
An ACCESS DISPUTES PANEL of the ACCESS DISPUTES COMMITTEE

Determination in respect of reference ADP39

(following a Hearing held at Central House, Euston on 8th July 2009)

The Panel

John Beer (First Capital Connect): elected representative for Franchised Passenger Class, Band 3

Nick Gibbons (DB Schenker): elected representative for Non-Passenger Class, Band 1

Carew Satchwell: appointed representative of Network Rail

Dave Walker (Southern): elected representative for Franchised Passenger Class, Band 3

Panel Chairman: **Sir Anthony Holland**

The Parties

for First Scotrail Ltd ("FSR")

Mike Price Contracts Advisor

Andy Miller Head of Performance

for Network Rail Infrastructure Ltd ("Network Rail")

Chris Hassall Acting Customer Relationship Executive (FSR)

Richard Wall Regulation Specialist

Brief Summary of Dispute, and the jurisdiction of the Panel

1. The Panel was asked, in a joint reference from First ScotRail Ltd. ("FSR") and Network Rail Infrastructure Ltd. ("Network Rail") to determine whether the delay affecting train 2Y46 (20:15 Glasgow Central to Edinburgh via Shotts) on Friday 13th April 2007 should be attributed to Network Rail or to the Train Operator.
2. On the evening in question 2Y46 had incurred 3 minutes of delay between Holytown Junction and Shotts, and a further three minutes between Shotts and Midcalder Junction. Network Rail had attributed the delay to the Train Operator, FSR. FSR had subsequently contested that attribution on the grounds that
 - 2.1. the driver of 2Y46 had subsequently reported that he had encountered fog, affecting visibility on those sections of route, that had caused him to reduce the speed of the train; and that therefore
 - 2.2. Network Rail, as the body controlling the Network which the fog was impairing, should be held responsible for the delay.
3. This contested attribution had been referred to the Delay Attribution Board ("DAB"). The DAB, in its Guidance no DAB-18, dated 19th May 2009, delivered following consideration at its meeting on 15th April 2009, had given its view that the delay to 2Y46 had properly been attributed to FSR. FSR did not accept this Guidance, which it considered to be "*contrary to*

the provisions in the relevant access agreement" (specifically the provisions of Schedule 8 of the template Passenger Track Access Contract, "the Performance Regime"). As entitled by the provisions Condition D2.4.4 of the Network Code, FSR had initiated a reference for Determination by an Access Disputes Panel. The joint submission of the Parties asks the Panel to determine: *"whether the DAB was correct in its allocation of the delay to First ScotRail in its guidance issued on the 19th May 2009 or whether the delay should be allocated to Network Rail.*

4. The Panel acknowledges its jurisdiction in this case. Network Code Part B provides for the parties, when they cannot agree an attribution to seek the guidance of the Delay Attribution Board, *"on the appropriate application of the Delay Attribution Guide"* (Condition B2.4.3), and then, if this guidance does not provide the parties with a basis for agreement, to *"refer the matter to the relevant ADRR Panel in accordance with the Access Dispute Resolution Rules"* (Condition D2.4.4).
5. The Panel noted that its function in disputes that have previously been the subject of guidance from the DAB is to act as the first dispute resolution body. As such it hears the arguments from the parties as if there had been no earlier guidance from the DAB; the DAB guidance may inform its deliberations, but, in the sense of ADR Rule A1.18, does not directly constitute a *"persuasive authority"*.
6. The parties were invited to state whether they wished this matter to be determined solely under the provisions of Network Code Condition B2.4.4, as stated in the joint submission, or whether they wished to pursue it also as a reference under Paragraph 16 of Schedule 8, so leaving open the avenue to appeal any determination of this Panel by reference to Arbitration. The parties replied that they wished any determination of this Panel to be the final conclusion to the specifics of this case.

