Case Number: TUR1/859/2013
25 February 2014

CENTRAL ARBITRATION COMMITTEE

TRADE UNION AND LABOUR RELATIONS (CONSOLIDATION) ACT 1992

SCHEDULE A1 - COLLECTIVE BARGAINING: RECOGNITION

DETERMINATION OF THE BARGAINING UNIT

The Parties:

RMT

and

Brylaine Travel Ltd

Introduction

1. The RMT (the Union) submitted an application to the CAC dated 19 November 2013 that it should be recognised for collective bargaining by Brylaine Travel Ltd (the Employer) for a bargaining unit comprising "all drivers at the above locations" which were listed as Boston, Skegness, Conningsby and Lincoln. The CAC gave the parties notice of receipt of the application on 20 November 2013. The Employer submitted a response to the application on 28 November 2013 which was duly copied to the Union.

2. In accordance with section 263 of the Trade Union and Labour Relations (Consolidation) Act 1992 (the Act), the CAC Chairman established a Panel to deal with the case. The Panel consisted of Mr Chris Chapman, Chairman of the Panel, and, as Members, Mr George Getlevog and Mr Gerry Veart. The Case Manager appointed to support the Panel was Nigel Cookson.

3. By a decision dated 20 December 2013 the Panel accepted the Union's application. The parties then entered a period of negotiation in an attempt to reach agreement on the appropriate bargaining unit, but no agreement was reached. In a letter dated 9 January 2014 the parties were invited to supply the Panel with, and to exchange, written submissions ahead of a hearing to determine the appropriate bargaining unit. The deadline for the parties' submissions was 5 February 2014. Not having received its submissions by the noon deadline the Case Manager emailed the Employer asking when they would be lodged. In the email the Employer was reminded that it should address the factors set out in the Case Manager's letter of 9 January 2014. The Employer responded by email later that same day. It referred to an attached notice adding that "Under these circumstances I don't think it appropriate for us to attend any hearings into this matter or to submit any further submissions". The notice, which the Employer had distributed to its workers, was critical of the Union for calling a strike on the London Underground adding that as the Employer's internal vote on union recognition had not shown a majority in favour of the Union being recognised, it had taken the decision not to enter in any formal voluntary agreement with the Union. The Employer ended the notice explaining to the workers that it hoped that a workable JNC could be established swiftly and successfully.

4. On 6 February 2014 the Panel Chairman directed that the Case Manager write to the Employer and explain that the hearing in Nottingham on the 12 February 2014 was to establish the appropriate bargaining unit in this matter and that this was best achieved with both parties present. It was pointed out that attendance by the Employer would allow it the opportunity to make oral submissions to the Panel on the Union's proposed bargaining unit and any alternative bargaining unit it may wish to put forward, adding that its presence would also allow the Panel to ask questions of fact so that it could ensure that the bargaining unit it determined was compatible with effective management. It was explained that the CAC could not compel a party to attend a hearing, but it was clear that the Employer was best placed to answer such questions. For these reasons, the Chairman asked that the Employer reconsider its position and engage in the statutory process. On the basis that it would reconsider, the Panel Chairman extended the deadline for the lodging of the Employer's statement of case to noon on 10 February 2014.

5. On 7 February 2014 the Employer replied to the Case Manager's letter of 6 February 2014. It asked the Panel to accept its letter as its formal intention not to undertake any

voluntary agreement with the Union and outlined its reasons for arriving at its decision. Having set out its reasons the Employer noted that the CAC should take all facets into consideration and that the Employer, as an independent organisation, must expect equal consideration of how it works as a team. It concluded its letter repeating its stance that it would not be entering into a voluntary agreement with the Union as it believed that its driving team did not want union recognition within the company.

6. On 10 February 2014 the Case Manager wrote to the parties. In his letter enclosing a copy of the Union's submissions he informed the Employer that, as set out earlier, the Panel would make its decision as to the appropriate bargaining unit based on the evidence put before it by the parties. For this reason, the Panel would ask that the Employer engaged with the statutory process and attended the hearing so that the Panel could indeed arrive at a decision having given consideration to the views of both parties.

