- 13.2. should any allocations of responsibility be tempered by considerations that the stock and train crew are in one or other case being sub-contracted to the other Train Operator?
14. On this second point the Panel was disconcerted to hear that ATW was unaware of the terms of any vehicle or train crew hire agreements between itself and Wessex Trains (the operator, in many cases, of the “other” part of service), in particular in relation to matters of liability for failure. That said the Panel was clear that the means by which one Train Operator procures rolling stock is, in relation to the operation of the Track Access Agreement, invisible, and therefore of no consequence. Similar arguments apply to the provision of train crew.
15. If there had been no franchise re-mapping, accountability for failures of train crew or of rolling stock provision would, in the generality of cases, have been allocated to the Train Operator in conformity with Schedule 8, paragraph 5.3(a)(ii), both being matters *“within the control of the Train Operator in its capacity as an operator of trains”*. Franchise re-mapping, associated with the obligation to continue through services, using “shared” rolling stock, created the need for Schedule 8, paragraph 5.3(b)(ii), but only to eliminate a potential for dispute in such circumstances.
16. Franchise re-mapping does not create any obligation to perpetuate the use of “shared” train crew. The decision as to which operator’s train crew should operate a continuing service, is entirely a matter *“within the control of the Train Operator [with the Access Rights for the continuing service] in its capacity as an operator of trains”*. There is thus no requirement for any use by analogy of Schedule 8, paragraph 5.3(b)(ii), nor for any

amendment to DAG paragraphs 4.17 or 4.38 to cater for the issues raised by the boundary between arriving and continuing services.

The Panel's determination

17. Taking account of all the preceding factors, the Panel determined that
 - 17.1. there is a separation between the delay attribution process, and the contractual process by which, under Schedule 8 of the Track Access Agreement, responsibility is allocated as between the Train Operator and Network Rail;
 - 17.2. the delay attribution process may inform the process of allocation of responsibility, but, in circumstances where the delay attribution process (as in DAG paragraphs 4.17, or 4.38) recognises finer matters of causality that are not specifically recognised in the contract, it would not be reasonable to expect to re-interpret the contract to accommodate those nuances;
 - 17.3. in any one Track Access Agreement 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;
 - 17.4. 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 in despatching a continuing service; thus
 - 17.4.1. until a train fails to depart on time from the first station to which the relevant access rights relate, there is no delay incident as regards that train;
 - 17.4.2. where a train that fails to depart on time because the requisite rolling stock or train crew are not available from the arriving service operated by another Train Operator, that delay, within the terms of the bilateral Track Access Agreement, can only be the responsibility of the Train Operator that owns the Track Access Right for the continuing service;
 - 17.5. this principle is not disturbed by considerations as to whether the Train Operator owns, leases, or hires in (from a second Train Operator), the rolling stock in question, or by questions of the ultimate employer of the train crew scheduled to operate the train;
 - 17.6. by the same token, whilst it may be true that the boundary between arriving and continuing services may result from service re-mapping, at the behest of the SRA, timetabling of such joined up services can be achieved by the inclusion, in a Bid, of the appropriate qualitative requirements, as set out in Network Code Condition D3.3. It does not otherwise require re-interpretation of the normal operation of the Timetable Change process;
 - 17.7. it is quite possible that one Train Operator may have the benefit of third party arrangements with another that confers the right to use that other Train Operator's stock or personnel; for the purposes of the operation of the bilateral Track Access

Agreement such agreements are invisible, and therefore cannot have any bearing on the translation of delay attribution into allocation of contractual responsibility.