Some preliminary issues of definition; the relevant contractual provisions

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

7.1. Access Dispute Resolution Rules

"Precedent

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

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

"Determinations and Remedies

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

7.2. Network Code Part B:

"Delay Attribution Guide " means, subject to Condition A.1(g), the document which provides guidance on the attribution of delay across the Network, entitled *"Delay Attribution Guide"* as issued by Railtrack PLC (in railway

administration) on 1st September 2002” [this provision was first incorporated into the Network Code on 18th June 2003]

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

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

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

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

- (a) ;
- (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) and
- (e) *information and guidance set out in the Delay Attribution Guide.”*

7.3. Schedule 8 provisions:

“5 Allocation of responsibility for Minutes Delay and Cancelled Stops

5.1 Assessment of incidents causing Minutes Delay and Cancelled Stops

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

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

....

5.2. Network Rail responsibility incidents

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

- (a) *breach by Network Rail of any of its obligations under this contract; or*
- (b) *(whether or not Network Rail is at fault) by circumstances within the control of Network Rail in its capacity as operator of the Network; or*
- (c) *(whether or not Network Rail is at fault) by any act, omission or circumstance originating from or affecting the Network (including its operation), including, subject to paragraph 5.3(b)(i), any incident in connection with rolling stock on the Network for*

which any train operator other than the Train Operator would be allocated responsibility if it were the Train Operator under this contract."

5.3. Train Operator responsibility incidents

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

(a) is caused wholly or mainly:

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

(b)...."

The Rule Book, Module TW, Train Working GER/T8000, Paragraph 14

"Reducing speed in poor visibility

The person responsible: Driver

You must reduce the speed of your train as you consider necessary, if you cannot see the signals at the normal distance during

- fog*
- falling snow, or*
- any other poor visibility.*

You must not exceed 40 mph during fog or falling snow on a line where AWS is not provided on the line of route, or is not in use on the train".

Professional Driving Policy (First ScotRail); Seasonal Issues

"p 29 Fog/Falling Snow

*When the sighting of signals or speed restriction indicators is being impeded by fog or falling snow, you should **reduce** the speed of your train as necessary.*

- Remember, visibility of your normal "landmarks" will be impaired possibly leading to you becoming disorientated;*
-"*

"p.27 Low Adhesion Driving

- ...*

- *Do not run the risk of failing to stop at a signal or overrunning a platform or other required stopping point, even if it means increasing the running times;*
- ...”

The Panel’s findings in respect of facts

8. Train 2Y46 is scheduled to run the 23 miles between Holytown Junction and Midcalder Junction in 40 minutes (passing time at Holytown Junction) and 21:20 (passing time at Midcalder Junction), including 9 intermediate station stops.
9. On Friday 13th April 2007 2Y46 incurred two separate delays of three minutes between these monitoring points. These delays were initially attributed to the Train Operator, as *“Lost time in running”*.
10. On 16th April the attribution was disputed by FSR; *“Incorrect Manager Code; Driver reports running on reduced speed in this section due to exceptionally bad fog”*.
11. No report of fog made by any other member of FSR or Network Rail staff was put before the Panel. However, the Parties were in agreement that the FSR driver’s report should, in this case, be taken as persuasive evidence of the occurrence of sufficient fog to impair his visibility.
12. On Friday 13th April train 2Y65 (20:24 Edinburgh to Glasgow Central via Shotts) passed Midcalder Junction at 20:51, and Holytown Junction at 21:33. This train did not incur attributable delays between these monitoring points.
13. The line between Holytown Junction and Midcalder Junction is signalled using colour light signals (a combination of three and two aspect) and is equipped with AWS and TPWS, i.e. the signalling arrangements are such that the Rule Book does not prescribe, or require, they be supplemented (for example by the deployment of fog-signalmen) in order to maintain safe working of trains during times of fog or falling snow.
14. The Parties are agreed that the signalling arrangements on the line in question were working normally at the time of the disputed delays.
15. The DAB, at the conclusion of its Guidance note had recognised that *“...the DAG currently offers no specific guidance for the attribution of such incidents”*.
16. The Parties agreed that the action of the FSR driver, in responding to his perception of reduced visibility by slowing his train, was the appropriate response to assure safe operation of the railway. The Parties did not agree, however, on the allocation of any resultant delay.

