



Neutral citation [2022] CAT 49

**IN THE COMPETITION**  
**APPEAL TRIBUNAL**

Case Nos: 1304/7/7/19  
1305/7/7/19

Salisbury Square House  
8 Salisbury Square  
London EC4Y 8AP

10 November 2022

Before:

THE HONOURABLE MR JUSTICE ROTH  
(Chair)  
SIMON HOLMES  
PROFESSOR ROBIN MASON

Sitting as a Tribunal in England and Wales

**BETWEEN**

**JUSTIN GUTMANN**

Class Representative

-and-

**(1) FIRST MTR SOUTH WESTERN TRAINS LIMITED**  
**(2) STAGECOACH SOUTH WESTERN TRAINS LIMITED**

Defendants

**AND BETWEEN**

**JUSTIN GUTMANN**

Class Representative

-and-

**LONDON & SOUTH EASTERN RAILWAY LIMITED**

Defendant

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**RULING (AMENDMENT)**

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## **A. INTRODUCTION**

1. On 19 October 2021, the Tribunal issued its judgment granting the two applications for a Collective Proceedings Order (“CPO”), subject only to determination of whether the class should include passengers who purchased season tickets: [2021] CAT 31 (the “CAT Judgment”). Following further submissions, we determined that season tickets should not be within the scope of journeys covered by the class definition and a CPO was made accordingly.
2. We stated that the Applicant had the option to apply under rule 85 of the Competition Appeal Tribunal Rules 2015 (“the CAT Rules”) to vary the CPO to bring season tickets within the scope of the class definition and the order made provision for such an application. On 10 December 2021, the Class Representative applied for permission to vary the CPOs accordingly (“the Season Tickets Application”), serving a third expert report by Mr Derek Holt. On 21 January 2022, the three Defendants filed a joint response opposing the amendment (the “Defendants’ Response”).
3. When the Defendants were given permission to appeal to the Court of Appeal, further proceedings before the Tribunal were stayed by order of Green LJ of 4 February 2022 (as varied on 18 February 2022) pending the outcome of the appeal. On 28 July 2022, the Court of Appeal issued its judgment dismissing the appeals: [2022] EWCA Civ 1077 (the “CA Judgment”).
4. The Defendants had indicated that they were content for the Tribunal to decide the Season Tickets Application on the papers and the Class Representative does not oppose that course. The Tribunal has proceeded accordingly and this ruling now addresses the Season Tickets Application, using the same abbreviations as the Judgment.

## **B. THE AMENDMENT**

5. The class definition set out in the CPO is as follows:

*“All persons who, at any point during the Relevant Period purchased or paid for a rail fare for themselves and/or another person, which was not a season fare or a Boundary Fare or a fare for the portion of their journey from the last station covered by their Travelcard to their destination, where:*

*a. the person for whom the fare was purchased held a Travelcard valid for travel within one or several of TfL’s fare zones (the “Zones”); and*

*b. the rail fare was for travel in whole or in part on the services of the Defendant(s) from a station within (but not on the outer boundary of) those Zones to a destination beyond the outer boundary of those Zones (including fares for return journeys).”*

6. The Class Representative seeks to amend this as follows:

*“All persons who, at any point during the Relevant Period purchased or paid for a rail fare for themselves and/or another person, which was not ~~a season fare or~~ a Boundary Fare or a fare for the portion of their journey between the last station covered by their Travelcard to their destination, where:*

*a. the person for whom the fare was purchased held a Travelcard valid for travel within one or several of TfL’s fare zones (the “Zones”) at the time of their journey or, where the fare was a season ticket fare, for the period of validity of that fare; and*

*b. the rail fare was for travel in whole or in part on the services of the Defendant(s) from a station within (but not on the outer boundary of) those Zones to a destination beyond the outer boundary of those Zones (including fares for return journeys and season ticket fares).”*

Further, there would be inserted an additional definition of “season ticket fare”:

*“a fare which entitles the owner to make an unlimited number of journeys on a specified route during a specified period of validity”*

7. The Defendants oppose the amendment on four grounds, which we address in turn.

**(1) Temporal overlap not addressed**

8. Since season tickets, unlike other fares, are by definition valid for repeated journeys over a period, there is a sequencing issue raised by the claims in these proceedings. The Class Representative accepts that an annual season ticket holder who subsequently bought a one week Travelcard in the course of that year would not obviously suffer damage from the failure to make available a Boundary Fare season ticket.