18. The Panel therefore finds that, in the circumstance where a single train, or set of train crew, operates a through service utilising the Track Access rights of more than one Train Operator,
 - 18.1. allocation of the responsibility for delay at any boundary point shall be determined as between Network Rail, and the Train Operator whose Track Access Right supports the continuing service;
 - 18.2. such an allocation shall be unaffected by the existence of any contracts or agreements between the Train Operators concerned;
 - 18.3. such an allocation shall be unaffected by any attribution back to root cause of delay relating to the arriving service (whether in relation to the DAG, or to the allocation of delay as between Network Rail and the Train Operator of the arriving train, under the terms of that Train Operator's Track Access Agreement). For purposes of delay attribution services do not give rise to TOC on TOC delays at the point at which an arriving service operated by one Train Operator becomes a continuing service operated by another;
 - 18.4. where the responsibility for delay to a train is allocated to a Train Operator, that responsibility shall be assessed in terms of the provisions of the Track Access Agreement that contains the rights to run that train over the relevant section of route;
 - 18.5. there is no entitlement for the Train Operator, in such a specific circumstance, to require Network Rail to levy performance payments (under Schedule 8), from another Train Operator.
19. 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

Submission to: Delay Attribution Board

Date: 4th November 2005

Subject: Attribution of Delay Incidents connected with the sharing of Rolling Stock and/or Traincrew

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Attribution of Delay Incidents connected with the sharing of Rolling Stock and/or Traincrew

1. Introduction.

This submission concerns the correct attribution of delays to departing services, caused by the late arrival of either rolling stock or traincrew, where those incoming services form or operate services by or on behalf of another Train Operating Company and where the root cause of the delay is not the responsibility of either Train Operating Company. This situation is almost identical to a previous submission which gave rise to determination DAB2. Network Rail appealed DAB2 to Access Disputes Panel whose determination was issued as ADP07 (see Appendix A).

The TOCs concerned are First Great Western (FGW) and First Great Western Link (FGWL). These Operators share an owning group and, since 12 December 2004, have operated a Joint Timetable but, because of the franchising process, have two entirely separate Track Access Contracts. This issue will be resolved with the introduction of the Greater Western Franchise in 2006.

Detail of the Submission.

There is currently a considerable number of disputed incidents in TRUST which relate to services shared between FGW and FGWL. Since First Group assumed responsibility for running the former Thames Trains franchise, they have introduced a extensively modified timetable which involves a certain number of shared services, principally involving First Great Western services arriving at London Paddington, with the rolling stock then forming a First Great Western Link service. Consequently, any delay to the inbound FGW service can cause a late departure of the outgoing FGWL service and it is this circumstance which has led to the disputes.

They have arisen because, under the circumstances outlined above, Network Rail have attributed all late departures caused by the late inward arrival of previous services in accordance with determination ADP07, i.e. to FGWL. First Group are of the view that ADP07 does not apply to all such incidents. They are of the view that, as both TOCs share a common Owing Group and are planned in common, the delay should be attributed to the root cause of the late arrival.

3 The Views of the Parties

3.1 Network Rail

Network Rail's view is that the determination in respect of ADP07 does apply in the scenarios disputed by FGW and FGWL, as paragraph 18.1 of the determination states:-

"allocation of the responsibility for delay at any boundary point shall be determined as between Network Rail, and the Train Operator whose Track Access Right supports the continuing service"

and, notwithstanding that both TOCs have a common owner and that the services are *planned* in common, FGW's and FGWL's services are supported by totally separate regulated and model-claused Track Access Contracts. Thus, allocation of the responsibility for the delay to the departure from Paddington (the boundary point under these circumstances) rests with FGWL (a totally separate Access Party under the terms of Part A, Paragraph 1.2 of the Network Code), the Train Operator whose Track Access Right supports the continuing service.

3.2 First Group

As Network Rail have stated above First Group took over operation on the Thames Trains Franchise on the 1st April 2004. The Franchise was renamed to First Great Western Link (FGWL). Until the 12th December 2004 both Train Operating Companies carried on operating their existing pre-agreed timetables.

