
ACCESS DISPUTE RESOLUTION COMMITTEE

Determination No. AD17

(Hearing at Kings Cross, 6th April 2000)

(to note that Reference AD18 was heard on 24th June 1999)

- 1 The Committee was asked by Northern Spirit (NS) Train Operating Company to rule that
 - 1.1 Railtrack should pay NS compensation in those circumstances where the Rules of the Route engineering allowances were greater than Allowances for Temporary Speed Restrictions within Schedule 4 Part B of the NS Track Access Agreement, and
 - 1.2 to give guidance as to how any such compensation should be calculated.
- 2 The Committee noted that the crux of the dispute related to the interpretation of Appendix 1, and associated note (xii), to Schedule 4 to NS's Track Access Agreement, in relation to
 - 2.1 the definitions of a Network Possession, and of a Possessions Allowance,
 - 2.2 those Temporary Speed Restrictions (TSRs) that fall within the scope of Network Possessions,
 - 2.3 the engineering allowances in respect of TSRs included within the applicable Rules of the Route, and
 - 2.4 the "Calculations in respect of Possessions" (paragraph 6 of Schedule 4).
- 3 Clause 6.3 of Schedule 4 defined that such disputes were, in the absence of agreement between the parties, to be referred to the Access Dispute Resolution Committee for resolution.
- 4 The Committee therefore considered the form of the Appendices to NS' Schedule 4, and, in particular, the words of note (xii) to Appendix 1, which state:

"The Allowances for Temporary Speed Restrictions indicate the extra journey time permitted due to speed restrictions enforced for the purpose of or in connection with inspection, renewal, repair, enhancement or other modifications to the Network or track. Railtrack shall not be liable to pay compensation if and to the extent that extra journey time caused by these Temporary Speed Restrictions do not exceed the relevant number of minutes specified in this Appendix. Where the allowances for the Temporary Speed Restrictions specified in the 1995/96 Rules of the Route exceed those shown in this Appendix, it is agreed that no compensation will be payable for the difference between the extra journey time permitted in the Rules of the Route over that permitted in this Schedule 4".

- 5 The Committee noted that NS's case was based on an interpretation of these words that
- 5.1 inclusion, within a timetable, of an engineering allowance over and above that specified in Appendix 1 should be treated, for purposes of calculating compensation under Schedule 4, as the equivalent of imposing a Temporary Speed Restriction;
 - 5.2 where the engineering allowances specified in the Rules of the Route exceed those shown in the Appendix, compensation would be payable for that difference in respect of every individual inclusion in the Timetable; and that
 - 5.3 such compensation should have been payable from 28th May 1998.
- 6 By contrast Railtrack's contention was that Schedule 4 as a whole meant that compensation only became payable in respect of trains affected by the imposition of actual Temporary Speed Restrictions. However, Railtrack also acknowledged that
- 6.1 payment had been made in respect of additional allowances for Sundays for periods during Winter 1996/7 and 1997/8, but that these were now considered to have been inappropriate; and that
 - 6.2 compensation should logically be payable, in defined circumstances where trains are affected by actual Temporary Speed Restrictions; to the extent required to compensate for the full value of any difference between the Rules of the Route engineering allowances, and those incorporated within Schedule 4. However,
 - 6.3 there was doubt as to the contractual basis by which compensation in such circumstances should be calculated.
- 7 In considering the merits of the cases presented by the parties, the Committee noted that it had previously considered a reference (AD18) relating to a comparable assertion that compensation should be paid, under Schedule 4, for the impact of including allowances in the Timetable. In that case the Committee had
- 7.1 determined that engineering allowances are not themselves to be understood as Network Possessions, but that
 - 7.2 the inclusion within a Schedule 4 of specific provisions regarding engineering allowances ought to be taken into account by the parties as a contractual obligation of import to the values for engineering allowances set in the Rules of the Route by the Access Condition D procedures.
- 8 The Committee did not perceive, in the arguments brought to this hearing, any reason why the particular features of the NS Track Access Agreement, should cause it to take a view of the NS Agreement, fundamentally different from that in AD18.
- 9 However, the Committee was concerned that this general assessment did not imply that Appendix 1, included in Schedule 4 by agreement of the parties, was without contractual force. Rather, the Committee saw that a tabulation of such allowances implied that, when Railtrack sought to reach agreement on the allowances in any Applicable Rules of the Route, then NS would be entitled, within the processes laid