7. A hearing was held in Nottingham on 12 February 2014 and the names of those who attended the hearing are appended to this decision. In accordance with paragraph 19 of Schedule A1 to the Act (the Schedule) the Panel's task was to determine first whether the Union's proposed bargaining unit was appropriate and then, if it was found not to be so, to determine another bargaining unit that was appropriate.

Background

8. The Employer's website explains the history of the company. Briefly, we are told that Brylaine Travel was formed by Brian and Elaine Gregg in 1980 and that they initially operated four vehicles in Old Bollingbroke, near Spilsby, Lincolnshire. Over the next decade the business expanded until it became, in its words, the largest independently owned bus operator in Lincolnshire. Today the company operated a range of vehicles from the small 28 seat buses type to a fleet of 80 seat double-deckers. The Employer's head office depot was based in Boston, Lincolnshire, with further depots in Skegness and Conningsby. The website confirmed that the main depot was in Boston adding that it was also the central point for the mechanical workshops, as well as administration. For some reason the background history given by the Employer on its website made no reference to the depot at Lincoln but which also formed part of the Union's proposed bargaining unit.

The hearing

9. In his opening remarks the Panel Chairman said that the Employer had made clear its intention not to attend the hearing but that he had hoped that there had been a change of mind. However, this was not the case as there was no attendance either by or on behalf of the Employer by the time the hearing started.

10. The Panel Chairman then set out in clear terms the function of the hearing and how it formed part of the sequential process undertaken by the CAC when faced with an application for statutory recognition. He explained the issues that the Panel would examine in its determination of an appropriate bargaining unit and which are set out in paragraph 19(b) of the Schedule. The Panel Chairman then called upon the Union to explain its reasons for selecting its proposed bargaining unit.

Summary of the submission made by the Union

11. The Union, by way of history, explained that it had a branch secretary employed at Stagecoach in Lincoln and that drivers in the proposed bargaining unit would approach him with issues to do with matters such as discipline as they had no one else they could approach within their own company for this information. Drivers started to join the Union in numbers and it then reached the stage whereby they wanted the Union to represent them for collective bargaining purposes.

12. A meeting was held between the Union and the Employer and during this meeting the Employer stated its preference at that time for discussions to be limited to the drivers alone. Whilst the Union would have been happy to have had a wider bargaining unit including the engineers, it was nonetheless content, in view of the Employer's comment, to keep it to the drivers for now.

13. However, since then the Employer's view had changed and it was now clear it did not want the Union presence within the company at all. In a further meeting with the Employer, the Union had explained how recognition would work and the parties swapped templates for procedure agreements. Again, the Union had made it clear to the Employer that it would be content to expand the bargaining unit to include engineers. But the Union then received from

the CAC a copy of the Employer's notice criticising the RMT strike in London and this was followed very soon after by phone calls from members within the proposed bargaining unit who had received copies of the notice from the Employer. The Employer had also labelled the Union as "aggressive" in its in-house magazine.

14. The Panel Chairman asked the Union about the content of the Employer's letter of 3 February 2014 which referred to the setting up of a JNC and whether the Union understood this to include the engineers. As far as the Union was aware the Employer wanted a committee covering all of its workers but with no Union involvement. When asked about the JNC representatives, the Union said that it did not know whether the Employer intended the representatives to be elected or nominated. The Union did comment that the remit of the JNC would extend to pay and terms of conditions but that it would be limited to discussing these issues rather than negotiating. The Union referred to the Employer's in-house company magazine "Busz" which explained about the setting up of the JNC.

15. The Panel Chairman asked the Union about the location of the engineers and the Union explained that as far as it knew, they were in the main located at Boston. There were depots at the other three locations but the Union did not know how many engineers were based at these depots. To the Union's knowledge, if a bus needed to be fixed it would be brought to Boston for repair.

16. The Union had no knowledge as to whether the engineers or office staff provided holiday cover for the drivers. As far as it knew, an engineer would test drive a bus following repair but they were not service drivers. As far as the Union was aware the engineers did not have contracts of employment which called upon them to drive, if necessary.

17. The Panel Chairman asked the Union if it knew whether the drivers were hourly paid, which it said they were, but it did not know whether the same arrangement applied to the office staff. Nor did the Union know if the engineers had similar terms and conditions to the drivers.

