



WEST MIDLANDS TRAFFIC AREA

DECISION OF THE TRAFFIC COMMISSIONER

PUBLIC INQUIRY HELD IN BIRMINGHAM ON 24 JANUARY 2018

OPERATOR: DENISE MAXWELL T/A KNOWLE TRANSPORT

LICENCE OD1102524

Decision

1. The standard national goods vehicle operator's licence held by Denise Maxwell trading as Knowle Transport is revoked with effect from 0001 hours on 10 March 2018, pursuant to Sections 26(1)(c)(iii) and 27(1)(a) and (b) of the Goods Vehicles (Licensing of Operators) Act 1995 ("the 1995 Act").
2. The good repute of transport manager Paul Horsburgh is lost, pursuant to Schedule 3 of the Goods Vehicles (Licensing of Operators) Act 1995. Under paragraph 16 of that Schedule, he is disqualified for an indefinite period of time from acting as a transport manager on any operator's licence in the European Union. Before he can act as a transport manager again, he must retake and pass the transport manager CPC examination.
3. Denise Maxwell is not of good repute. She is disqualified for a period of five years from holding or obtaining any type of operator's licence in any traffic area and from being the director of any company holding or obtaining such a licence, pursuant to section 28 (1), (4) and (5) of the 1995 Act. The disqualification will take effect at 0001 hours on 10 March 2018 and terminate at 0001 hours on 10 March 2023.

Background

Operator details

1. Denise Maxwell trading as Knowle Transport holds a standard national goods vehicle operator's licence (OD1102524) for 14 vehicles and four trailers. There are 13 vehicles currently in possession. The licence was granted in July 2011. The nominated transport manager on the licence is Paul Horsburgh.

Previous history

2. At a public inquiry in April 2015, Denise Maxwell's licence was suspended for 21 days by the then traffic commissioner Nick Jones, after the operator had been fined £79,000 by HMRC for illegally using rebated fuel in its vehicles. HMRC's assessment value (ie the amount of duty it considered that the operator had evaded) was £239,900, a sum

which the operator was also charged. The operator was categorised by HMRC as an “habitual offender”.

DVSA report

3. In December 2017 I received a report from DVSA vehicle examiner Paul Matthews. He stated that vehicle WA58 BVE, operated by Denise Maxwell, had been stopped on 2 August 2017 and found to be fitted with a device that disabled the AdBlue system. This would have increased the NOx emissions from the vehicle to beyond the limit for a Euro 4 engine. An S-marked prohibition was issued.
4. A day later, on 3 August 2017, vehicle GF11 FHD, also operated by Ms Maxwell, was stopped by DVSA and also found to be fitted with an AdBlue disabling device. Again, an S-marked prohibition was issued.
5. On 18 September 2017 another of Ms Maxwell’s vehicles WA09 BMV was stopped. This time it was discovered that a fuse had been removed which rendered the AdBlue system inoperative. An S-marked prohibition was issued.
6. Mr Matthews subsequently visited the operator to investigate. Denise Maxwell declined to answer his questions on the advice of her solicitor. However, Mr Matthews did shortly afterwards receive a letter from the solicitor which explained that vehicles WA58 BE and GF11 FHD had been fitted with AdBlue emulators as a temporary measure, since both vehicles had experienced severe difficulties in operating with the AdBlue system installed. The devices had been on the vehicles for approximately two months while waiting for the AdBlue systems to be replaced in one go. In respect of WA09 BMV the driver of the vehicle on 18 September had experienced a fuse problem and had removed another fuse (the AdBlue fuse) from the fuseboard to replace the faulty fuse. The company was committed to ensuring that there would be no repetition of these shortcomings in the future.

