



## **NORTH EAST TRAFFIC AREA**

### **DECISION OF THE TRAFFIC COMMISSIONER**

**PUBLIC INQUIRY HELD IN LEEDS ON 23 MAY 2018**

**ANCHOLME AGRICULTURE HAULAGE LTD**

**LICENCE OB1097837**

#### **Decision**

1. Pursuant to adverse findings under Section 26(1)(c)(iii) and (f) the Goods Vehicles (Licensing of Operators) Act 1995 ("the 1995 Act"), and Sections 27(1)(a) and (b) of the said Act, the Standard National goods vehicle Operator's Licence held by Ancholme Agriculture Haulage Ltd is curtailed from 5 to 3 vehicles from 16 July 2018.
2. Pursuant to Schedule 3 paragraph 1 of the 1995 Act and Article 4.1 of Regulation EC 1071/2009 James Stuart Smith has lost his good repute as a Transport Manager. Under paragraph 16(2) of that Schedule, he is disqualified, with immediate effect for 3 years, from acting as a Transport Manager on any operator's licence. He must first retake and pass the CPC qualification before returning to the Industry as a Transport Manager.
3. A Period of Grace of is granted until 31 August 2018 for the Operator to engage a Transport Manager.

#### **Background**

##### *Operator details*

1. Ancholme Agriculture Haulage Ltd holds a Standard National Goods vehicle Operator's Licence (OB1097837) for 5 vehicles and 5 trailers. There are 5 vehicles in possession. The Licence was granted on 7 September 2010. The authorised Operating Centre is at Ancholme House, Atherton Way, Brigg, DN20 8AR. The sole director of the company has always been David Mark Smith.
2. The nominated Transport Manager is James Stuart Smith (brother of David Smith), who holds his own Operator Licence, James Stuart Smith (OF0219741). Until recently he had also held a Licence based out of the Ancholme House Operating Centre, James S Smith (Wrawby) Ltd (OB0228361). This Licence was revoked on 12 April 2018 following the dissolution of the Company on 27 February 2018. In August 2017, this Licence was the subject of regulatory action at Public Inquiry where the Licence authority was curtailed and the repute of Mr Smith as a Transport Manager was tarnished.

### *DVSA investigation*

3. On 10 August 2017 during a DVSA roadside inspection at Wellfield Weighbridge in County Durham, vehicle FJ10XDN was found to be fitted with an AdBlue emulator. AdBlue is used by vehicles to meet Euro 4 or better emissions standards by the reduction of NOx emissions from diesel engines. A functioning emulator 'cheat' device found on a vehicle has the effect of disabling the vehicle's AdBlue system and extinguishing the warning light on the dashboard which would have warned the driver that the AdBlue system was not functioning. The Operator was thus gaining a competitive advantage over its rivals in that it was avoiding the cost of both the AdBlue and of maintaining the AdBlue system in the vehicle. In those circumstances NOx emissions are increased up to 3 times the legal threshold for the vehicle depending on which generation of Euro engine is in use. The DVSA issued an S-marked prohibition, indicating a serious failure in the Operator's maintenance systems. This triggered a DVSA Operator follow up investigation.
4. On 14 September 2017, DVSA Vehicle Examiner Tony Aiken carried out a follow up investigation at the Operator's premises in Brigg. The only vehicle present was YM57CWW; it wasn't in use at the time but was found to have an AdBlue emulator fitted. The remaining 3 vehicles were on task, however, using the Operator's tracking facility vehicle BX09CYP was diverted to a DVSA checksite at Cuerdon, where it too was found to be fitted with an AdBlue emulator. The vehicle was given a further prohibition for not having its service brake line attached to the trailer. The remaining 2 vehicles were directed back to the Operating Centre for inspection. KP57MDZ was given a prohibition for an ABS warning light indicating a fault and the final vehicle NV61FXA was clear of defects. In summary, of a fleet of 5 vehicles, 3 were found to be fitted with emulators, with 2 further prohibitions issued, one of which, for failing to have brake lines attached to the trailer, was also 'S' marked.
5. Company director, David Smith, and Transport Manager James Smith were in attendance during the DVSA visit. Both denied knowledge of the devices and stated that they must already have been fitted to the vehicles when purchased. Neither had noticed that the AdBlue systems were not working or consuming AdBlue.

