
Delay Attribution Board

Guidance No. DAB-27

1. Introduction

The Delay Attribution Board (the Board) received a request for guidance in connection with the Attribution of TRUST incident 069776 'FCC Fail to mitigate KGX' created on the 15th July 2011.

- 1.1. The Board received the joint request for guidance from First Capital Connect Limited (FCC) and Network Rail Infrastructure Ltd, London North East Route, (Network Rail) on the 15th September 2011.
- 1.2. The main guidance sought by FCC was presented as follows:
 - 1.2.1. The Board is asked to provide guidance as to whether this incident has been created containing enough information for First Capital Connect to understand why the incident has been created and where they have failed to mitigate.
 - 1.2.2. Has the incident been created in accordance with the guidelines laid out in the Delay Attribution Guide (DAG).
 - 1.2.3. What information should be described by Network Rail when a "Failure to Mitigate" incident is created.
 - 1.2.4. The Board is requested to advise what is believed to be correct cause and responsibility for the incident described above.
- 1.3. FCC also requested the Board to give guidance as to whether Network Rail had created the incident correctly including information that, in the view of FCC, would enable parties to identify if:
 - 1.3.1. The Network Rail freeform supplied enough detail for the incident to be investigated thoroughly by FCC.
 - 1.3.2. A Service Recovery Conference took place with all affected parties and was reviewed regularly during the incident. (Evidence was presented by FCC that no telephone conference took place).
 - 1.3.3. The request to cancel trains over 30 minutes late during the evening peak when they would be full and standing was deemed reasonable.
 - 1.3.4. All train operators affected by the incident were involved in the process, which Contingency Plan was requested and, if thinning of service is proposed, how many train operators would be assisting to mitigate.
 - 1.3.5. A measurable timeline of key points when track access was made available, allowing parties to consider whether/where reasonableness failed.
 - 1.3.6. Passenger loadings were considered in line with industry best practice as disruption started during the evening peak. Peak services have a specific mention in any Contingency Plan.

- 1.3.7. Customer backlog had been cleared prior to the Contingency Plan being implemented/requested.
- 1.3.8. Drivers hours had been taken into consideration when enforcing a Contingency Plan, ensuring they were not “out of hours”
- 1.3.9. Time had been given to assess traincrew availability for the amended train schedule prior to the commencement of Service Recovery.
- 1.4. The guidance sought by Network Rail was presented as follows:
 - 1.4.1. The Board is asked to give guidance in this reference as to whether it is believed this incident has been created correctly on the basis that Network Rail contends that FCC failed to use “reasonable endeavours” to assist in the mitigation of this particular set of circumstances and whether Network Rail has acted appropriately in its management of the subsequent delay attribution in accordance with DAG section 4.1.7.
- 1.5. The Board considered this request for guidance at its meeting on the 20th September 2011.
- 1.6. This note summarises the request for guidance received from FCC and Network Rail (the parties) and the guidance provided by the Board.

2. Information Received

- 2.1. The parties indicated that they had discussed the issues relevant to this matter, in accordance with the formal procedures for obtaining agreement in relation to a disputed attribution. They have been unable to reach a common position. The parties therefore agreed that the issues raised should be referred to the Board for guidance in accordance with Network Code Condition B2.4 and had prepared a joint submission accordingly, setting out their respective positions.
- 2.2. The parties provided the factual background in relation to a fire incident at Welwyn Garden City which is the main incident from which the disputed incident (069776) was derived.
- 2.3. A summary of the events can be described as follows: On Friday 15th July 2011 an external fire occurred affecting the operation of train services through Welwyn Garden City station. An emergency isolation was required affecting both routes (Welwyn and Hertford Loop) from 1835 hours. Fire Services were already on site but the Potters Bar MOM was not available, therefore the Hitchin MOM was required to attend. At 1905 the Hertford Loop was re-energised but the mainline (via Welwyn) remained closed to traffic. The mainline was re-energised and opened to traffic at 1938 hours. At 1943 hours trains started to move but the trains were being staggered away on signals. 1A67 (Bradford – KGX) was the first to move in the up direction, 1B90

(KGX – Lincoln) in the down direction. A copy of an FCC log item and a Network Rail log item was provided to verify this information.

2.4. The parties provided a Significant Performance Incident Review (SPIR) which indicated that four TRUST incidents were created as a result of the fire at Welwyn Garden City. One of these TRUST incidents was 069776 'FCC Fail to mitigate KGX', which is the subject of this dispute. The other three incidents were not referred to by the parties and appeared to represent attribution of the main incident to Network Rail and an attribution to Joint Responsibility due to the fire being at a station.