Public inquiry

Call-up

7. In the light of Mr Matthews’ report and the operator’s previous history I decided to call the operator and transport manager to a public inquiry.
8. The call-up letter was sent on 20 December 2017, citing Sections 26(1)(b), (c)(iii), (e), (f) and (h) and 27(1)(a) and (b) of the 1995 Act as well as Article 4.1(a) of Regulation EC 1071/2009. By letter of the same date, transport manager Paul Horsburgh was also called to the inquiry to consider his repute.

Holding of public inquiry

9. The inquiry was held in Birmingham on 24 January 2018. Present were Denise Maxwell and Paul Horsburgh. The operator and transport manager were represented by Samuel Green QC, instructed by Neil Davis from Cartwright King Solicitors.

Evidence by and on behalf of the operator

10. Mr Green explained that Ms Maxwell had been faced with a dilemma when AdBlue system problems emerged with vehicles WA58 BE and GF11 FHD. These vehicles were servicing contracts which carried severe penalties for failure to perform. The operator’s maintenance provider, Mitchells Commercials Ltd, had suggested disabling the AdBlue system. Ms Maxwell believed she was facing a binary choice between incurring contract penalties or fitting the emulators. She had not paused to consider other possibilities such as renting replacement vehicles. None of the rest of the fleet had been affected. Mr Green provided a letter dated 8 January 2018 from Mitchell Commercials Ltd confirming that it had not been able to rectify AdBlue problems with

the two vehicles in question and so “a decision was made” to have emulators fitted as a short-term measure.

11. Mr Green further explained that Ms Maxwell had known nothing of the repositioned fuse incident on 18 September until after the event. The decision to use the AdBlue fuse to rectify a problem with the vehicle’s lights had been taken by the driver alone. Ms Maxwell had since written to drivers telling them not to do this (a copy of the letter was shown to me).
12. In summary, the AdBlue breaches had been for a short period of time. Ms Maxwell should have acted sooner to address the problem but everything had been put right immediately after the stops in early August.
13. I asked Ms Maxwell why none of the driver defect reports or safety inspection sheets relating to vehicles WA58 BE and GF11 FHD seemed to identify any problems with AdBlue. She stated that the problems might have been raised orally rather than on any documentation.

Transport manager

14. I asked transport manager Paul Horsburgh whether he had been aware of the fitting of the AdBlue emulators and if so what his advice to the operator had been. He stated that he was responsible for tachographs and drivers’ hours issues, not vehicle maintenance. He had not been aware of the AdBlue problems.
15. Mr Horsburgh told me that he was paid **REDACTED** a month in cash by the operator. He spent around 7 hours at the operator’s yard every Friday, downloading tachographs. He would then carry out the tachograph analysis on Saturdays. Although the call-up letter had stipulated that the operator should bring the last 12 months worth of drivers’ hours infringement letters, this had not been done. Instead Mr Horsburgh had provided a memory stick. He now loaded this into his laptop and showed me the drivers’ hours data. I asked him to show me details of infringements committed by a couple of named drivers. He could not. Mr Horsburgh said he was not too familiar with the system and was going to make arrangements with a person from the software company to show him how to use it. I asked how long he had been using it and he replied four years. It quickly became apparent that, although Mr Horsburgh had been downloading driver card data, he did not know how to use the software to analyse the data for infringements. He was simply looking at information on screen and then laboriously counting up driving minutes, break minutes etc.
16. I asked to see the downloads for the driver who had been driving WA09 BMV on 18 September 2017. However, the most recent download for that driver was for the month of June. No download had been performed since, clearly infringing the requirement to download driver cards at least every 28 days.
17. I was frankly shocked by Mr Horsburgh’s presentation. It was clear to me that he had no idea how to use the system to identify driver infringements or instances of missing mileage where drivers might have driven the vehicles without their cards inserted into the tachograph. I asked him why he had not sought advice from the software provider before now and he replied that he had been waiting to see how things turned out today.
18. I drew Mr Horsburgh’s attention to the TM1 form he had signed on 15 May 2013 confirming that he had a contract with Denise Maxwell and that this contract included making sure that vehicles were inspected properly and on time, that vehicles were operated lawfully and that drivers recorded and reported defects. Mr Horsburgh accepted that no contract existed, although he had asked for one, and that he played no part in assuring the operator’s compliance with maintenance requirements.