- down in Access Condition D, to assert that the allowances in Rules of the Route should be aligned with those in Appendix 1.
- 10 In advancing this view the Committee stated that,
- 10.1 Access Condition D (D2.4) is a mechanism for achieving, through compensation, a workable consensus on all aspects of the Rules of the Route; it does not itself provide for the payment of any compensation.
- 10.2 to protect their interests, NS would be well advised, in making any response to the Rules of the Route, as required by Access Condition D2.4.3, should be prepared to challenge all those proposals for engineering allowances which exceed the Possessions Allowances set out in Appendix 1 to Schedule 4; it is not acceptable for a Train Operator to allow Railtrack to bring forward Rules of the Route revisions, unchallenged, in the expectation that any detriment can be re-couped through compensation;
- 10.3 If Railtrack, in its final notification of the Rules of the Route, does incorporate engineering allowances in excess of those provided for in Appendix 1 to NS' Schedule 4, then, in those circumstances where compensation is payable (i.e. where a TSR falling within the definition of a Network Possession is actually imposed), that compensation should be calculated by reference to the allowances in Appendix 1, rather than the values in the Rules of the Route.
- 11 In the circumstances of 10.3 above, there would need to be an additional calculation agreed and overlaid on the normal basis of calculation of compensation under Schedule 4; such a calculation would require the use of a notional "Corresponding Day", but the Committee were of the view that this was a reasonable course of action enabled by (c) within the definition of "Corresponding Day". The Committee considered that, as this would only occur where Railtrack perceived it to be to its overall advantage to incorporate greater allowances than those set out in Appendix 1, this was a reasonable direction to give; any other direction would imply that Railtrack was free to repudiate Appendix 1 without sanction.
- 12 Finally the Committee noted that neither party had exercised adequate control of its contractual interests; as a consequence they had each given the other party tacit grounds for false expectations; NS by not challenging the differences between R of R and Appendix 1 through the Access Condition D processes; and Railtrack by making payments in relation to Sunday services, which they subsequently believed were inappropriate. The Committee was of the view that there should not be any retrospective adjustment either to the Rules of the Route, or to any past Compensation payments made.
- 13 The Committee therefore determined that
- 13.1 No compensation under Schedule 4 of NS's Track Access Agreement is payable in respect merely of the inclusion in Timetables of Allowances for Temporary Speed Restrictions; such compensation is payable only in respect of trains directly affected by actual TSRs;

- 13.2 the inclusion within the NS Track Access Agreement of Appendix 1 does imply that the parties recognise, jointly, a contractual obligation in respect of the values for engineering allowances that might be set as a result of the Rules of the Route procedure;
- 13.3 in seeking agreement on the Rules of the Route for future timetables, in accordance with the provisions of Access Condition D, the parties will need to take explicit account of the contractual obligations set out in Appendix 1 of Schedule 4 of NS's Agreement. However, the operation of the Access Condition D procedures presumes that the Train Operator does take a pro-active role in asserting those rights that it wishes to protect;
- 13.4 to the extent that if, in future timetables, the agreed Rules of the Route engineering allowances, arrived at in accordance with the full provisions of Access Condition D, exceed those in Appendix 1, then, given that special feature of NS's Agreement, Railtrack, in any calculation of Schedule 4 compensation in respect of Railtrack Possessions (including TSRs) should take into account those differences over individual route sections; and
- 13.5 in respect of past timetables, any calculation of compensation in respect of trains directly affected by actual TSRs, where the Timetabled allowance exceeds the S4 contractual allowance, that calculation of compensation shall not be back-dated before 28th May 1998.

Bryan Driver,
Chairman,
Access Dispute Resolution Committee