2.5. A large amount of supporting documents were provided by the parties including:

- Contingency plans and principles
- Incident logs
- E-mail correspondence between NR Area General Manager and FCC GN Route Manager
- Voice tapes of conversations between various key operational staff on duty at the time of the incident.
- A letter from ORR to the parties concerning Network Rail's performance on FCC's services.
- Timeline of communications and significant events.

3. FCC View

3.1. To give some context to this event, numerous discussions have taken place to resolve the issue, however the culture within senior positions within LNE is one which is not in line with the purpose of delay attribution. Correct attribution allows the responsible party the opportunity to create action plans and investment cases to remove the reason for the delay. However in meetings it was said that this incident was created to "teach the TOC a lesson".

3.2. At no point have FCC been advised why the "fail to mitigate" incident was created. The Network Rail freeform text gives no detail as to what FCC failed to mitigate. Therefore, FCC believes this incident:

3.2.1. Did not follow Service Recovery principles regarding agreeing and communicating a plan and, therefore, should not have been created in the first instance.

3.2.2. Did not take into account the passenger loadings during the evening peak – a point specifically noted by ORR in its letter to the parties as essential when recovering the service.

3.2.3. Showed bias as the suggested Contingency Plan includes other operators on the route but no other "Failure to Mitigate" incidents were created for other train operators.

- 3.2.4. Did not provide sufficient information in the log, nor during subsequent attempts by FCC, to allow investigation within the attribution timescales.
- 3.3. Network Rail did not follow the Service Recovery protocol. The Network Rail log regarding the first Service Recovery Conference taking place at 1935 hours is incorrect. A conference with FCC as a party did not take place throughout the whole incident. Without this interaction it is impossible to assess whether FCC "failed to mitigate" as no recovery plan was agreed or discussed to measure FCC's actions against.
- 3.4. Information gathered to explain the reason for this incident being created has been derived from voice conversations between Network Rail and FCC Control offices. These included a call from Network Rail York Control informing FCC that a "failure to mitigate" incident had been created against them. FCC understood from this call that someone higher up the Network Rail chain of command had instructed the incident to be created.
- 3.5. The Contingency Plan (KX Kilo 1) that was suggested had been implemented is not just for FCC services, it also includes other train operators using the London North Eastern route. However, FCC believed that no other train operator has a "failure to mitigate" incident against them and noted that only one East Coast train was cancelled with all other services completing their journeys even if running significantly late. .
- 3.6. FCC made every effort to mitigate delay and recover the service as suggested in the KX Kilo 1 Contingency Plan whilst also considering the peak service that had been affected, the significant volume of customers at stations waiting for the peak fares to finish, customers who had been on trains at a stand for over 50 minutes as well as drivers being out of hours, how their diagrams would be affected and, of course, the train mileage and unit diagrams. FCC contended that Contingency Plans cannot simply be eased into operation. It was FCC's view that being forced into not running trains over thirty minutes late and threatened with a "failure to mitigate" incident does not assist in ensuring good communication, decision making or working relationships. FCC argued that Senior Management should not be involved in the attribution of an incident of this type and such involvement in this case was a hindrance to good Service Recovery rather than a help and prevented clear timelines and full information that would assist in the delay attribution process from taking place. ORR is very clear that customers should be the first priority during Service Recovery. FCC considered that in this instance, this was not a view shared by Network Rail.
- 3.7. On Monday 18th July, FCC attempted to contact a Network Rail representative who would be able or willing to give details about the "failure to mitigate" incident and why it had been created. FCC also wanted to ascertain why the attribution staff failed to explain in the

Network Rail freeform text the reason why the “failure to mitigate” incident had been attributed, rather than simply being ordered by a superior to create it. Unfortunately, due to vacancies, sickness and annual leave, this information was not forthcoming from Network Rail but the Route Performance Manager, whom FCC was able to speak to, agreed to find out and respond to FCC with the information requested. Despite numerous other requests for this information, it had still not been provided by 1st August 2011. Therefore, it had been impossible for FCC to investigate the incident within industry timescales.

