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## **An ACCESS DISPUTES PANEL of the ACCESS DISPUTES COMMITTEE**

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### **Determination in respect of reference ADP50**

*(following a Hearing held at 1 Eversholt Street, Euston on 24<sup>th</sup> March 2010)*

#### **The Panel**

<b>John Boon:</b>	appointed representative of Network Rail
<b>John Beer</b>	(First Capital Connect): elected representative for Franchised Passenger Class, Band 3
<b>Tony Deighan</b>	(Eurostar): elected representative for Non-Franchised Passenger Class
<b>Ian Kapur</b>	(GB Railfreight): elected representative for Non-Passenger Class, Band 2

#### **Plaintiffs:**

##### **For Rail Express Systems Ltd ("RES")**

<b>Nigel Oatway</b>	Access Manager
<b>Stewart Smith</b>	Industry Contracts Manager
<b>Mark Coyle</b>	Business Manager
<b>Paul Gold</b>	Senior Solicitor
<b>Elizabeth Stonebank</b>	Legal Services

##### **For London Underground Ltd ("LUL")**

<b>Sarah Schütte</b>	Senior Associate Solicitor
<b>Stacey McManus</b>	Group Station Manager, Wembley Central
<b>Jonathan Morris</b>	Disputes Team Leader, Legal Services
<b>Jack Chao</b>	Trainee Solicitor

#### **Interested Party in attendance:**

##### **For Southern Railway Ltd ("Southern")**

<b>Caroline Jarvis</b>	Head of Franchise & Access Contracts
<b>Clare Smith</b>	Access Assistant

**Panel Chairman: Sir Anthony Holland**

#### **Brief Summary of Dispute, and the jurisdiction of the Panel**

1. The Panel was asked, in separate references from Rail Express Systems Ltd ("RES") and London Underground Ltd ("LUL") to determine certain questions as to the Rights of the parties in relation to access to Wembley Central Station for the purpose of operating Charter services to bring spectators to, and away from, the Carling Cup Final on 28<sup>th</sup> February 2010.
  - 1.1. LUL is the Station Facility Owner ("SFO") for Wembley Central;
  - 1.2. LUL (as SFO), and RES (as "Beneficiary") have a Charter Station Access Agreement (Access by Charter Train Operator for the provision of Non-Regular Passenger

- Services) ("CSAA") reference SAA/59/28/M/07/01 and dated 8<sup>th</sup> November 2007, under which RES can obtain Permission to Use for 13 stations, including Wembley Central;
- 1.3. RES had made initial contact with LUL regarding the possible operation of 2 all-booked dining charter trains from Manchester before and after the Carling Cup Final on 28<sup>th</sup> February 2010. This initial approach was made on 19<sup>th</sup> January (the day that Manchester United beat Manchester City in the Semi-final) followed by a telephone conference (20<sup>th</sup> January), and a meeting on 29<sup>th</sup> January at which LUL declined to confirm the access sought, pending the supply by RES of further information LUL considered necessary.
  - 1.4. On 3<sup>rd</sup> February RES advised the ADC Secretary that it wished to raise a formal dispute with LUL concerning LUL's failure to grant the Permission to Use in accordance with the terms of the CSAA, as a consequence of which the opportunity to operate the proposed trains had been lost.
  - 1.5. The ADC Secretary subsequently notified LUL of the dispute on 5<sup>th</sup> February. LUL contends that this was the first intimation that it had had that the Permission to Use was no longer to be sought.
2. The parties had originally been offered the chance to have this dispute heard at a Panel convened for 4<sup>th</sup> March 2010; however,
    - 2.1. the parties had continued with discussions of certain matters of principle, with the aspiration of reaching some form of common ground; in consequence,
    - 2.2. LUL contended that it was inappropriate to bring the matter to a formal hearing, because
      - 2.2.1. there was still the prospect of the parties reaching a formal agreement, and
      - 2.2.2. as RES had withdrawn its request in advance of LUL giving any final decision, there was no disputed matter that lay within the jurisdiction of the ADR Rules.
    - 2.3. RES maintained that the matter should properly be *"referred to an Access Disputes Panel...for determination in accordance with Condition H5 of the Station Access Conditions incorporated into the Charter Station Access Agreement between the parties as approved by the office of Rail Regulation, reference SAA/59/28/M/07/01 and dated 8<sup>th</sup> November 2007.."*
  3. The Panel was asked
    - 3.1. by RES, in its submission dated 9<sup>th</sup> March to **determine**
      - (a) ***"Whether LUL is within its rights in failing to provide the Common Station Services listed in the Annexes, in respect of staff to manage access to and from the station platforms, and to provide passenger assistance during boarding and alighting.***
      - (b) ***Whether LUL has acted reasonably in accordance with the agreement in denying access to RES for its Charter passenger train services on the basis that it has rejected RES's arrangements for the management of its passengers in areas that are outside the Station lease and not subject to its jurisdiction.***
      - (c) ***Whether it is reasonable, pursuant to the agreement, for LUL to require RES to provide management of the means of access to and from the Slow Line platforms at the Station; and***