19. I looked through the documentation provided and noted that the tachograph calibration dates for two vehicles, WA09 BMV and BN61 UVK, had been missed. Mr Horsburgh said that he did not know about this.
20. I noted that the driver entitlement records consisted of photocopies of drivers' licences and driver qualification cards. There was no evidence of regular checking of entitlement on the DVLA website. Mr Horsburgh confirmed that he had not carried out any checks with DVLA.
21. I noted that many of the safety inspection reports contained numerous driver detectable defects, defects such as broken light which should be identified by drivers on a daily basis and rectified straight away rather than await the next six-week inspection. Taking just one example, the inspection of WA09 BMV on 4 August 2017, I noted the following defects which should have been identified by drivers on a walk-round check: washer jets blocked, ignition switch faulty, side light inoperable, one nearside tyre sidewall split, a nail in the offside tyre, the air suspension warning light on, holes in the rear wing. Driver defect reports in the week prior to 4 August were all marked nil defect. By contrast, I saw that the driver of the same vehicle had reported problems with the air suspension on every single defect sheet (some 35 sheets in total) between 6 November and 22 December 2017 (the most recent sheet available), with no record of any action by the operator. The driver defect reporting system is clearly completely dysfunctional, a result of the transport manager not taking responsibility for it and the operator not having the necessary qualifications or knowledge to manage the system properly.
22. Mr Green said that if I were unhappy with Mr Horsburgh's competence and repute as transport manager, the operator could propose a new transport manager, Nicholas Martin. A copy of Mr Martin's transport manager CPC certificate, dating from 1998, was handed to me. Mr Martin was not present at the inquiry so I was unable to question him about his competence, his repute or any improvement plans he might have.

Further information

23. I asked Denise Maxwell if she could provide me with invoices showing the purchase of AdBlue over the past 15 months. She undertook to do this within the next few days. She subsequently provided invoices for AdBlue covering the period 10 October 2016 to 23 January 2018. I examined these and found that, according to the information therein, a total of 630 litres of AdBlue was purchased by the operator in the ten month period 1 October 2016 to 31 July 2017 (ie before the S-marked prohibitions were issued on 2 and 3 August 2017). In the six months since those prohibitions, a total of 8296 litres was purchased. There was no large-scale changeover of vehicles in August 2017 which could account for an increase in monthly use of AdBlue from an average of 63 litres before the prohibitions to 1383 litres afterwards – the increase was by more than a factor of 20. My clerk emailed Denise Maxwell on 25 January 2018 asking her to explain the discrepancy. No reply has been forthcoming as of the date of this decision, despite my clerk asking for a response by 1 February.

Findings

24. After considering all the evidence I have reached the following findings:
 - i) the operator's vehicles have incurred three S-marked prohibitions (Section 26(1)(c)(iii) of the 1995 Act refers) for the AdBlue system being suppressed or inoperable;
 - ii) the operator has failed to fulfil her undertaking to ensure that the laws relating to tachographs and drivers' hours are observed (Section 26(1)(f) refers). Transport

manager Paul Horsburgh does not have sufficient knowledge of the software he is using to be able to identify or thus take action on driver infringements or missing mileage;