The Contentions of the Parties

17. The Panel considered that the contrasting assertions of the Parties could be summarised as follows.
18. For FSR:
 - 18.1. the delay resulted from the fact that the driver slowed the train;
 - 18.2. the driver slowed the train because he encountered fog, and the Rule Book, and the complementary (FSR) Professional Driving Policy, require that the speed of the train should be reduced in such a case;
 - 18.3. the occurrence of fog is therefore, because of the requirements of the Rule Book, potentially going to result in delay to trains;

- 18.4. the occurrence of fog is not within the control or responsibility of the Train Operator; and therefore
- 18.5. the resultant delay should be attributed to the responsibility of Network Rail.
- 19. For Network Rail:
 - 19.1. the Network in the area where the delay was incurred was in sound working order as regards the signalling equipment; as such *"the operation of the Network was unaffected"*.
 - 19.2. the signalling equipment provided was such as to give drivers the best opportunity to observe signals and assure safety in the event of fog; and
 - 19.3. Network Rail acknowledges its role in ensuring that there is compliance with Railway Group Standards, of which the Rule Book is one; however, this does not mean or imply that Network Rail is in control of the manner in which individual Train Operators interpret or apply that standard; *"Acknowledging that the Rule Book is a Railway Group Standard published by RSSB, this does not mean that any delay brought about as a result of complying with any aspect of the Rule Book is within the control of Network Rail."*;
 - 19.4. the Delay Attribution process is primarily about allocating delay on a straightforward "us or them" basis, on the basis of the immediately relevant observed facts; it is not a process about establishing detailed chains of causality for specific incidents;
 - 19.5. in this case there were no delays other than as a result of the train speed being reduced, and this speed reduction was at the initiative of the driver of 2Y46; and therefore
 - 19.6. the delays had been properly attributed to FSR;
 - 19.7. the Delay Attribution Board, in its guidance note DAB-18, had also taken the view that this was the correct attribution for these delays, even though the specific circumstances were not contemplated in the codes within the Delay Attribution Guide ("DAG").

The Panel's findings in respect of entitlements

- 20. The Panel reminded itself that the practical function of the DAG is provide criteria by which to judge circumstances in which delay has occurred, and to make a pragmatic attribution of responsibility, for the purposes of furnishing the data necessary to calculate the sums payable, in this case, under the Passenger Schedule 8 Performance Regime. On the other hand, however useful the guidance given, where the DAG does not contemplate the circumstances of a case then the correct attribution has to be based upon an assessment of how the specific circumstances in question align with the three different categories of defined contractual responsibility in Schedule 8:
 - 20.1. *"Network Rail responsibility incidents"* (Schedule 8 paragraph 5.2);
 - 20.2. *"Train Operator responsibility incidents"* (Schedule 8 paragraph 5.3); or
 - 20.3. *"Joint responsibility incidents"* (Schedule 8 paragraph 5.4).
- 21. The Panel acknowledged that in this case neither FSR nor Network Rail had sought to apply paragraph 5.4 and so, Schedule 8 admitting of no other options, the issue in question is which of paragraph 5.2 or 5.3 properly applies. In the absence of an appropriate code in the DAG, the Panel must decide the allocation on the basis of all relevant available information.