18. Mr Hitchen, from the Union's Organising Unit, explained that to his knowledge the terms and conditions that applied to the drivers did not apply to the other workers. Their shift patterns, the regulations that covered their work and that they worked directly with members

of the public singled them out from the other workers within the company. An engineer may drive a bus to get it back to the depot for repair or maintenance but this did not involve any service work i.e. picking up passengers. The office staff would also be on different terms and conditions. The drivers were hourly paid and not salaried, although the Union did not know the arrangements for the remuneration of the engineers.

19. The Union then answered questions put by the Panel. When asked how the bargaining unit was defined in its discussions with the Employer, the Union said that it had been left blank on its template whilst in the Employer's it referred to PCV drivers, which excluded the engineers. The Union confirmed that as far as it was aware, the drivers were the only ones on a shift pattern with those in the office on "office hours". When asked if, in any discussions with its members, the Union had been informed as to whether the drivers were treated differently, for example in respect of sick leave, the Union said that no such information had been forthcoming.

20. There was some discussion as to the number of engineers as the Union understood there to be four but the Employer made reference to eight engineers in an email to the Case Manager of 13 December 2013 when referencing the results of the in-house ballot the Employer had conducted as to whether the workers supported union recognition or favoured a JNC. The Union explained that it had arrived at the figure of four from information relayed by its members.

21. In summing up the Union said that it would accept all workers in a bargaining unit but, despite what it had said previously, the Employer had told the Union that it wanted to limit the bargaining unit to drivers. The Union would be happy to start with a bargaining unit limited to the drivers and to build a relationship with the Employer and then widen the bounds of the bargaining unit through agreement.

Summary of the submission made by the Employer

22. Whilst the Employer did not attend the hearing on 12 February 2014 and so made no oral submissions, the Panel has examined the correspondence received from the Employer since the application was lodged to see whether its views on the appropriate bargaining unit could be identified. Prior to the hearing, on 3 February 2015, the Employer furnished the

CAC with the notice that it had issued to its workers. However, this notice, dated 3 February 2014, carried no indication as to the Employer's view on the appropriate bargaining unit but rather reasons as to why it did not wish to enter into an agreement with the Union. Again, in its letter to the CAC dated 7 February 2014, and which listed a chronology of the Union's attempt to gain recognition, it contains no clue as to the Employer's view on the appropriate bargaining unit save a reference to the CAC having to understand that "…as an independent organization, (the Employer) must take on board the general consensus of ALL (emphasis supplied) our team to create an environment that works to support all" which could possibly be interpreted as a call for a company-wide bargaining unit. This interpretation of the Employer's view on the appropriate bargaining unit is buttressed by comments it made in its response to the application back on 28 November 2013. At that time, when asked whether it agreed with the Union's proposed bargaining unit, the Employer said that it had always operated a system of total fairness to all staff and that, for the first time in 34 years, the staff would be split into drivers, engineers and admin.

Considerations

23. The Panel is required, by paragraph 19(2) of the Schedule to the Act, to decide whether the proposed bargaining unit is appropriate and, if found not to be appropriate, to decide in accordance with paragraph 19(3) a bargaining unit which is appropriate. Paragraph 19B(1) and (2) state that, in making those decisions, the Panel must take into account the need for the unit to be compatible with effective management and the matters listed in paragraph 19B(3) of the Schedule so far as they do not conflict with that need. The matters listed in paragraph 19B(3) are: the views of the employer and the union; existing national and local bargaining arrangements; the desirability of avoiding small fragmented bargaining units within an undertaking; the characteristics of workers falling within the bargaining unit under consideration and of any other employees of the employer whom the CAC considers relevant; and the location of workers. Paragraph 19B(4) states that in taking an employer's views into account for the purpose of deciding whether the proposed bargaining unit is appropriate, the CAC must take into account any view the employer has about any other bargaining unit that he considers would be appropriate.

24. The Panel must also have regard to paragraph 171 of the Schedule which provides that "[i]n exercising functions under this Schedule in any particular case the CAC must have

regard to the object of encouraging and promoting fair and efficient practices and arrangements in the workplace, so far as having regard to that object is consistent with applying other provisions of this Schedule in the case concerned." We have reached our decision after full and detailed consideration of written and oral submissions and the evidence before us and responses to questions addressed to the Union at the hearing.