- 3.8. FCC reported that when it was no longer possible to remove individual delays from the incident, Network Rail convened a telephone conference for their staff members to talk through this incident. FCC were subsequently offered “a commercial deal” to accept 50% of the incident, but this was declined on the basis that Network Rail had still not provided any detailed information explaining why it considered FCC failed to mitigate delay.
- 3.9. FCC argued that if Network Rail wish to highlight suspected operational issues, ordering an incident to be created in TRUST is not the correct procedure. At the very least, in line with industry practice, there should be sound reasoning supported by detailed information as to why a “failure to mitigate” incident has been created, including agreed Service Recovery times and conference calls involving all parties concerned.
- 3.10. FCC believes that delays and cancellations within incident 069776 should be re-attributed to Network Rail under the Welwyn Garden City fire incident.

4. Network Rail View

- 4.1. DAG section 4.1.7 specifically covers “failure to mitigate”. It states *“When agreeing attribution of Minutes Delay, or Reliability Events the contractual responsibility of Network Rail and Train Operators to mitigate the effects of an Incident should be taken into account. This includes where one of the Track Access Contract parties refuses a reasonable request (usually defined with reference to any contingency / service recovery plans that may have been agreed) to terminate one or more trains short of destination to prevent knock-on effects continuing for an extended period on intensively diagrammed services. A separate incident attributed to the party concerned is to be created for the effects of such failure to mitigate.”*
- 4.2. As such, the DAG and the track access contract are directly linked in the decision making processes required for the creation of such an incident and the attribution of trains to it.
- 4.3. Further, DAG section 4.1.8 states *“in the case of incidents where Network Rail is held to be at fault, if the acts or omissions of the Train*

Operator were such as to prevent the mitigation of delay then the additional delays must be attributed accordingly.”

- 4.4. Network Rail is obliged by the Railway Operational Code (ROC) to manage the network so as to achieve the Objective. This responsibility is set out in section 4.1 of Part B of the ROC and is described as “The Network Rail Operational Control Function”. The Objective is;

“to sustain, and where necessary restore expeditiously, the operation of Services in accordance with the Working Timetable and in a manner consistent with the ORR ROC Criteria, having regard to:

(a) the needs of passengers and freight customers;

(b) the interests of safety and security; and

(c) the efficient and economical operation of the Network and of trains operating on it,

and, without prejudice to its right and obligation of direction and management, shall use all reasonable endeavours to do so on a co-operative basis with Train Operators.”

- 4.5. Network Rail is required to work on a co-operative basis with all Train Operators and is further directed, in performing the Network Rail Operational Control Function in section 4.3 of the ROC, to use all reasonable endeavours to meet the Objective and strike a balance between the needs of passenger and freight operators and restore the operational railway. In this regard Network Rail must further consider the ROC Criteria.

- 4.6. The ROC also defines for each Train Operator the obligation it carries to manage the service as the Train Operator Operational Control Function. In this regard section 4.4 of Part B of the ROC provides that the Train Operator must support the overall aim of achieving the Objective;

“In performing the Train Operator Operational Control function, each Train Operator shall use all reasonable endeavours to do so in a manner which supports the fulfilment of the Objective by Network Rail in a manner consistent with the ORR ROC Criteria and includes co-operation with Network Rail in making and implementing “real time” decisions.”

- 4.7. Lastly at section 4.5 of Part B of the ROC, Network Rail and the Train Operator are duty bound to achieve the Objective through “...liaison and co-operation using the supporting procedures...” that the ROC provides for. Although this requirement is not without prejudice to Network Rail’s powers of direction provided by the ROC.

- 4.8. On at least 4 separate occasions during the incident in dispute, both by phone and face to face, Network Rail sought to engage with FCC in

an effort to present and agree appropriate Service Recovery actions to be undertaken in accordance with the agreed Contingency Plans. On each occasion this request was met with a refusal.

4.9. Network Rail contends that in the management of this incident FCC failed to discharge its obligations under the ROC in that its actions in;

a). refusing to receive the agreed Contingency Plan from the Kings Cross SSM; and

b). refusing to co-operate with the reasonable request of Network Rail to thin the service on the Hertford Loop to accommodate the agreed Contingency Plan

resulted in Network Rail being unable to achieve the expeditious recovery of the operation of services in accordance with the Working Timetable in a manner consistent with the ROC Criteria.

4.10. Section 4.1.7 of the DAG provides guidance on the real time attribution of incidents and the creation of "failure to mitigate" incidents. In this paragraph it is stated that the contractual responsibility of the parties to mitigate an incident should be taken into account. It further states as an exemplar, occasions where one of the parties refuses a reasonable request to prevent 'knock on' effects continuing especially where previously agreed contingencies or service recovery plans have been agreed.