- (d) *Whether LUL has acted reasonably in declining to accept RES's arrangements for the management of its passengers proposed at the meeting on 29<sup>th</sup> January 2010*"
- 3.2. by LUL, initially in its submission, but with more emphasis in its formal opening statement to the Panel, to note its views that:
- (e) *"This Referral is unnecessary. The parties were in the middle of discussions about how they could make the Access Request work when RES unilaterally withdrew and issued the Referral.*
  - (f) *The issues are not complicated and do not require a hearing. All that is needed is to agree what information is able to be supplied to LUL so that LUL can be satisfied that suitable arrangements will be in place and to ensure safety of operation.*
  - (g) *Arrangements for the plaza are relevant. Significant numbers of people will use routes to and from the station via the adjoining plaza so the crowd control arrangements to be made there are relevant to LUL. The fact that LUL has no jurisdiction over the plaza does not mean that it should not be concerned about any arrangements made with the lessee (St Modwen) or the owner (Network Rail). Given the station layout and the station operation on event days, the interface between the areas for which LUL is and is not, responsible must be considered. Access requests cannot be considered without reference to what will actually happen on the day.*
  - (h) *RES has made no proposals as to how to manage its customers. The offer to provide one steward was vague, was prompted by LUL's request and there had been no explanation why RES assessed one as the appropriate number.*
  - (i) *RES did not have confirmed times on 28 February from Network Rail for the proposed train. That is a reasonable and relevant factor to an Access request.*
  - (j) *The despatch of trains is the TOCs' responsibility. LUL has a duty to provide common station services but does not despatch trains for other TOCs on competence grounds – by agreement TOCs provide their own staff to despatch trains and LUL staff attend the platforms to assist. The same applies at other stations. As part of past access requests, RES has agreed to do its own train despatch and has re-confirmed again in discussions about the checklist.*
- 3.3. and therefore LUL asks the Panel to determine that
- (k) *There is no "dispute" or "claim", because the Access Request was withdrawn, and*
  - (l) *There was no "decision" about which to complain; and*
  - (m) *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. Schedule 3 of the Access Agreement and the Order already set out the information required and the timescale for decision-making.*
4. The Panel Chairman noted the points made by LUL in respect of jurisdiction, and noted that LUL had interleaved its arguments on jurisdiction with arguments on the merits of RES' representations. The Chairman considered that

- 4.1. whilst LUL had doubts as to the existence of a dispute, there was no ambiguity in the mind of RES that it had been disadvantaged because of the way in which LUL had understood its obligations under the CSAA;
  - 4.2. the granting, or withholding of the Permission to Use the Station was of the essence of the CSAA, and has logically to be assessed by reference to the entitlement of each party to expect that the other behave in the manner that the CSAA prescribes, taking into account the commercial objectives that the agreement is intended to enable;
  - 4.3. where one party is asserting that the other has not behaved in the way that complies with the contract, there is reason for treating this as *"a dispute or claim arising out of or in connection with these Station Access Conditions or a Relevant Agreement [which] shall be resolved by the Industry Committee (save where the parties agree to submit the dispute to mediation instead)..."* [NSAC Condition H5]. This approach is of assistance where the contract in question is either ambiguous or appears, on the face of it, not to meet the needs of a particular situation;
  - 4.4. the parties have not agreed on mediation; and
  - 4.5. the Panel is not precluded, upon completion of its deliberations, from determining that either there is no valid ground for alleging a dispute, or from finding that the matter lies outwith its competence. It would however, on the basis of the representations made by both parties, be premature and inappropriate to reach such a conclusion in advance of a full consideration of all the argued merits of the case; and therefore
  - 4.6. the Panel should act on the basis that it has the jurisdiction to consider and determine the case unless or until it is apparent that it has not.
5. The Panel noted that
- 5.1. the approach in respect of jurisdiction laid down by the Chairman appeared to be acceptable to LUL who had the opportunity to consider the matter at a brief recess after both parties had made their opening submissions; and
  - 5.2. Southern was present as *"a party that is likely to be materially affected by the outcome of the reference"* [sub-paragraph (c) of Definition of *"Dispute Party"* in ADR Rules].

### **The Evidence laid before the Panel**

6. The Panel confirmed that, in accordance with the duties and procedures laid down in Access Dispute Resolution Rules Part A (*"The Function and Operation of Panels"*), it had reviewed and considered the following items.
- 6.1. *"RES reference to Access Disputes Panel"* (dated 09/03/10) reference ADP 50, and incorporating
    - Appendix 1: Charter Station Access Agreement ("CSAA") ORR Reference SAA/59/28/M/07/01, dated 08/11/07;
    - Appendix 2: Station Access Conditions;
    - Appendix 3: e-mails dated 10/12/09 (initial approach to LUL for access in 2010), 06/01/10 (reminder), and 19/01/10 (specific request for access for 28/02/10);
    - Appendix 4: personal notes of meeting between RES and LUL on 29/01/10 (prepared and dated 1st February 2010);

- Appendix 5: Relevant correspondence between the parties and personal notes of meeting between RES and LUL on 24/02/10;
  - Appendix 6: Photographs of the exterior of Wembley Central Station, showing the entrances to the slow line platforms;
- 6.2. LUL's reply to RES' reference; *"In the matter of a referral by Rail Express Systems Ltd to the Access Disputes Committee regarding a request for access to Wembley Central Station on 28/02/10: LUL's submission as directed by the Access Disputes Committee on 02/03/10"* (dated 16/03/10) with Appendices:
- Appendix A: Part A of ADR Rules *"The Function and Operation of Panels"*
  - Appendix 2A: LUL plan showing Station Lease area (dated 3/9/07);
  - Appendix 2B: Photograph of station front as of June 2009 (dated 6/09);
  - Appendix 2C: Photographs of station and immediate vicinity on Carling Cup Final day (dated 28/02/10);
  - Appendices 2D – 2I: Photographs (dated 02/03/10) showing
    - (D) entrance to event bridge ;
    - (E) event bridge;
    - (F) inside of event bridge;
    - (G) entrance to platforms 6 & 7;
    - (H) entrance to platforms 4 & 5;
    - (I) entrance to platforms 1-3 and station booking hall.