At the Timetable Conference in February 2004, First Group proposed the introduction of the "Wider Benefits Timetable". This timetable consisted of a jointly operated service on the routes radiating out from Paddington, using both Train Operating Companies resources including Rolling Stock and Traincrew. This timetable required resources leased by one of the TOC's to work on the others services. An example of this is that now both HST's and Class 180's leased to

First Great Western now operate on First Great Western Link services to Oxford and the Cotswolds. All catering staff on the class 180's are employed but FGW irrespective of the fact their diagrams see them working a considerable number of FGWL services.

This inter operability of the two fleets was a key part of the "Wider Benefits Timetable", and it would not have been financially or operationally possible without the sharing of resources. It was the whole "Wider Benefits Timetable" and the introduction of 125mph resources on the former Thames Trans franchise that led to the franchise being awarded to First Group.

The reason why we have brought this submission relates to the same clause as highlighted by Network Rail above. As part of the "Wider Benefits Timetable" we do not operate any "shared" or "continuing" services. All trains are either one operator or the other throughout. The change of TOC from either First Great Western to First Great Western Link or visa versa, only happens at the terminating location.

The allowance used before working the next service is always compliant with the Network Rail Rules of the Plan. An individual service from one location to another is not jointly operated (which is where we differ from ADP07), what is jointly operated is the whole timetable, this applies right through the entire planning and operational process.

In times of disruption we also operate as one Train Operator with the aim of minimising delay to our customers who ever caused the delay. This often leads to First Great Western trains making additional stops vice First Great Western Link services. During special events this Joint Timetabling approach is also evident, as HST's and class 180's working First Great Western services will call additionally at Newbury Racecourse when there are events there, and at Twyford during the Henley Regatta.

The same also applies during engineering works, where both Train Operating Companies have been prepared to amend their services to give the best journey opportunities to our customers and give Network

Rail the required amount of engineering access. In the past operating such a timetable has not been possible with the differing owning groups.

As part of this submission we would like to highlight a few example of the types of incidents, which has led to the dispute being brought before you, and us not being able to accept the ruling from ADP07. Once it became clear that Arriva were not going to appeal the decision the only option open to us was to bring our own dispute.

Incident 810700 – 7th August 2005

On the above date 2N54 15:48 Paddington to Oxford (retimed to depart at 15:50) was delayed at Paddington awaiting a driver. On this date because of engineering works the traincrew diagrams were amended so that the driver for 2N54 travelled passenger on 1L52 11:58 Swansea to Paddington from Reading.

Had 1L52 arrived Paddington on time at 15:27 this would have given the driver 23 minutes before departure of 2N54. However on this day 1L52 was delayed by another TOC's incident, which meant its late arrival at Paddington led to a 14 minute late start on 2N54 which caused the above incident to be created.

Network Rail have attributed this incident to theGWL, which we have disputed as we believe the dispute should be down to root cause which in this case was the other TOC's incident which caused 1L52 to be late. The fact that a First Great Western Link driver was travelling on a First Great Western service is we believe irrelevant.

Incident 045506 – 13th October 2005

As part of the "Wider Benefits Timetable", both HST's and 180's are diagrammed as a common fleet. An example of this is Monday to Friday diagram IW61 for an HST set.

The 1L60 12:55 Cardiff Central to Paddington arrives at its destination at 14:59, this service is listed in the First Great

Western Track Access Contract. This train then forms the 1D41 15:21 Paddington to Oxford service which is a First Great Western Link train and forms part of the half hourly pattern from Paddington to Oxford which is operated by both TOC's, although the majority are under First Great Western Link's Track Access Rights. When this set returns from Oxford it then works the 18:18 Paddington to Cheltenham which is a First Great Western service.

On the day in question 1L60 was delayed by a Track Circuit Failure on its inwards journey, this led to 1D41 suffering a 2 minute late start from Paddington.

Network Rail have attributed this incident to the FGWL, which we have disputed as we believe the dispute should be down to root cause which in this case was the Track Circuit Failure.