4.11. Network Rail contends that as a result of FCC's refusal to liaise and co-operate (in respect of the contingency plans to be deployed to expeditiously recover the service after the disruption at Welwyn) that it had no option but to create a "Failure to Mitigate" incident in line with the guidance contained within the DAG. It is the contention of Network Rail that the behaviour exhibited by FCC in respect of this event are in contravention of its obligation contained in the ROC and that the creation of a "Failure To Mitigate" incident and the attribution of train delays (as was advised to FCC in real time) is justified in the circumstances.

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 is set out in the Network Code Conditions 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 any of the Access Parties were dissatisfied with the guidance provided they could refer the matter to Access Dispute Adjudication (ADA).

5.3. If the issue is referred to ADA, then an Adjudication Panel (the Panel) would be formed to consider the dispute. In doing so, the Panel would

take account of the guidance provided by the Board but would not be bound by it. The 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 Board's guidance and the reasons which explain how the Board arrived at its position both to the parties and, if necessary, to the 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 DAG should be proposed, to improve clarity.

6. Consideration of the Issues

- 6.1. The Board at its meeting on 20th September 2011, considered the request for guidance and took account of the following:

6.1.1. The information provided by both Network Rail and FCC in connection with the incident disputed between the parties and their respective requests for guidance.

6.1.2. The verbal information provided by the representatives of Network Rail and FCC at the Board meeting.

6.1.3. The relevant provisions of the DAG.

- 6.2. In coming to its conclusion, the Board regarded the following points as particularly relevant:

6.2.1. The parties have not disputed the facts of the Welwyn Garden City fire incident.

6.2.2. The parties had not jointly agreed and implemented a recovery/contingency plan in response to the Welwyn Garden City fire incident.

6.2.3. The FCC "failure to mitigate" incident had been created approximately 5 minutes before all running lines were re-opened and included some delay that occurred around the time the fire was first reported.

6.2.4. That whilst there was nothing stipulated in the DAG, it was considered good practice for an incident freeform text to indicate the reason for the allocation of delays and cancellations to the incident to ensure that the party being attributed the incident can readily understand why the decision has been taken.

6.2.5. It was apparent that the normal dispute escalation process had not been followed by the parties, in particular that there had been an escalation to 'Level 4' within 3 days seemingly without any detailed discussions at lower levels as is usually expected in the dispute escalation process.

- 6.2.6. The parties had not undertaken a forensic post-incident review of the delays attributed and the actions required by the SPIR appeared not to have been completed, in particular, the action to 'discuss the FCC failure to mitigate incident'.
- 6.2.7. The parties appeared to have arrived at an entrenched position without having undertaken an objective review of the attributed delays.

7. Guidance of the Board

7.1. The Board unanimously agreed the following:

- 7.1.1. That whilst the request for guidance received by the Board indicated that it was a joint submission and that the parties had discussed the incident in accordance with the agreed procedures, it had become clear to the Board after questioning the parties at the meeting that they had bypassed a number of the key stages of the dispute escalation process, in particular at Level 2.
- 7.1.2. That Network Rail has the right to create a "failure to mitigate" incident in accordance with DAG Section 4.1.7 if Network Rail consider that an operator of trains has failed to mitigate the effects of an incident.
- 7.1.3. That such a "failure to mitigate" incident should include a full explanation of the reason for its creation and each allocation of delay to that incident.
- 7.1.4. That it would be normal to expect the parties to examine and understand the reason for the delays being attributed to the incident and that this dialogue had not occurred.
- 7.1.5. That the Board possessed less information, knowledge and understanding of the incident than the parties and that, as the parties had not themselves carried out any forensic analysis, the Board was not in a position to decide whether or not the creation of a "failure to mitigate" incident was reasonable or whether each individual delay allocated to that incident was also reasonable.

7.2. The Board advised the parties to put aside any past disagreement experienced in the dispute escalation process and jointly undertake a forensic analysis of the delays (trains) in the disputed incident and determine if any should be considered as a 'failure to mitigate'. If, after such forensic analysis it is concluded that all of the individual delays included in the incident cannot be deemed as a "failure to mitigate" by FCC, then the incident would be erased.

7.3. In giving this guidance to the parties, the Board indicated that should there be any disagreement following the forensic analysis of the incident that cannot be resolved by the parties themselves, they are at liberty to make another request for guidance to the Board which focuses on the detail of the specific disagreements between them.

This guidance was approved by the Delay Attribution Board on 18 th October 2011.	Nigel Oatway (Deputy Chairman)
Signature:	