*LUL – DBS correspondence regarding access at Wembley Central Station*

- Appendix 3: e-mails between DBS and LUL (19/01/10 – 20/01/10);
- Appendix 4: presentation given by LUL to DBS: Charter Train Service Review (dated 29/01/10);
- Appendix 5A: e-mails between LUL and DBS (dated 09/03/10);
- Appendix 5B: e-mail between LUL and DBS (dated 09/03/10) covering exemplar "Contingency Plan for events in the vicinity of Wembley Central Station (version 1: issue date 14/08/09);

*Access Disputes Committee correspondence*

- Appendix 6: Letter from DBS to Access Disputes Committee (dated 03/02/10);
- Appendix 7A: Letter by e-mail from Access Disputes Committee to LUL (dated 05/02/10);
- Appendix 7B: Letter by e-mail from Access Disputes Committee to RES and LUL (dated 05/02/10);
- Appendix 8: e-mail from Access Disputes Committee to RES and LUL (dated 23/02/10);
- Appendix 9: Letter by e-mail from Access Disputes Committee to RES and LUL (dated 02/03/10);

- Appendix 10: e-mails between Access Disputes Committee, LUL and RES (dated 09/03/10 – 15/03/10)
- 6.3. *"Rail Express Systems Limited's ("RES") Opening Remarks at Access Disputes Panel (Adp50) on Wednesday 24 March 2010".*
  - 6.4. *"LUL's Opening Submission as directed by the Access Disputes Committee on 17/03/10"*
  - 6.5. The questions posed by Panel Chairman and Members and the responses given.
  - 6.6. The Panel had requested that LUL bring to the hearing the Safety Certificate and Risk Assessment for Wembley Central Station, so that it could be consulted, if, in the course of the hearing this appeared appropriate: LUL had brought these documents in electronic form. In the event, the Panel did not find it necessary to consult these documents.

### **Some preliminary issues of definition; the relevant contractual provisions**

7. The Panel's attention was drawn to the following definitions, contractual provisions, and precedents 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;*
- b) be bound by any relevant decision of any superior tribunal..."*

##### ***"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. Definitions**

<i>"Exclusive Station Services"</i>	<i>Means any services specified in paragraph 9 of Appendix 1 to Schedule 3 (Call off Specimen Order) by the Beneficiary or the Station Facility Owner in advance of the beneficiary using the Station" [CSAA Section 1 "Interpretation"</i>
<i>"conflict"</i>	<i>"In the event of any conflict of interpretation between this code and an Access Agreement (not including this code) the following order of precedence shall apply: (1) this code; and (2) the Access Agreement" Network Code Part A1.1 (h)</i>
<i>"Non-Regular Passenger Services"</i>	<i>"means a service: (a) which is not listed in the Great Britain Passenger Railway Timetable; or (b) for which the fare is not a permanent Fare or a Temporary Promotional Fare fore the purposes of the Ticketing and</i>

	Settlement Agreement, and includes the Royal Train and Third Party Passenger Services. [CSAA Section 1 "Interpretation"]
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### **7.3. Extracts from CSAA**

#### **"3 PERMISSION TO USE THE STATION**

- 3.1 *The Station Facility Owner hereby grants the Beneficiary and its Associates permission to use the Station in connection with the provision of Non-Regular Passenger Services.*
- 3.2 *In consideration of the permission granted to the Beneficiary and its associates by the Station Facility Owner in clause 3.1 and the performance by the Station Facility Owner of its other obligations under this Agreement in relation to the Station, the Beneficiary shall pay the Access Charge in accordance with Clause 7 and, to the extent that it is applicable, Part F of the Station Access Conditions.*
- 3.3 *Where the Beneficiary requires permission to use the station in respect of any period or occasion the Beneficiary and the Station Facility Owner shall comply with the provisions of Schedule 3."*

#### **"4 STATION ACCESS CONDITIONS**

- 4.1 *Except as provided for in Clause 7.10, the Station Access Conditions are incorporated in and shall form part of this Agreement in relation to the Station.*
- 4.2 *Except where the Office of Rail Regulation shall have directed otherwise in the exercise of its powers under the Act, the Station Facility Owner shall ensure that the Beneficiary agrees to comply with the Station Access Conditions.*
- 4.3 *During the term of this Agreement, each of the parties shall duly and punctually perform, observe and comply with its obligations in relation to the Station set out in the Station Access Conditions as incorporated in the Agreement under Clause 4.1."*

#### **"7 CHARGES FOR PERMISSION TO USE THE STATION**

- 7.1 *The Access Charge for the Station shall, in respect of an Accounting Year, be the aggregate of the following:*
  - (a) *an Annual Charge (if any);*
  - (b) *the Per Station Visit Charge (if any); and*
  - (c) *any Exclusive Charge.*
- 7.2 *The Beneficiary shall, not later than 60 days prior to the commencement of an Accounting Year (except in relation to the First Year) notify the Station Facility Owner of the estimate of the number of occasions upon which the permission to use will be exercised and so far as it is able to do so in advance, the Exclusive Station Services the Beneficiary requires in relation to the Station for that Accounting Year.*
- 7.3 *The Station Facility Owner shall, not later than 30 days after receipt of such notification, notify the Beneficiary of the Annual Charge (if any), the Per Station Visit Charge (if any) and any Exclusive Charge which the Station Facility Owner is at that time able to identify for that Accounting Year.*