The fact that a First Great Western Resource is diagrammed to work a First Great Western Link service is we believe irrelevant in this case. As the correct Rules of the Plan allowance has been given, this delay should go to root cause which was the Track Circuit Failure.

Although the two incidents highlighted above are relatively small incidents it is the point of principle that in both cases Network Rail is expecting to receive compensation through the Schedule 8 Regime for incidents over which First Group has no control. One being a TOC on TOC incident, the other being a failure of a Network Rail piece of equipment.

In Appendix A the issue of separate contracts between the two Train Operators is raised. First Great Western Link also operates a Joint Service with Heathrow Airport Ltd (HAL) this is for the stopping service between London Paddington and Heathrow Terminal 1,2,3. This service commenced operation in June 2005 and is the subject of a separate Performance Regime outside of Schedule 8 between the parties.

A separate performance regime between First Great Western and First Great Western Link has never been considered appropriate, as unlike the Arriva case highlighted in ADP07 we are operating a completely joined up operation.

Another problem with following the ruling from ADP07 is that not all delay relating to an incident is being correctly captured and attributed. Using incident 045506 as an example. Had the HST working 1L60 been diagrammed to work a First Great Western service from Paddington an additional 2 minutes delay would have been added into the TSR Incident. By Network Rail following ADP07 this delay is not recorded as part of the TSR Incident. The same would have applied had the delay to 1L60 been say a fleet related incident, all the delay should have been recorded to the root cause incident, rather than creating a separate incident number. This way schemes to improve performance can be properly targeted, as root cause attribution correctly captures the total delays for any given incident be it Train Operator or Network Rail caused.

The only incidents that form part of this dispute are ones where Network Rail is responsible for the delay to the second train. Delays that are a result of a failure of First Group have already been accepted, as they would have already been within a First Group incident.

4. Guidance Sought.

Delay Attribution Board is asked to give guidance on the appropriate attribution of the type of incident which is the subject of this paper.

Delay Attribution Board

Guidance No. DAB-10

1. Introduction

- 1.1 The Delay Attribution Board (Board) received a request for guidance in relation to the Attribution of Delay to Incidents connected with the sharing of Rolling Stock and/or Traincrew where the shared resources belong to the same owning group operating under a joint timetable. This request was received from First Group (First) and Network Rail Infrastructure Ltd (Network Rail) on November 4th, 2005.
- 1.2 The Board considered this request for guidance at its meeting on November 22nd, 2005.
- 1.3 This paper summarises the request for guidance received from First and Network Rail and the guidance provided by the Board.

2. Information Received

- 2.1 This submission concerns the correct attribution of delays to departing services, caused by the late arrival of either rolling stock or traincrew, where those incoming services form or operate services by or on behalf of another Train Operating Company and where the root cause of the delay is not the responsibility of either Train Operating Company. This situation is almost identical to a previous submission which gave rise to determination DAB2. Network Rail appealed DAB2 to Access Disputes Panel whose determination was issued as ADP07 (see Appendix A).
- 2.2 The operators concerned are First Great Western (FGW) and First Great Western Link (FGWL). These Operators share an owning group and, since 12 December 2004, have operated a Joint Timetable but, because of the franchising process, have two entirely separate Track Access Contracts. This issue will be resolved with the introduction of the Greater Western Franchise in 2006.
- 2.3 There are currently a considerable number of disputed incidents in TRUST which relate to services shared between FGW and FGWL. Since First Group assumed responsibility for running the former Thames Trains franchise, they have introduced a extensively modified timetable which involves a certain number of shared services, principally involving First Great Western services arriving at London Paddington, with the rolling stock then forming a First Great Western Link service. Consequently, any delay to the inbound FGW service can cause a late departure of the outgoing FGWL service and it is this circumstance which has led to the disputes.
- 2.4 They have arisen because, under the circumstances outlined above, Network Rail have attributed all late departures caused by the late inward arrival of previous services in accordance with determination ADP07, i.e. to FGWL. First Group are of the view that ADP07 does not apply to all such incidents. They are of the view that, as both operators share a common Owning Group and are planned in common, the delay should be attributed to the root cause

of the late arrival. Both parties have therefore agreed that it should be referred to the Board for guidance. The parties requested the Board to consider the following