### **Public inquiry**

6. The Operator was called to Public Inquiry, call-up letter sent on 11 April 2018, citing Sections 26(1)(c)(iii), (ca), and (f) and 27(1)(a) and (b) of the 1995 Act as well as Article 4.1 of Regulation EC 1071/2009. James Smith was also called by separate letter in his capacity as Transport Manager to consider his repute.
7. I do not set out all of the evidence of the Public Inquiry, only that relevant to my considerations and findings.

### *Preliminary Considerations at Hearing*

8. The Inquiry was held in Leeds on 23 May 2018. Present for the Operator were Mr David Smith (Director) and Mr James Smith (Transport Manager); they were not legally represented. DVSA Vehicle Examiners, Mr Tony Aiken and Mr Stephen Cave were in attendance. Mr Aiken conducted the follow up Operator visit on 14 September 2017, Mr Cave accompanied him to provide additional SME technical support on the AdBlue aspects of the case.
9. As a preliminary matter I noted the parties did not have legal representation. I canvassed the seriousness of the allegations with the Operator and Transport Manager. They confirmed it was their intention to proceed unrepresented and they were fully aware of the issues; I proceeded with the Public Inquiry on this basis.

10. At the outset of the Public Inquiry I sought to establish the current level of knowledge of the Operator and Transport Manager as to the purpose of AdBlue and the effect of fitting an emulator device to a vehicle. The Operator Mr David Smith displayed a basic understanding of the issues, Mr James Smith displayed a detailed knowledge. Both stated that at the time that the first vehicle was stopped their collective knowledge of AdBlue systems and usage was poor as was their knowledge of the use of emulators.
11. To assist the Operator and Transport Manager, in terms on chronology, we reviewed the Operator's fleet at the time that emulators were found using the information provided in the bundle. This is summarised as follows:
- **FJ10XDN** was acquired by Ancholme Agriculture Haulage Ltd on 22 July 2017 from James S Smith (Wrawby) Ltd. Prior to that it was purchased by James Smith on 20 April 2016 from Scania GB. An emulator was found during a roadside check on 10 August 2017.
  - **YN57CWW** was specified by Ancholme Agriculture Haulage Ltd in June 2014 having been purchased from James S Smith (Wrawby) Ltd. Prior to that it was purchased by James Smith from Wright Truck Sales in Wetherby in February 2014. An emulator was found during a follow up visit to the Operating Centre on 14 September 2017; the vehicle was not in use at the time. [I noted after the Public Inquiry that the vehicle had been de-specified on 20 July 2017, before the DVSA visit. This point was not raised by any party during the Inquiry].
  - **BX09CYP** has been in possession of Ancholme Agriculture Haulage Ltd since 1 December 2016, but specified on the licence from 31 March 2016. Prior to that it was purchased by James Smith in January 2016 from Wright Truck Sales in Wetherby. This vehicle was found to have an emulator fitted having been rerouted to a DVSA site in Cuerdon on 14 September 2017.
  - **KP57MDZ** was given a prohibition for an ABS warning light when inspected on return to the Operating Centre on 14 September 2017, but was clear of an emulator device.
  - **NV61FXA** was found to be clear of defects when inspected on its return to the Operating Centre on 14 September 2017.

*Evidence of Vehicle Examiner, Mr Stephen Cave*

12. Vehicle Examiner Cave provided a brief overview of the AdBlue system and in particular the general indicators that an AdBlue emulator device may be in use. He cited a number of obvious signs that the vehicle's AdBlue system was not operating as intended.

These are summarised as follows:

- i) The lack of characteristic clicking noise on vehicle start up as the AdBlue system initiated.
- ii) The lack of sound of the AdBlue system self-purging itself of the chemical when the engine is turned off.
- iii) The AdBlue level on the dashboard never moving from a definite level, usually showing as a quarter, half, or three quarters full.
- iv) Furring (a white residue) around the cap where the AdBlue is replenished as evidence that the chemical is not being consumed by the vehicle and added on a regular basis.

- v) The consumption of AdBlue was lower than expected, given that consumption of AdBlue relative to diesel is 5-10%. AdBlue is topped up on average every 2-3 diesel refuels.
13. Mr Cave further advised that the filters on AdBlue pumps should be changed but that this varied depending on the make and model of the vehicle, and the mileage undertaken. However, a vehicle that had been in possession for a number of years should have had multiple filter changes if serviced to manufacturer standards.
14. He was of the opinion that drivers, especially where Operators allocated dedicated vehicles to drivers as for this licence, would be aware of at least some of the indicators and these should have been identified in defect reporting sheets. He felt that it was extremely unlikely that all of these signs could go unnoticed over a lengthy period with the vehicles in regular use.