- 7.4 The notice referred to in Clause 7.3 shall include a breakdown of the proposed Annual Charge, Per Station Visit Charge and the Exclusive Charge in sufficient detail to enable the Beneficiary to make a proper assessment of the charges proposed, the method of their calculation and the costs of the amenities and services in question.
- 7.5 The Station Facility Owner shall provide the Beneficiary with such further information and/or clarification relating to the amounts notified to the Beneficiary under Clause 7.4 as the Beneficiary may from time to time reasonably request, promptly upon receipt of any such request.
- 7.6 The parties shall negotiate in good faith with a view to reaching agreement on any necessary amendments to paragraphs (1), (2) and (3) of Schedule 4 and if agreement has not been reached within 30 days after notice has been received under Clause 7.3, either party may refer the matter for final and binding determination by an arbitrator acting accordance with the relevant provisions of the Access Dispute Resolution Rules. The arbitrator appointed in accordance with this Clause 7.6 shall determine the Access Charge for the Accounting Year on a fair and equitable basis having regard primarily to the matters as respects which duties are imposed on the Office of Rail Regulation by section 4 of the Act and subject to any advice the Office of Rail Regulation may from time to time give to the arbitrator.
- 7.7 The Station Facility Owner and the Beneficiary shall notify the Office of Rail Regulation within 14 days of any amendments to the Access Charge are agreed by them or determined by an arbitrator pursuant to Clause 7.6.
- 7.8 The notice to the Office of Rail Regulation referred to in Clause 7.7 shall contain sufficient details of the amendments to the Access Charge to enable the Office of Rail Regulation to make a proper assessment of the new proposed charges, the method of their calculation and the costs of the amenities and services in question.
- 7.9 The parties shall provide the Office of Rail Regulation with such further information and/or clarification relating to the new proposed charges as the Office of Rail Regulation may reasonably request, promptly upon receipt of any such request.
- 7.10 Part F of the Station Access Conditions is not incorporated in this Agreement.
- 7.11 Where the parties have agreed an Annual Charge, the Beneficiary shall pay the Annual Charge, in respect of the First Year, within 30 days of such agreement, and prior to the commencement of each subsequent Accounting Year.
- 7.12 After each station visit made pursuant to this Agreement, or at such intervals as may otherwise be agreed by the parties from time to time (the Agreed Period) the Station Facility Owner shall invoice the Beneficiary for the Per Station Visit Charge (if any) and any Exclusive Charge relating to that visit, or which have accrued during the Agreed Period such invoice being sent by electronic or facsimile transmission (with confirmation copy by prepaid first class post to the address for service of the recipient set out in Schedule 2), and the Beneficiary shall pay the amount payable under such an invoice within 28 days of the receipt of it.
- 7.13 All amounts payable under this Clause 7 shall, except as may otherwise be agreed by the parties from time to time, be paid by direct debit mandate or standing order mandate to such bank account in the United Kingdom as may be nominated by the Station Facility Owner of Beneficiary (as appropriate) from time to time."



## **SCHEDULE 3**

### **CALL-OFF PROCEDURE**

#### **1. CALL-OFF ARRANGEMENTS**

1.1 In respect of any period or occasion in which the Beneficiary wished to exercise its permission to use a Station, unless otherwise agreed between the parties from time to time, the Beneficiary shall inform the Station Facility Owner of its requirements for access and Exclusive Station Services by sending an order substantially in the form of the Appendix to this Schedule to the Station Facility Owner at least one month in advance of the date when the permission to use will be exercised (in each case, an **Order**).

1.2 The Station Facility Owner shall accept an Order sent in accordance with paragraph 1.1 above by counter-signing it, specifying any additional Exclusive Station Services which it identifies will be required by the Beneficiary for that access, specifying the cost for those Exclusive Station Services which have not been agreed under Clause 7 of this Agreement and returning it by facsimile as soon as practicable and in any event within five days of receipt except where, and to the extent that, the Station Facility Owner shall reasonably determine that it is unable to do so.

1.3 The Beneficiary shall be deemed to have accepted the specification by the Station Facility Owner for additional Exclusive Station Services and the cost of Exclusive Station Services not agreed under Clause 7 of this Agreement unless it contacts the Station Facility Owner prior to the access being sought and negotiates and comes to agreement with the Station Facility Owner as to the Exclusive Station Services, and the cost thereof, for that access.

1.4 The Station Facility Owner shall accommodate any Order sent on less than one month's notice, except where, and to the extent that, the Station Facility Owner shall reasonably determine that it is unable to do so.

1.5 Where the Station Facility Owner refuses any Order or other request it shall do so by returning it to the Beneficiary as soon as reasonably practicable together with written notice of its grounds of refusal.

#### **2 TELEPHONE ORDERS**

The Station Facility Owner shall use reasonable endeavours to accommodate any telephone order from the Beneficiary for the provision of access, except where, and to the extent that, the Station Facility Owner shall reasonably determine that it is unable to do so, provided that any such requests shall be made by the Beneficiary's duly authorised representative and confirmed by an Order as soon as reasonably practicable thereafter.

#### **3. BENEFICIARY'S OBLIGATIONS**

The Beneficiary shall ensure that correct details and projections of use of the Station are included in the appropriate Order."

### **"APPENDIX TO SCHEDULE 3**

#### **Call-off Specimen Order**

Request to use station(s) pursuant to Clause 3.3 of the Charter Station Access Agreement between the parties specified at paragraph 2 and 3 below.

1. Station(s) and ORR Station Annex Reference(s):

2. *Station Facility Owner:*
3. *Beneficiary:*
4. *Access Requirements:*
5. *Date(s) of operation:*
6. *Term:*
7. *Type of Vehicles:*
8. *Access Specifications:*

*[Details of train length, train formation, duration of train service, and other details which would reasonably be required by the Station Facility Owner]*

9. *Exclusive Station Services:*

#### **Details of relevant services**

*The Station Facility Owner shall in connection with the permission to use the Station granted by it under Clause 3 during the term of this Agreement in relation to the Station, or during any applicable Exclusive Period, use all reasonable endeavours to ensure that the Exclusive Station Services are provided in accordance with the specification set out in this Call-off Order and, if any changes have been made to them by agreement, their standard and quantum after such changes have been made."*

#### **The Panel's findings in respect of facts**

8. The Panel found that
  - 8.1. Prior to the reconstruction of the National Stadium, charter trains in connection with football events had been operated on a regular basis.
  - 8.2. RES had operated special trains to/from Wembley Central on 19<sup>th</sup> April 2009 (FA Cup Semi-final Manchester United vs Everton: decided only after extra time and penalties). A combination of factors (redevelopment works on the Network Rail/ St. Modwen site, the late finish to the match, requiring last minute re-scheduling, and passenger numbers (500 + on first train and 250 on second) had caused practical problems for LUL.
  - 8.3. RES and LUL had agreed arrangements for the operation of a further Charter train to Wembley Central to convey supporters from the Newcastle for the FA Vase Final between Whitley Bay and Glossop North End on Sunday 10<sup>th</sup> May 2009. In the light of the perceived problems on 19<sup>th</sup> April it had been agreed between LUL, RES and BTP at a meeting on 6<sup>th</sup> May 2009, that RES, would:
    - 8.3.1. provide a Team Leader/Coordinator at Wembley Central who would be briefed by LUL; and
    - 8.3.2. issue an information leaflet to its passengers containing a map and instructions for returning to the station post event.