22. The Panel reminded itself further that considerations of the avoidance of delay were secondary to considerations of safety. In this context
- 22.1. the signalling equipment's primary function is to assure a safe separation of trains, and
 - 22.2. the driver's primary responsibility is to ensure that his or her train is controlled in a way which does not result in the safe separation of trains being compromised, for example as a result of a SPAD;
 - 22.3. the Panel noted that this primacy of safety over possible train delays was explicitly recognised elsewhere in the FSR Professional Driving Policy. *"Do not run the risk of failing to stop at a signal or overrunning a platform or other required stopping point, even if it means increasing the running times."*
23. As regards the decision as to whether the delays in question should be considered Network Rail or Train Operator responsibility incidents, the Panel found that
- 23.1. Schedule 8 is, in many respects, a crude process that does not generally recognise third party or "act of God" responsibility for delay, and offers only very limited scope for shared responsibility;
 - 23.2. the drafting of paragraphs 5.2 and 5.3 envisages attribution as being based on causes that are *"wholly or mainly"* within the control of the Train Operator or Network Rail regardless of whether the party is at fault. It is therefore not necessary for a party to be able entirely to control the circumstances giving rise to a delay to still be responsible within the scope of Schedule 8;
 - 23.3. the duty that is imposed upon the driver by the Rule Book in the event of fog is not to reduce speed; it is rather a duty to make a judgement in the circumstance *"if you cannot see the signals at the normal distance during... fog"* and then to make the consequential judgement as to whether, or by how much, to reduce the speed of the train (*"You must reduce the speed of your train as **you consider necessary** [emphasis added] if you cannot see the signals at the normal distance during fog"*);
 - 23.4. the FSR Professional Driving Policy expresses the same idea in a similar way (*"When the sighting of signals or speed restriction indicators is being impeded by fog or falling snow, you should **reduce** the speed of your train as **necessary** [emphasis added]"*): the driver is accountable for assessing the situation, and making the appropriate "necessary" response, on the basis of his professional competence.
 - 23.5. in one instance the Rule Book does prescribe a specific response that does not require the driver to exercise his judgement (*"You must not exceed 40 mph during fog or falling snow on a line where AWS is not provided on the line of route, or is not in use on the train"*): this is not applicable to the circumstances of this case;
 - 23.6. the responsibility for ensuring that all Train Operators work to a common set of Rules, aimed at achieving consistent safe outcomes, lies with Network Rail. However
 - 23.7. the responsibility for translating the achievement of those outcomes, insofar as they impact upon the ways in which trains are driven, is a matter for the Train Operator, which bears the responsibility for assuring that its employees (in this case its drivers) are trained, supervised, and maintained to the necessary level of professional competence to meet its obligations to Network Rail;
 - 23.8. if that larger responsibility for the professional competence of its drivers lies with the Train Operator, it must follow that, if the proper discharge of that professional competence results in a train delay, then that delay is inevitably within *"the control of*

the Train Operator in its capacity as an operator of trains", and therefore the attribution of the delay has to be to the Train Operator, in accordance with Passenger Schedule 8 paragraph 5.3.

- 23.9. by contrast, Network Rail has no control over the nature or quality of the judgements to be made by the driver, either on the day or in the formation of the relevant professional competence. Furthermore, in this instance, Network Rail has not failed in any respect in the normal operation of the Network that would justify these delays being attributed to *"circumstances within the control of Network Rail in its capacity as operator of the Network"*. It would therefore be quite wrong to designate these delays *"Network Rail responsibility incidents"*.

The Panel's Determination:

- 24. The Panel therefore determines that the delays incurred by 2Y46 on Friday 13th April 2007 should be deemed *"Train Operator responsibility incidents"* falling within the scope of paragraph 5.3 of Schedule 8.**
25. The Panel considers that there would be advantage to the industry were the DAB to propose amendments to the DAG addressing such circumstances.
26. In relation to Access Dispute Resolution Rule A1.72(l), the Panel notes the answer given by the Parties at paragraph 6 of this determination, and therefore considers that the provisions of Network Code Condition B2.4.4 do not contemplate that either party has any right to contest the findings of this Panel with any other body.
27. The Panel has complied with the requirements of Rule A1.72, and is satisfied that the determination, in all the circumstances set out above, is legally sound, and appropriate in form.



Sir Anthony Holland
Panel Chairman

15th July 2009