

4.3.10

Extract From Access Dispute Resolution Committee

Determination No. AD39

(Hearing held at King's Cross on 5th October 2004)

7. In AD27, the Committee had looked at two instances of trespass, and had determined to which party those incidents should be allocated, by direct reference to the wordings of section 5 of Schedule 8 of the Track Access Agreement. The significance of the AD27 determination was that it established a simple principle, namely that until the trespass had been discovered there was no Delay Incident; only after its discovery was there a Delay Incident, which, because it was a matter "*originating from or affecting the Network*", fell logically to be allocated to the responsibility of Network Rail.

8. The Committee considered that AD27 had established a distinction that was of direct relevance to this case, namely that the (largely mechanistic) process that, in accordance with the terms of the Track Access Agreement, attributes an Incident that causes Delay to one or other of the contracting parties, is something totally different in kind from the discovery and attribution of the cause of that Incident. Attribution to the right contracting party is a function of the operation of Schedule 8 in relation to quantified Delays that have occurred, and as such is the proper province of the TRUST Delay Attribution Guide. Establishing possible chains of causality, relates, speculatively, to matters which may or may not have lead to Delay, and which are not therefore themselves Delay Incidents; as such they have no part in the operation of Schedule 8, nor are they within the province of the TRUST Delay Attribution Guide.

9. 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..

12. The Committee could see no logical circumstance where a Fire on a Train, however started, could be construed as anything other than a "*circumstance originating from or affecting rolling stock operated by or on behalf of the Train Operator (including its operation)*". Furthermore, and for the avoidance of doubt, given that the parties were agreed that there had not been any failures in the management of the aftermath of the fire that would warrant the creation of a second incident, all the 1,897 minutes of Delay noted above must also be allocated to the Fire on the Train.

13. The Committee therefore determined that responsibility, in relation to the operation of Schedule 8, for the 1,897 Minutes of Delay associated with the Fire on a Train at Colchester on 11th March 2003 should be allocated to First Great Eastern.