On the day, other circumstances meant that the train could not get to Wembley but worked in and out of King's Cross.

- 8.4. RES had operated other Charters to Wembley Stadium station (operated by Chiltern Railways) but on 10<sup>th</sup> December 2009 Stewart Smith of RES e-mailed Stacey McManus of LUL stating *"Unfortunately Stadium Station has limited capacity when compared with Central, and we continue to receive requests from our customers to arrange charters calling at Central. ... Now that the station frontage works seem to be complete is it safe to assume that there is now a sufficient holding area for Charter passengers, and that you can accept our passengers?"*
- 8.5. On 6<sup>th</sup> January Stewart Smith e-mailed again *"Have you had a chance yet to review my request?"*
- 8.6. On 19<sup>th</sup> January Becky Wesley of RES had e-mailed Stacey McManus LUL in response to an enquiry from a prospective client seeking to operate two 250 seat VIP dining car trains to Wembley for the Carling Cup Final. The potential client had stressed that only trains calling at Wembley Central would be acceptable. Following a telephone conversation on 20<sup>th</sup> January a meeting was held at LUL premises at Wembley on 29<sup>th</sup> January, and attended by representatives of RES, Network Rail, Virgin Trains and BTP. Stacey McManus of LUL gave a Powerpoint general overview of event management arrangements at Wembley and also tabled various questions to which, it was considered, RES needed to respond to as a pre-requisite of LUL considering granting Permission to Use.
- 8.7. The Panel was given two sets of notes relating to the meeting on 29<sup>th</sup> January:
  - 8.7.1. a formal note produced by Stewart Smith, dated and made on 01/02/10, concluding *"Meeting closed by SM advising that until RES provided an acceptable crowd management plan access was refused for this and any other train"*
  - 8.7.2. manuscript notes produced by Stacey McManus on the day of the meeting which, when read to the Panel appeared to be the source of the section **[LUL's (Stacey McManus') Account concerning the Access Request]** in the LUL submission, that states at paragraph 9 *"I had not made a final decision whether to grant access or not. I accept that 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."*
9. The Panel was presented with emails and notes of both the meeting of 29<sup>th</sup> January, and a subsequent meeting on 24<sup>th</sup> February, together with the arguments rehearsed as to whether or not there were grounds for an ADP hearing. The Panel was also given details of an event management plan for London Midland trains (which make special additional calls at Wembley Central on major events), and further exchanges in respect of a template/checklist.
10. The Panel found that whilst LUL was of the opinion that a consensus, sufficient to permit it to grant Permission to Use could be achieved by further dialogue, that was not the view of RES. This was tested by an offer to the parties of the chance to adjourn the hearing and seek a basis of full understanding. This was not acceptable to RES who, after retiring to consider the suggestion, asked the Panel to proceed to a determination.

## **The Contentions of the Parties**

11. The Panel considered that the contrasting assertions of the Parties could be summarised as follows.

### **12. For RES;**

- 12.1. The sole reason RES requires a station access agreement in respect of Wembley Central is so that it can operate charter passenger services on behalf of its customers (for example, football clubs) to events occurring at Wembley Stadium. Unlike most other passenger operators who provide services to Wembley Central on event days (such as London Overground, LUL, Southern and London Midland) RES's trains only convey named passengers that have pre-booked and paid for their tickets in advance through RES's customer. It is, therefore, essential that RES is in a position to confirm to its customer in advance that it has access arrangements in place with LUL at Wembley Central so that the selling of tickets to passengers can commence.
- 12.2. RES considers that LUL has misunderstood the nature of its obligations under the CSAA, in particular in regard to the SFO's responsibility to deliver the Common Station Services and Amenities defined in the annexes, to CSAA.. RES considers that LUL, in its response to RES' approach regarding possible Charter Trains for the Carling Cup Final, by seeking to transfer back onto RES responsibilities that are properly LUL's, was being unreasonable and not acting in accordance with the terms of the CSAA, and thus had placed RES in a position where it could not pursue the business opportunity on offer.
- 12.3. RES contends that LUL's position is at odds with RES being able to benefit from the Permission to Use to which the CSAA entitles it. RES is therefore pressing for a clarification of the entitlements of the parties in relation to the proposed operation of the Charter trains to the Carling Cup Final on 28<sup>th</sup> February 2010.

### **13. For LUL;**

- 13.1. LUL's duties in relation to the safe management of the station require it be satisfied that suitable arrangements are in place to ensure safety of operation. This also requires LUL to address the interfaces with the areas for which LUL is and is not, responsible, and therefore entitles it to insist that RES in turn should take on responsibilities (for example in respect of the Plaza), which are beyond the boundaries of the station
- 13.2. Access requests cannot be considered without reference to what will actually happen on the day, and RES had made no proposals as to how it would manage its customers, just as it did not have confirmed times on 28<sup>th</sup> February from Network Rail for the proposed train.
- 13.3. The dispatch of trains is the TOC's responsibility. LUL has a duty to provide common station services but does not dispatch trains for other TOCs on competence grounds – by agreement, other TOCs provide their own staff to dispatch trains and LUL staff attend the platforms to assist.
- 13.4. The Referral is unnecessary because the parties were in the middle of discussions about how they could make the Access Request work when RES unilaterally withdrew and issued the Referral. This in LUL's view meant that RES could not claim it had been refused Permission to Use and therefore there was no case to be heard.
- 13.5. The Panel has no jurisdiction where there is no claim.