9. The revised class definition proposes to address this by limiting claims in respect of season tickets to purchases where a Travelcard was held for the whole duration of the season ticket. That is expressly put forward as a pragmatic solution to addressing all the various sequencing and temporal overlap issues, on the basis that it is a conservative assumption that is more onerous than strictly necessary. As we understand it, the proposed definition does not require the season ticket to be co-extensive with the Travelcard: it is designed to cover, for example, the situation where the holder of a one year Travelcard occasionally purchases during that year a one week (or one month) season ticket. Consistent with the underlying argument in the claim form, the Class Representative will contend that such a traveller has paid for the portion of the journey covered by the Travelcard and should have been able to buy a Boundary Fare season ticket applicable only from the outer boundary of that portion.
10. The Defendants submit that this approach is unsatisfactory and that the claims should be simply limited to the situation where the season ticket is purchased at a time when a Travelcard is already held. That would of course cover the example in the paragraph above. The Defendants argue that if the season ticket had been purchased before the Travelcard there can be no claim. They assert that this is the position for other tickets under the existing claim and that season tickets should be treated similarly.
11. The Class Representative objects to this, on the basis that his proposal allows for cases “where several Travelcards with contiguous validity cover the duration of the season ticket”. The Class Representative explains in his skeleton argument:

“For example, a London-based passenger who regularly buys a monthly Travelcard on the 1<sup>st</sup> of every month (which in light of the cost of an annual Travelcard may not be usual) should rightly still be able to benefit from a Boundary Fare season ticket that runs across the end of a month. This would not be possible if there was some form of a combined requirement that a Travelcard valid for the whole duration of the season ticket fare was already held at the time of purchase of that fare.”

He also argues that under the existing claim form the claims are not restricted to cases where a Travelcard is held at the time when the non-Boundary Fare was purchased.

12. We think that there is a danger of over-complicating the class definition. We have excluded only cases where the traveller purchased a so-called point-to-point fare since that is a general and very close substitute for a Boundary Fare: CAT Judgment at [132]-[134]. In view of the wide range of tickets and the wide variety of individual circumstances in which rail tickets are purchased, we do not think that it is productive to seek more elaborate refinement of the class definition at this stage in an attempt to exclude specific kinds of case in which no loss was incurred: see the CAT Judgment at [127]. The main point as regards the Defendants is that the aggregate damages should be calculated on a basis that takes account, albeit on an estimated basis (which may involve the ‘broad axe’: see *Merricks SC* at [51]-[53]) of cases where there was no recoverable loss. The main point as regards class members is that the distribution of aggregate damages among them should be on a basis that is reasonable and fair, even if it is not directly compensatory on an individual basis: see *Merricks SC* at [77].

13. The essential abuse alleged in this case is pleaded as follows in the Re-Amended Claim Form at para 42:

“The abuse, which is continuing, consists in the Defendants' neglecting of their special responsibility as dominant undertakings through failing to take any or sufficient steps to prevent Class Members from being double-charged for part of the service provided to them. In practice, the abuse consists in failing to make Boundary Fares sufficiently available for sale, and/or failing to use their best endeavours, for example in the form of better staff training, amended sales procedures, or increased customer-facing information, to ensure that there is a general awareness among their customers of Boundary Fares so as to enable customers to buy an appropriate fare which avoids them being charged twice for part of their journeys.”

See also the CA Judgment at [89].

14. The abuse causes loss through customers purchasing a rail fare which results, in effect, in their paying twice for a part of the journey, i.e. that part which is covered by a Travelcard, where that would have been avoided if they had been able to purchase or aware of the possibility of purchasing a Boundary Fare.

15. We have no doubt that the Defendants are correct that in most cases where the alleged abuse causes loss the customer will have purchased their Travelcard

before they purchase a rail ticket. That is recognised in the Re-Amended Claim Form, for example at para 66:

“In the current case, the abuse consists in the first place in the Proposed Defendants charging a customer (whether directly or via an agent) for a fare relating to an element of a journey for which that customer has already purchased a fare (in the form of a Travelcard) and which the customer therefore does not require; in particular in a situation where, via the mechanism of the Travelcard Agreement, the Proposed Defendants has already received compensation (in the form of a revenue share from the sale of Travelcards) for 15 providing the service to the customer in relation to that element of the journey covered by the Travelcard.”