*Evidence of Vehicle Examiner, Mr Tony Aiken*

15. Mr Aiken adopted his Public Inquiry report as evidence and this was not challenged by the Operator or Transport Manager. Mr Aiken reviewed the investigation. He clarified that vehicle YN57CWW was the only vehicle at the Operating Centre at the visit and that the vehicle was not in use at the time (see paragraph 11 above for post Public Inquiry clarification). With regard to the vehicle that was directed to Cuerdon stop site, BX09CYP, there was also the serious issue of the vehicle not having the service brake line connected to the trailer, for which an 'S' marked prohibition was issued in addition to the 'S' Marked prohibition issued for the emulator device. As the vehicles were not monitored for AdBlue usage and the Operator utilised a shared AdBlue tank at the Operating Centre, he was not able to gather evidence that would quantify the reduction in AdBlue usage, in order to assess any commercial advantage enjoyed by the Operator.
16. During the investigation by Mr Aiken on 14 September 2017, maintenance arrangements and facilities were found to be generally effective. Mr Aiken reviewed current maintenance documentation immediately prior to the Public Inquiry. He highlighted that pre-planned roller brake testing was not being undertaken on the Operator's fleet to the minimum 4 times per year including annual test; no evidence of brake testing was produced. The Transport Manager, James Smith, confirmed that roller brake tests were undertaken perhaps a 'couple' of times per year. These were not pre-planned though as part on the regular maintenance inspections, and the frequency did not adhere to the DVSA Guide to Maintaining Roadworthiness.
17. Mr Aiken also highlighted that the Driver Defect Reporting System was not working as expected, with not all faults signed off as rectified and some repeated defects found, sometimes for up to a week. The Operator and Transport Manager stated in response that some of these faults were not safety critical and therefore not rectified immediately. The Transport Manager stated that the repeated fault was for a trailer ABS light that wasn't in fact a fault as the light was intended to extinguish once a certain vehicle speed is reached. The defect sheets indicated the reports were not always observed on a daily basis which is to be accepted when Operator's engage in country wide tramping, however, there was no evidence that the defect reports were assessed on return to the Operating Centre, which would be expected of an effective and robust system to monitor defects.

*Mr David Smith, Director*

18. There is clear direction from the Upper Tribunal that I am entitled to treat the conduct of the Sole Director effectively as the conduct of the Limited Company and repute is determined accordingly 2013/008 Vision Travel International Limited and T2013/61 Alan Michael Knight. Mr David Smith provided an overview of his business. Approximately 80% of his work is in collecting fertiliser loads from ports and

distribution to farms around the country. Of the 5 drivers he employed a couple did engage in tramping throughout the week and in general mileages across the fleet were high. However, the work was seasonal and during quieter spells more general haulage work was sought. He had started to work for his brother about 15 years ago. About 7 years ago he decided that he wanted his own business and applied for his own Operator's Licence. This was granted in 2010, operating from the same Operating Centre as brother's previous entity, James S Smith (Wrawby) Ltd in Brigg.