## The Panel's findings in respect of entitlements

14. The Panel considered that to determine this case (including the question of whether the facts justified the view that there was a dispute that came within its jurisdiction), it had to consider the CSAA in relation to the following questions:
  - 14.1. What is the scope and function of the CSAA?
    - 14.1.1. Which are the relevant interfaces that the CSAA regulates?
    - 14.1.2. Who, at each of those interfaces, is the supplier, and who the customer? And
    - 14.1.3. Who is the directing mind in relation to safe operation on either side of each interface?
  - 14.2. What are the entitlements and obligations that the CSAA confers on the respective signatories in respect of
    - 14.2.1. the terms of the "Permission to Use"?
    - 14.2.2. the services each should provide the other?: and
    - 14.2.3. the behaviours each is required to supply to the other, including communications, information to be supplied, and timescales for answers? and
    - 14.2.4. the extent to which the terms of contract permit one party to delegate, transfer, or subcontract any of its responsibilities to the other?
15. In addressing these questions the Panel is confining itself to a consideration of what the CSAA (and any other documents incorporated by reference) requires the parties to do, and by when, and is not seeking to make qualitative judgements as to the individual actions proposed. That said, the Panel considers that there must be an objective expectation that the party responsible for operating (as a monopoly supplier) the only railway station affording direct rail connection to most of the major cities of the UK for people wishing to visit the new National Stadium, will have the willingness, capacity and preparedness to deal with any special trains that its beneficiaries (i.e. Train Operators already party to signed and regulated agreements) may wish to operate.
16. The Panel finds that the function of the CSAA is to give the operators of Non-Regular Passenger Services access to station facilities such as will enable the passengers on such services to make safely the transition between the Charter train and "the outside world". The physical interface between the responsibilities of the Train Operator (the customer) and the SFO (the supplier of services) is *de facto* the platform edge. Within the train the Train Operator carries the responsibility for safe operation, and on the station that responsibility is upon the SFO. In particular the SFO holds the accountability for the safe delivery of the "Common Station Amenities and Services".
17. The Panel notes that considerable emphasis is laid by LUL upon the importance of a second interface, namely that between the area of land owned by Network Rail upon which rests Wembley Central Station, and that other area of land, also owned by Network Rail, and referred to as the St Modwen development. The Panel acknowledges that station redevelopment works can have an impact upon the free flow of passengers to or from the station, but the management of the resulting issues cannot be other than the responsibility of the Station Facility Owner. It is reasonable for the SFO to expect that all Train Operators would provide such information as will assist it in addressing such problems, but
  - 17.1. Train Operators have no responsibility for the management of that external interface, and

- 17.2. it is the responsibility of the SFO to mitigate any external factors, and to deliver those "Common Station Amenities and Services" to which the CSAA commits it.
18. The Panel does not find that volume of ticket holders wishing to support two Premier League teams contesting an Annual Cup Final at its purpose built venue, can be deemed to dilute this responsibility of the SFO.
19. In relation to the Permission to Use for which RES applied, this is set out in Section 3 of the CSAA. There are no qualifications put upon this Permission other than that it requires the payment of the relevant Access Charge, and that the Train Operator observes the provisions of Schedule 3 for the purposes of booking a specific date and time for the Non-Regular Passenger Service.
20. The procedures in Schedule 3 are superficially straightforward, inasmuch as they advocate Call-off Arrangements including certain benchmark, but not inviolate, timescales, by which
  - 20.1. the Train Operator files an Order, giving details of the service for which specific Permission to Use is sought, and in particular clarifying any requirements for "Exclusive Station Services" (*Means any services specified in paragraph 9 of Appendix 1 to Schedule 3 (Call off Specimen Order) by the Beneficiary or the Station Facility Owner in advance of the beneficiary using the Station*) [CSAA Section 1 "Interpretation");
  - 20.2. the SFO responds, including clarifying any issues of cost, and any further Exclusive Station Services that it considers are also required: and
  - 20.3. the Beneficiary (the Train Operator) confirms acceptance of the conditions made by the SFO.
21. The Call-off Order procedure advocates adherence to a certain proforma, set out in the Appendix to Schedule 3. In relation to RES' bid to operate Carling Cup trains, the Call-off procedure raises the following issues of principle:
  - 21.1. does the information supplied have to be precise and comprehensive, i.e. as if already defined and agreed with other parties, or just sufficient to open up such necessary dialogue between the parties to test the feasibility of the request?
  - 21.2. is it a reasonable expectation that the "Common Station Amenities and Services" specified in the CSAA, will, as a matter of course, be supplied by SFO? and
  - 21.3. where Exclusive Station Services are stipulated, whether by the SFO or the Beneficiary, should these be confined to services that relate to the limits of the Station (i.e the limits within which the CSAA applies)?
22. The Panel notes that wording of "Schedule 3 Call-off Procedure" provides for many of the stipulated actions or timescales to be subject to tests of reasonableness. The Panel considered that, within the CSAA, and particularly in respect of Wembley Central, such tests of reasonableness apply within the context of a presumption that the SFO has the responsibility (and the obligation) to take such measures as are necessary to enable the running of such Special Charter trains; any reason for not so doing has, therefore, to be particularly compelling.
23. In support of this frame of mind the Panel would cite the following provisions of Schedule 3:
  - 23.1. in 1.3 the opportunity that the Beneficiary "*contact[s] the Station Facility Owner prior to the access being sought and negotiates and comes to agreement with the Station Facility Owner as to the Exclusive Station Services, and the cost thereof, for that access.*"; in other words clears away potential obstacles to individual applications;