16. Indeed, the Class Representative’s present application to amend states at the outset, at para 6:

“This abuse is suffered by holders of TfL Travelcards who purchase fares (including fares for return journeys) for travel outbound of London, who could have benefited from a Boundary Fare by virtue of their Travelcards which *already* gave them the right to make the part of their journeys stretching to the outer boundaries of the zones of validity of their Travelcard.” [Our emphasis]

17. This reflects the fact that most customers purchasing a rail ticket for an individual journey who also hold a Travelcard at the time of travel will have purchased that Travelcard in advance. In the great majority of cases, if a customer buys their Travelcard only some time after purchasing the rail ticket, but before the rail journey is taken, they suffered no loss as they would not have bought a Boundary Fare even if they were aware of it. However, there may be circumstances where loss falling within the scope of the abuse is caused in such a sequence: in particular, if the abuse is held to apply to Advance Fares, a customer may purchase an Advance Fare 8-10 weeks in advance of the date of travel, knowing that they will be purchasing a Travelcard for the week or month in which the rail journey is to take place. It seems to us reasonable to assume that such a customer would have bought an Advance Boundary Fare if such a fare had been available (and they had been aware of it) although that preceded the purchase of their Travelcard.
18. In our view, the same considerations apply to season tickets and the example cited by the Class Representative, quoted at para 11 above, is not a fanciful one. As mentioned above, we have already narrowed the class definition by excluding point-to-point fares, on the basis that this is a clearly defined category

where no loss was suffered. The proposal to limit the addition of season tickets to cases where a Travelcard was held for at least the period of validity of the season ticket is a sufficient limitation. We do not think that adding a requirement that the Travelcard must have been bought before the season ticket (or indeed in every case before the rail fare) is appropriate or necessary.

## **(2) Out-boundary Travelcard Season Tickets**

19. As we understand it, this is a combined product that enables travel between the station outside London and the TfL travel zones covered by the Travelcard as well as unlimited within the specified Zones. The Day version covers one return rail journey to London plus unlimited travel within Zones 1-6: it is therefore irrelevant to these claims which are limited to outbound travel from London. But there are 7-Day or longer versions for any combination of adjoining Zones which include Zone 6, all of which can be used for multiple inbound and outbound journeys. The Defendants' contention appears to be that in view of the availability of this product the failure to offer Boundary Fare season tickets cannot be an abuse. Since we are addressing an application to amend, the question is whether that is so clear that such an allegation is not reasonably arguable, i.e. that it could be subject to reverse summary judgment.
  
20. We can see that an Out-boundary Travelcard Season ticket might provide equivalent benefit where the customer wants a Travelcard and a season ticket for the same period. However, the proposed inclusion of season tickets in the claims is primarily concerned with the case where the holder of a Travelcard purchases season tickets of shorter duration: see para 9 above. As the Class Representative states in his application to amend:

“For example, a London based traveller who regularly buys a *monthly* Travelcard for Zones 1–6, and who wishes to travel to Reading for *one week* only, would not be able to avoid their loss by purchasing a one week Out-boundary Travelcard, unless by chance one of their monthly Travelcards had just come to an end on the day they needed to start travelling to Reading.”

The Defendants point out that such a traveller might be entitled to exchange their existing Travelcard for a Reading to Zone 1-6 Out-boundary Travelcard. But the changeover provisions to which they refer require that the expiry date

of the new ticket is the same as that of the old, so if the monthly Travelcard had, say, two weeks left on it, the substituted Reading to Zones 1-6 Out-boundary Travelcard would also have to be for two weeks; and as the Defendants appear to accept, since the customer was going to Reading for only one week, at the end of that week the customer would have to apply for another changeover back to a regular Travelcard for the final week. This process has only to be described to make clear that this is a theoretical not a practical alternative, and hardly such as to preclude the lack of a simple one week Boundary season fare being an abuse. And if the traveller held a one-year Travelcard, it seems very doubtful that he could use these changeover rules at all for the purpose of one week's travel to Reading.