19. Ancholme Agriculture Haulage Ltd and James S Smith (Wrawby) Limited (prior to its revocation on 12 April 2018), both undertook the same type of business, predominantly in fertiliser delivery. They shared the Brigg Operating Centre including maintenance facility, the same Transport Manager and centralised on site Diesel and AdBlue tanks. There was an arrangement whereby the 2 entities alternated in the purchase of 1000 litre AdBlue tanks, as each entity had similar numbers of vehicles that utilised the chemical. He paid rent to James S Smith (Wrawby) Ltd for parking at the Operating Centre and also for maintenance provision. Since the demise of James S Smith (Wrawby) Ltd, Ancholme had not taken on any additional work as it was working at capacity. Trailers were now rented externally as he previously rented trailers from his brother's company. In demonstrating that Ancholme met the essential requirements for legal operation, Mr Smith stated that the 2 companies employed separate drivers with only one coming over from his brother's company following dissolution. He conceded that there were many shared services and facilities but insisted that the correct separation, not least in the finances and employment of the drivers, was achieved.
20. [Redacted]. He has now also rents the maintenance facility and Ancholme Agriculture Haulage Ltd employs the one full time fitter. Ancholme Agricultural Ltd now purchases the fuel and AdBlue; it was acknowledged that AdBlue usage had gone up as a result of the emulators being found.
21. Maintenance of Ancholme Agriculture Haulage Ltd is recorded as in-house, which is now correct as at the day of the Public Inquiry, however, historically the maintenance provider was James S Smith (Wrawby) Ltd; this had not been recorded on the Licence. Mr Smith acknowledged that this was correct, although he did occasionally undertake some maintenance himself as a trained mechanic.
22. I asked Mr David Smith whether any other vehicles and trailers were kept at the Operating Centre, now that he was the only authorised user of the site for 5 vehicles and 5 trailers. His said there were some trailers that were used as storage only and that there had been a couple of unserviceable vehicles until recently. No other vehicles parked at the Operating Centre and he did not take on any vehicles from his brother's revoked Licence.
23. Mr Smith told me he was shocked when the first emulator was found on 10 August 2017. I asked him what actions had taken place to check the other vehicles on the fleet during the month that elapsed until the DVSA follow on visit on 14 September 2017. He responded that YN57CWW was not checked as it was parked in the yard and unlikely to be used. The other 2 vehicles that used AdBlue had been checked by Cross Truck and Bus at Scunthorpe. He stated that BX09CYP had been checked and what was thought to be an emulator was found. Therefore, it had been a real shock when an emulator was found on 14 September 2017. I asked if he could prove that the vehicles had been checked for emulator devices between the initial stop and the DVSA visit and he stated that there would be invoices for the work somewhere. I asked if these could be provided to me by the end of the week (Friday 25 May 2018).
24. I asked Mr Smith whether given the indicators highlighted by the DVSA Examiners, it was plausible that vehicles on his Operator's Licence could be utilised, for in one case 3 years, without any inclination that the AdBlue systems were not in use or

consuming AdBlue. Mr Smith conceded that it appeared too much of a coincidence for 3 out of a fleet of 5 vehicles to have been purchased with emulators fitted. However, he maintained the line that he never had any inclination that there was anything untoward with the vehicles AdBlue systems. His drivers, Transport Manager, or maintenance team had never raised any issues in this regard.

*Mr James Smith, Transport Manager*

25. Mr James Smith gave a perspective of how his own licence, James S Smith (Wrawby) Ltd, had been dissolved without his immediate knowledge. He told me he is attempting to get the company reinstated. He conceded that as an experienced Operator and Transport Manager he should have informed the Traffic Commissioner of the dissolution of the company and gave the excuse that there was so much going on during a very emotional time, that it didn't cross his mind to do so.
26. In August 2017, prior to dissolution, that Operator's Licence appeared at Public Inquiry and was curtailed from 10 vehicles and 10 trailers to 5 vehicles and 5 trailers. Mr Smith recalled that this was due to maintenance shortcomings, including PMI intervals being exceeded and failure to produce tachograph data. His reputation was tarnished at the Public Inquiry and he agreed to the undertaking to attend a 2 day CPC refresher course, which he attended in March 2018. An extension of time to attend had to be requested as he previously attended a one day Operator Licence Awareness Course 'in error'.
27. Mr Smith holds a valid Sole Trader Goods Operator Licence in the Eastern Traffic Area authorised for 3 vehicles and 3 trailers. Mr Smith stated that although the Eastern Traffic area Operating Centre was still available to him, he 'regularly' brought the 3 vehicles held on this Licence back to Brigg Operating Centre as this is where the vehicles are maintained. This statement was in conflict with the evidence of David Smith who had stated that now the only vehicles kept at the Operating Centre were his. James Smith conceded that this amounted to unlawful operation, although he had engaged with the Central Licensing Office with a view to submitting an application for a new licence in the North Eastern Traffic Area.
28. I enquired as to Mr Smith's employment status with regard to his Transport Manager role for Ancholme Agriculture Ltd, as I would expect an external Transport Manager to have a contract of employment and receive fee income. Mr James Smith stated that he had no such contract and did not receive remuneration from Mr David Smith, "as they were brothers". I pointed out that the fact they were siblings did not negate the requirement for formality and that case law doesn't permit a volunteer Transport Manager. He acknowledged this point but stated that he thought that because they were brothers it would be allowed, although he had no authority for this. Mr Smith stated that his current responsibilities were entirely centred on the Transport Manager function within Ancholme Agriculture Haulage Ltd, overseeing maintenance and drivers; he had no contact with Ancholme Agriculture Haulage Ltd's customers.
29. I put it to Mr James Smith that he was the common denominator for the 3 vehicles which were found with emulators fitted. All 3 had been on his licence before they were sold to his brother's company and he had been the Transport Manager for the vehicles since he purchased them. I enquired as to how they had not been spotted given the protracted period of time in which they have been under his responsibility. Mr Smith stated he purchased the vehicles from what he thought were reputable dealers, so had not had them checked over other than by his own maintenance team. He was adamant that he had not fitted the devices himself and never had an inclination that emulators were fitted. Drivers had never raised any issues with the AdBlue systems that would put him on alert that something may be wrong. The fitter had never asked him to purchase filters for the AdBlue pumps. He said that he and his brother lacked real understanding of AdBlue in terms of its general purpose and knowledge of the AdBlue vehicle systems. He stated that he also knew little about