- 23.2. in 2, "The Station Facility Owner shall use reasonable endeavours to accommodate any telephone order from the Beneficiary for the provision of access, " and
- 23.3. "The Station Facility Owner shall in connection with the permission to use the Station granted by it under Clause 3 during the term of this Agreement in relation to the Station, or during any applicable Exclusive Period, use all reasonable endeavours to ensure that the Exclusive Station Services are provided in accordance with the specification set out in this Call-off Order and, if any changes have been made to them by agreement, their standard and quantum after such changes have been made."
24. These facilitative provisions and the associated "can-do" mind set, depend also upon the parties having a clear understanding of the amenities and services that are available as a function of the specific Station Access Conditions, so that there can be no question of
- 24.1. the Train Operator presuming on facilities that are not present, or
- 24.2. the SFO seeking to provide as "Exclusive Station Services" services that are required obligations in the Station Access Conditions.
25. In this regard the Panel notes that under Part N of the National Station Access Conditions, "Station Facility Owner's obligations"
- "The Station Facility Owner shall (or shall procure that another person on its behalf shall)*
- "1.3 Use all reasonable endeavours to ensure that the Common Station Services are provided to a standard and in a quantum which is at least as good as their standard and quantum as at the Relevant Date.*
- 1.8 Save as otherwise specifically provided in the Station Access Conditions provide or procure the provision of the Common Station Services and the Common Station Amenities."*
- and that furthermore Annex 1 to the Wembley Central Station Access Conditions includes amongst "The Common Station Amenities and Common Station Services"
- "3.4 Such policing as may be required by statute and such security measures as the Station Facility Owner reasonably considers are necessary.*
- 3.6 Punctual dispatch of trains operated by or on behalf of any User.*
- 3.7 The provision of competent and appropriately trained staff to supervise the arrival and departure of trains.*
- 4.3 The provision of sufficient numbers of competent and appropriately trained staff to provide reasonable customer services and assistance to each Passenger Operator's passengers (including any who are disabled), including customer assistance in relation to boarding and alighting from trains, and handling of luggage."*
26. The Panel therefore had difficulty in understanding or endorsing LUL's postures in relation to
- 26.1. **RES has made no proposals as to how to manage its customers.** or
- 26.2. **The dispatch of trains is the TOC's responsibility**
- except insofar as they indicate that LUL expects to "procure that another person on its behalf shall" discharge those parts of its contractual obligations. To the extent that this is achieved by re-mitting the responsibility back to the Train Operator, the Panel would anticipate that this would have a bearing on the charges raised whether "per Visit" or for Exclusive Station Services.

27. Taking all of the foregoing points into account the Panel then addressed the question of whether there legitimately was a dispute between RES and LUL falling under the jurisdiction of the Panel, and found as follows
- 27.1. the circumstances at Wembley Central are not different in kind from those that obtain at other stations for which RES has rights of Access as prescribed in a relevant CSAA. There are perhaps differences of degree insofar as the proximity of the National Stadium raises the public profile of the SFO, and provides a greater incentive to address problems that might otherwise recur;
  - 27.2. LUL did not lack an understanding of the issues that could be associated with the operation of Charter Trains, and its obligations as SFO, as evidenced by its analysis of the situation on 19<sup>th</sup> April 2009, and the subsequent (abortive) arrangements made for the train on 10<sup>th</sup> May 2009;
  - 27.3. the general approach made by RES on 10<sup>th</sup> December 2009 should reasonably have provided a stimulus for opening a fresh dialogue as contemplated by paragraph 1.3 of Schedule 3 of the CSAA. The Panel has been given no evidence substantiate the statement (by Stacey McManus) that *"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 e-mail. I understood that those discussions were still ongoing when RES sent a further e-mail on 6<sup>th</sup> January"*, nor has the Panel had corroboration from RES that this was a matter actively in hand;
  - 27.4. it is self-evident that when, after the finalists for the Carling Cup became known, and RES had a definite request to provide a service, tickets for which would have soon to be on sale, time became of the essence in the operation of Schedule 3. The Panel is not convinced
    - 27.4.1. that RES was as proactive as it might perhaps have been. Even though important details such as the precise timing of the return train were not known, many matters of principle could have been exchanged in advance of the meeting on 29<sup>th</sup> January, and allowed LUL to conduct that meeting on an agenda of the solutions that it proposed;
    - 27.4.2. that LUL appreciated the implications of the timescales associated with planning and selling a bespoke charter train service, as compared with catering for an augmented regular service. In particular LUL did not appear to recognise that a Charter train operator has to make a "go/no-go" decision in conjunction with its prospective client, in good time for the operation either to proceed, or for the client to make alternative arrangements.
  - 27.5. Taking account of all the evidence set before it, the Panel is satisfied that
    - 27.5.1. the stance adopted by LUL in the discussions at the meeting on 29<sup>th</sup> January 2010, would reasonably have convinced RES that continuing to market Carling Cup specials would have carried an unwarranted commercial risk; and that therefore
    - 27.5.2. RES had been "constructively" refused access to Wembley Central Station;
    - 27.5.3. it has good reason to take that view having regard to the contents of the respective notes made by the parties at or around the date of the meeting on the 29<sup>th</sup> January 2010 (which in neither case could be said to be entirely clear as to the final mind set of the parties, particularly bearing in mind, as would have been apparent to LUL, that there was always a limited amount of time



available to RES to implement the commercial arrangement it wished reasonably to enter into); and that therefore

27.5.4. RES was quite within its rights to bring a reference to the Access Disputes Panel, and that

27.5.5. the Panel had the jurisdiction to determine the rights of the parties.