3 Summary of the position of Network Rail

- 3.1 Network Rail held the view that the determination in respect of ADP07 does apply in the scenarios disputed by FGW and FGWL, as paragraph 18.1 of the determination states:-

“allocation of the responsibility for delay at any boundary point shall be determined as between Network Rail, and the Train Operator whose Track Access Right supports the continuing service”

and, notwithstanding that both Operators have a common owner and that the services are planned in common, FGW’s and FGWL’s services are supported by totally separate regulated and model-clause based Track Access Contracts. Thus, allocation of the responsibility for the delay to the departure from Paddington (the boundary point under these circumstances) rests with FGWL (a totally separate Access Party under the terms of Part A, Paragraph 1.2 of the Network Code), the Train Operator whose Track Access Right supports the continuing service.

4 Summary of the position of First Group

- 4.1 First Group held the view that the delay should be attributed to the prime cause of the incident causing the delay even if this delay was due to inward stock/traincrew of a different operator at a terminus station. Emphasising that in this case the two operators belong to the same owning group and are operating as part of a “Wider Benefits Timetable”.
- 4.4 The only incidents that form part of this dispute are ones where Network Rail is responsible for the delay to the second train. Delays that are a result of a failure of First Group have already been accepted, as they would have already been within a First Group incident.

5. Locus of the Board

- 5.1 The Board reviewed its locus in respect of providing guidance on this issue. The Board’s locus to provide guidance was defined in the Network Code B2.4.3 and B6.1.3.

5.2 The Board noted that while it could offer guidance to the parties as to how incidents of this nature should be attributed, this guidance was not binding on any party. If one or both parties were dissatisfied with the guidance provided they could refer the matter to Access Disputes Committee (ADC).

- 5.3 If the issue were referred to ADC, then an ADC Panel would be formed to consider the dispute. In doing so, the ADC Panel would take account of the guidance provided by the Board but were not bound by it. The ADC Panel would then make a determination that was binding on the parties concerned. This document is therefore being prepared as the vehicle for providing the

guidance and the reasons for how the Board arrived at its position both to the parties and, if necessary, to the relevant ADC Panel.

- 5.4 The Board agreed that it should seek to provide guidance that meets with the delay attribution vision:

“For all parties to work together to achieve the prime objective of delay attribution – to accurately identify the prime cause of delay to train services for improvement purposes”

5.5 The Board would need to consider if, in providing guidance, an amendment to the Delay Attribution Guide should be proposed, to improve clarity.

6. Consideration of the Issues

6.1 The Board at its meeting on November 22nd, 2005 considered the request for guidance and took account of the following

- i). The paper submitted by First Group and Network Rail setting out the issues and their respective positions;
- ii). The wording in the Delay Attribution Guide;
- iii). The guidance previously given by the Board to Arriva Trains Wales/Wessex and Network Rail under DAB-2.
- iv). The ADRC determination in respect of reference ADP07
- v). The wording in the Franchised Passenger Template Track Access Agreement;

4. Guidance of the Board

4.1 The Board agreed unanimously that the identity of the entity or entities which own TOCs is not relevant to the interpretation of track access agreements, performance regimes or the Delay Attribution Guide. The parties to the contracts are the TOCs themselves, not their parent organisations. The rights and obligations, including the calibration of the performance regimes, therefore applies to each TOC individually.

4.2 The Board concluded that, although several different types of incident were described in the submission, nothing in the submission would justify it in issuing guidance which would be at variance with the ADP07 determination.

This guidance was approved by the Delay Attribution Board on 17 January 2006	John Rhodes (Chairman)
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Signature:	
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