- iii) the operator has failed to fulfil her undertaking to ensure that drivers report defects in writing. The periodic safety inspection sheets show large numbers of driver detectable defects. The transport manager has no role in checking the reports or managing the defect reporting system which, as outlined above, is clearly dysfunctional;
- iv) the operator Denise Maxwell is not of good repute (Section 27(1)(a) refers). She took a deliberate decision to suppress the AdBlue system on at least two vehicles, instead of hiring in alternative vehicles or sub-contracting work out. I do not accept Mitchell Commercials Ltd's statement that there were AdBlue problems with the two vehicles which could not be rectified in a timely manner. For one thing, there is no evidence of any such problems on the maintenance or driver defect documentation in preceding days or weeks. For another, there seems to have been no difficulty in rectifying the problems after the vehicles were stopped by DVSA and found to have AdBlue emulator devices. Moreover, the exponential increase in the use of AdBlue after the stops in early August 2017 is very strong evidence that Ms Maxwell was making widespread use of AdBlue suppression devices before that date. Further, I do not agree with Mr Green's assertion that the illegal use of rebated fuel over the period 2012-2013 discovered by HMRC is a completely different issue. Coming on top of the diesel fraud, the AdBlue issue is a clear demonstration that Ms Maxwell has not learned her lesson and has continued her fraudulent behaviour through her manipulation of the devices which are meant to ensure that the vehicles stay within their permitted emission levels. Such persistent dishonest conduct has destroyed any trust I could have in her. Still further, large areas of her operation have been entirely outside the purview of her transport manager, a state of affairs which she was clearly fully aware of.
- v) the transport manager Paul Horsburgh is not of good repute (Section 27(1)(b) refers). He signed a TM1 form confirming that he had a contract with the operator and that his responsibilities included ensuring the proper maintenance of vehicles and effective driver reporting. He did not have a contract, has never had one, and never took responsibility for maintenance or driver defect reporting. These were issues which fell under Ms Maxwell's responsibility. In the area for which he does have responsibility, - drivers' hours – Mr Horsburgh is clearly incompetent. For four years he struggled with a tachograph analysis system he did not understand, and did not know how to generate the driver infringement and missing mileage reports which are the whole point of the analysis system. His attempts to identify infringements from a manual examination of the data were misguided: it would not be possible from the data he showed me to identify all infringements. I have found nothing substantive to put on the positive side of the balance.

Conclusions

- 25. Given my findings that both operator and transport manager lack good repute, revocation of the licence is mandatory under Section 27(1)(a) and (b) of the 1995 Act.
- 26. I nevertheless asked myself the Priority Freight question of how likely it is that the operator will comply in the future. The AdBlue fraud coming on top of the still recent rebated diesel fraud, I have no hesitation in concluding that it is extremely unlikely. The two serious issues of fraud and the prolonged and conscious operation without any transport manager involvement on the vital issue of maintenance mean that the answer

to the Bryan Haulage question of whether the operator deserves to go out of business is that it does.

Operator

27. I am revoking the licence with effect from 10 March 2018, to give the operator time to wind down its business in an orderly manner.

28. Because of the serious nature of the findings above, I conclude that Denise Maxwell deserves to be disqualified under Section 28 from holding a licence in the future. In deciding upon the length of her disqualification, I have taken account of paragraph 93 of the STC's Statutory Guidance Document 10. This posits a starting point of between one and three years for a first public inquiry but a period of between five and ten years for serious cases where an element of falsification is involved. As outlined above, there has been a considerable level of fraud or falsification by this operator in recent times. This is the operator's second inquiry involving fraud/falsification within three years. I have therefore concluded that a disqualification period of five years is the minimum I can impose which is proportionate, appropriate, and in line with the STC's guidelines.

Transport manager

29. Having concluded that Mr Horsburgh's good repute is lost I must also disqualify him under paragraph 16 of Schedule 3 to the 1995 Act from being a transport manager on any licence. Mr Horsburgh appeared well out of his depth as a transport manager – he clearly had no appreciation of the key nature of the role and no idea of how to produce the necessary drivers' hours analyses and infringement reports for which he was responsible. His failures and lack of basic knowledge are not such as will be cured by the mere passage of time. I am therefore disqualifying Mr Horsburgh from acting as a transport manager for an indefinite period of time, at least until he retakes and passes the transport manager CPC examination.



Nicholas Denton
Traffic Commissioner
7 February 2018