21. Even where a customer did want a season ticket for the same duration as a Travelcard, these Out-Boundary Travelcard Season tickets are primarily marketed as a ticket for travellers into London, which is doubtless why no Day Out-boundary Travelcard exists for a return fare from London. For tickets in respect of which Boundary Fares exist, the abuse alleged is that those Boundary Fares were not made sufficiently available to customers who would benefit from purchasing them. For tickets in respect of which no Boundary Fare exist at all, such as out-of-London season tickets, we think it is reasonably arguable that there was also an abuse where the suggested alternative was a form of ticket which also was not generally made available to customers for this purpose.
22. Accordingly, we do not consider that the existence of Out-boundary Travelcard Season tickets precludes it being reasonably arguable that the absence of Boundary Fare season tickets constituted an abuse.

### **(3) No obligation to create a new type of ticket**

23. This argument replicates the argument objecting to the contention that there could be no abuse in failing to offer Advance Boundary Fares: see the CAT Judgment at [73]-[74]. However, since the filing of the Defendants' Response, the Court of Appeal has held that it is indeed well arguable that the failure to offer an Advance Boundary Fare was an abuse: CA Judgment at [113]-[114].

The same reasoning applies to Boundary Season tickets. Accordingly, this objection fails.

**(4) No credible or plausible methodology**

24. We accept, as the Defendants effectively contend, that if the inclusion of season tickets within the claims would not have passed the test for certification, that result cannot be achieved by subsequent amendment. The test now is therefore the same.
25. The Defendants attack the methodology for addressing the season ticket issue described in Mr Holt's third report, submitting that it does not pass the *Microsoft* test. In particular, they contend that his proposal to assess the degree of overlap for outbound season tickets by the survey, to which we previously referred, would place undue additional weight on that survey and would require the addition of "a set of questions of exceptional complexity" addressed to "a very large sample size".
26. We addressed the reliance and design of the survey more generally in the CAT Judgment at [160]-[163]. As regards Mr Holt's third report, the use of a survey comes into play at step 3 of his four-step analysis, to assess the overlap of season ticket and Travelcard usage. We can see that given the smaller number of customers falling into this category, the survey size may have to be enlarged but we do not see that as a fundamental objection as there is no basis on the material before us to consider that it would have to be so large as to be unmanageable. We held previously that the Class Representative should not be expected to produce the detailed design of the survey at the time of certification, and we consider that the same must apply with regard to this amendment. Moreover, it appears that the Defendants may hold personal details of purchasers from them of season tickets valid for a period of one month or longer: Defendants' Response at fn 20. Although therefore not comprehensive of all season tickets, such data may enable a more targeted survey to be addressed to a significant sample of season ticket holders where the terms of their ticket were known. Given that quantification of damage in such cases may inevitably have to reset

on broad estimations, we find that Mr Holt’s method for addressing the season ticket issue satisfies the *Microsoft* test.

27. If it should prove that the survey results on this aspect of the claims are not sufficiently robust, it will be straightforward to exclude recovery in respect of season tickets. However, that is a matter for trial.

### **Wording of the Amendment**

28. We think that the wording of the draft amendment is intended to state that the season ticket journeys covered are for outbound travel from London. However, we think the point could be made clearer by a slight change in the wording. We therefore consider that it should read:

*“All persons who, at any point during the Relevant Period purchased or paid for a rail fare for themselves and/or another person, which was not ~~a season fare or~~ a Boundary Fare or a fare for the portion of their journey between the last station covered by their Travelcard to their destination, where:*

*a. the person for whom the fare was purchased held a Travelcard (or Travelcards) valid for travel within one or several of TfL’s fare zones (the “Zones”) at the time of their journey or, where the fare was a season ticket fare, for at least the period of validity of that season ticket fare; and*

*b. the rail fare (including a fare for a return journey and a season ticket fare) was for travel in whole or in part on the services of the Defendant(s) from a station within (but not on the outer boundary of) those Zones to a destination beyond the outer boundary of those Zones (including fares for return journeys).*

On that basis, we do not see any need to change the proposed definition of “season ticket fare”.

### **C. CONCLUSION**

29. We accordingly give the Class Representative permission to amend in the terms set out in para 28 above.
30. This ruling is unanimous.

The Hon. Mr Justice Roth  
Chair

Simon Holmes

Prof. Robin Mason

Charles Dhanowa O.B.E., K.C. (*Hon*)  
Registrar

Date: 10 November 2022