28. That said, the Panel is in agreement with LUL that there is no available remedy appropriate to addressing a commercial opportunity that was not finally pursued, and the Panel does not wish to opine further on this aspect of the case. Nor does the Panel claim any right to give general directions in respect of the ongoing deliberations between the parties.
29. On the other hand there are some specific matters of interpretation that are at the centre of the legitimate dispute brought by RES in respect of the trains not granted access to Wembley Central, which the parties have contested before the Panel, and which the Panel considered it is required to determine. Thus the Panel finds that
- 29.1. the parties should understand that the CSAA defines the interface between the SFO and the Train Operator, and the obligations each has to the other in relation to the transition that passengers must make between the train and the further boundary of the station;
- 29.2. the SFO may adjudge that its best option for discharging some of its obligations to provide Common Services (such as train despatch) is to "*procure that another person on its behalf shall*" undertake the task. In the present instance RES may have agreed to be the procured person for some of the common services, but it has not done so in all cases. Where it has not, the responsibility remains with the SFO, including if appropriate, giving training to staff in relevant additional skills. This conclusion is without prejudice to any discussions the parties might enter into as to what should be considered Exclusive Station Services (i.e. in respect of obligations not otherwise explicit in the CSAA) ;
- 29.3. The Train Operator is not party to the relationship between the SFO and the St Modwen development. Whilst this may be a complicating factor for the SFO in managing Wembley Central station (and collecting the associated access revenues) the SFO may not either
- 29.3.1. pray in aid difficulties arising out of that other relationship as reason for not fulfilling its obligations under the CSAA; OR
- 29.3.2. require the Train Operator to deploy staff or resources to assist in dealing with the difficulties in that relationship, as a condition of granting Permission to Use the Station.
- 29.4. the facility contemplated in Schedule 3 paragraph 1.3 for the parties to agree the nature and tariffs associated with Exclusive Station Services could usefully have been compiled at any time, building on the lessons learnt from the events of 19<sup>th</sup> April 2009, and certainly after the approach initiated on 10<sup>th</sup> December 2009. Had such an understanding already been reached it would logically have addressed most of the points of disagreement between the parties, and reduced the risk of RES' opportunity being "timed out". Furthermore, the existence of such an understanding would also have facilitated delivering on the presumption in the CSAA that, if it is practical to operate the proposed Non-Regular Passenger Service, the Train Operator is to be granted Permission to Use to use the Station, in return for payment of the agreed charges.

### **The Panel's Determination:**

30. Taking all the foregoing arguments into account, and acknowledging that the documents concerned are not always drafted unambiguously, the Panel therefore determines, in respect of the representations made by the parties, as follows;
  - 30.1. that the CSAA relates to the use of the Station, and exclusively to the operations within the bounds of the Station. Where the CSAA (and related incorporated documents) state or imply that the SFO will provide stated "Common Station Services or Amenities" the Train Operator is entitled to presume that the SFO will take responsibility for supplying or procuring the supply of such services;
  - 30.2. to the extent that the SFO has to deal with other land-owners and authorities beyond the boundary of the Station, these are a matter for the SFO to resolve. In managing these external relationships it is reasonable for the SFO to seek information from the Train Operator, and for the Train Operator to assist in such ways as it can. However, the SFO may not use the issues of its relationship with other parties as a ground for delaying, or declining any Permission to Use to which the Train Operator is entitled;
  - 30.3. that LUL should not have required RES to provide management of the means of access to and from the Slow Line platforms at the station;
  - 30.4. that RES, as an operator of Non-Regular Passenger Services, and signatory to a CSAA for the use of Wembley Central Station, could reasonably act on the presumption that, where it proposed to run such a service, and when it complied essentially with the provisions of Schedule 3 Call-off Procedure, it would be granted Permission to Use the Station;
  - 30.5. that, LUL, the SFO at Wembley Central, in responding to RES' approach in relation to potential VIP Charter trains in connection with the Carling Cup Final on 28<sup>th</sup> February,
    - 30.5.1. should have been under no doubt as to the fact that time was of the essence in dealing with all issues raised, and that,
    - 30.5.2. by virtue of the speed of its response, and the stance adopted at the meeting of 29<sup>th</sup> January, had "constructively" refused RES the Permission to Use to which it was reasonably entitled, and
    - 30.5.3. by so doing had given RES grounds for making the differences between it and the SFO a legitimate matter to be considered by this Panel.
  - 30.6. that whilst the provisions of Schedule 3 Call-off Procedure contain latitudes, and discretions in relation to information to be provided and timescales to be adhered to, the SFO has a responsibility to ensure that all necessary actions and decisions are taken expeditiously with the common objective that the traffic on offer is to be won, operated safely, and not turned away.
31. In addition to the above determination the Panel is of the view that it is entitled to make the following observations to assist the parties:
  - 31.1. where, as is frequently the case with proposals to run Non-Regular Passenger services in connection with sporting events, time is of the essence in finalising both operational and commercial arrangements, prevarication in the making of decisions is not acceptable, either in itself, or, where the relevant contract makes provision for decisions

to be challenged through the Access Dispute Resolution procedure, as a subterfuge to avoid creating grounds for a formal dispute;

- 31.2. without having sought details of the other commercial opportunities that RES alleges it would have been able to exploit, had there been an apparent readiness to grant Permissions to Use in accordance with the CSAA, the Panel considers that the demand for Non-Regular passenger Services to Wembley Central, whether operated by RES or other Charter Train operators, is more likely to increase than not;
- 31.3. to the extent that this Panel has found that neither RES nor LUL conformed very closely with the operational provisions required by paragraph 3.3 of the CSAA, and set out in Schedule 3, and the Appendix to Schedule 3, the Panel commends that in the on-going dialogue to which frequent reference has been made, the priority should be procedures that comply with the provisions, can be reflected in Agreements under Clause 7 of the CSAA, and enable both parties to comply with all the benchmark timescales so that the loss of commercial opportunities to operate Non-Regular Passenger Services is minimised.
32. Condition H5.1 of the National Station Access Conditions prescribes that Panel has to determine which of the routes available in ADR Rules is open to the Parties should they wish to appeal this determination. As the essence of this case has been about the intention and interpretation of regulated Station Agreements and Access Conditions the Panel determines that the only appropriate route for a possible appeal would be to the ORR in accordance with Part M (paragraphs M1(b) and M2(e)) of the Network Code.
33. 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**

31. 03. 2010.