25. The Panel was disappointed that the Employer had taken the decision not to attend the hearing on 12 February 2014 especially as it did not provide submissions addressing the question of the appropriate bargaining unit in this matter. In its letter of 7 February 2014 the Employer did ask that equal consideration be given to its views and the Panel, in the Case Manager's letter to the Employer dated 10 February 2014, made plain that it would make its decision as to the appropriate bargaining unit based on the evidence put before it by the parties and called upon the Employer to engage with the statutory process and attend the hearing so that the Panel could make its decision having given full consideration to the views of both parties. However, the Panel's entreaty was to no avail and we have had to make a decision based on the evidence provided by the Union in the absence of any contribution from the Employer.

26. The Union made submissions as to the appropriateness of its proposed bargaining unit, although its evidence was largely drawn out through questioning by the Panel during the course of the hearing. It explained, as far as it was able, given that it has had limited access to the workforce, how the engineers' terms and conditions differed to those of the drivers and that whilst engineers may be called upon to drive a bus as part of their general duties such as taking a bus to the depot for maintenance or repair, they would not drive on service routes picking up passengers. The admin workers also enjoyed terms and conditions that differed to the drivers. They worked in offices, were believed to be salaried and not hourly paid, and worked different hours. Neither did the office workers work face to face with members of the public, as did the drivers.

27. It is the Panel's assumption that, were it present, the Employer would argue for a company-wide bargaining unit. The difficulty that the Panel faces is that save for the Employer's comment that a bargaining unit comprising solely the drivers would split the workforce it put forward no evidence as to why such a bargaining unit would not be compatible with effective management.

28. Turning to the matters listed in paragraph 19B(3) the Panel has first, taken into account the views of the parties as summarised in this decision to the extent that they were made available. Second, the Panel has seen no evidence to suggest that there are any existing bargaining arrangements in place that cover any of the workers in the Union's proposed bargaining unit. Third, drawing on the Panel's industrial experience, it is custom and practice to have separate collective bargaining arrangements for hourly-paid workers and those workers described as admin and who are office based and would be, in the main, salaried rather than hourly paid. In the absence of any evidence from the Employer to the contrary, the Panel did not consider that the Union's proposed bargaining unit would give rise to small fragmented bargaining units. The desirability of avoiding such units was addressed by Collins J in the matter of *R (Cable & Wireless Services U.K. Limited) & Central Arbitration Committee & The Communication Workers Union [2008] EWHC 115 (Admin)* where he said:

However, it is obvious that the real problem is the risk of proliferation which is likely to result from the creation of one such unit. Hence it is important to see whether such a unit is self-contained. Fragmentation carries with it the notion that there is no obvious identifiable boundary to the unit in question so that it will leave the opportunity for other such units to exist and that will be detrimental to effective management.

29. In our view the drivers formed a clear and cohesive bargaining unit and as such satisfied Collins J's analysis as being self-contained and having a clear identifiable boundary. Fourth, the Panel considers that the workers within the proposed bargaining unit have common characteristics that differ from those outside the unit. The drivers are subject to specific and distinct forms of regulation, including the requirement for a PCV licence, restricted working hours as set out in the GB Domestic rules for passenger vehicles, and special training. No evidence has been put forward to show that any of the workers falling outwith the proposed bargaining unit are governed by the same or a similar set of regulations.

30. Finally, the Panel would add that although it has made its decision as to the appropriate bargaining unit in this matter, this would not prevent the parties, at a later stage, concluding a voluntary agreement encompassing a wider bargaining unit, should they wish to do so.

Decision

31. The appropriate bargaining unit in this matter is that as proposed by the Union, namely comprising all drivers employed at the depots in Boston, Skegness, Conningsby and Lincoln.

Panel

Mr Chris Chapman, Chairman of the Panel
Mr George Getlevog
Mr Gerry Veart

25 February 2014

Appendix

Names of those who attended the hearing on 12 February 2014:

For the Union

Dave Collinson	-	RMT Regional Organiser
Gerry Hitchen	-	RMT Organising Unit

For the Employer

No appearance by or on behalf of the Employer