emulators until the first device was found on 10 August 2017. They purchased AdBlue and drivers helped themselves when they needed it, and his son would top up AdBlue and fuel at the weekend for all the vehicles. His knowledge of AdBlue and emulators is much better now due to extensive media coverage and his own online research.

30. Since the first emulator was found and the curtailment of his own previous Licence in August 2017, Mr James Smith felt that he had 'upped his game' as Transport Manager. This had provided the wakeup call he needed. He did not repeat his brother's assertion that the fleet had been professionally checked after the first emulator was found. Drivers were now aware of their responsibilities and all had received a Memo on AdBlue specifically detailing operating procedures to be followed. AdBlue usage was now monitored and the indicators for emulators understood. He stated that he had recently purchased a vehicle for his own licence and had it properly checked in advance for emulators.
31. Mr Smith had held his Transport Manager qualification since 1992. He stated that since undertaking his refresher course recently he was shocked at how much had changed. He reiterated that he genuinely had not known about the emulators and had worked hard to rectify things once they came to light.

#### *Financial standing*

[Redacted]

#### *Closing submissions*

32. I indicated that I was going to reserve my decision, and asked the Operator and Transport Manager if there was anything further they wanted me to take into consideration, including the impact of regulatory action. Mr David Smith stated revocation would lead to the automatic close down of the business and the loss of 7 jobs, including 5 drivers, his own livelihood and that of the mechanic. It was unlikely that the business could sustain any form of suspension as he felt the drivers would seek alternative employment and customers would be lost. A curtailment would force the Operator to focus on a small number or even a single customer. No evidence, financial or otherwise, was produced to support these assertions (T/2013/047 Dundee Plant Hire Ltd refers). The Operator asked that the Licence be allowed to continue. He had learned valuable lessons which would not be repeated in the future.
33. The Transport Manager asked that be allowed to retain his repute. He had learnt from the events and the investigation, attending a CPC Refresher Course. He stated that he has done much to improve operating procedures and systems across the transport operation since his repute was tarnished at Public Inquiry in August 2017 and the first emulator found. He reiterated that he genuinely had never known that the devices were fitted and at the time he and his brother didn't really understand the purpose and use of AdBlue or emulators. The required understanding was now in place and he had taken action to ensure that it never happened again.

#### **Consideration and Findings**

34. There was no contract between Mr James Smith and the Operator. The Upper Tribunal has emphasised the importance of such a contract (T/2011/36 LWB Ltd) in order to establish the professional competence of the Operator. The existence of a contract establishes a genuine link to the Operator and it follows that although brothers, a voluntary Transport Manager, is not permitted (T/2015/40 Tacsí Gwynedd

refers). I find that the Operator lacks the required professional competence pursuant to Section 27(1)(a) of the 1995 Act. Article 4.2 of Regulation EC 1071/2009 requires an external Transport Manager to have a contract with the Operator which specifies the tasks to be performed. This is not the only reason I make adverse findings in terms of professional competence.

35. The important working relationship between an Operator and Transport Manager was blurred by the fact that historically each brother's Operating Licences worked in close proximity, sharing an Operating Centre and relying on Mr James Smith's CPC qualification. This 'confusion' was compounded further by the fact that other than the employment of the drivers and financial separation, all the services and facilities from both licences were shared to the extent that there was little to distinguish the 2 entities in day to day operations at Ancholme House. In reality there were actually 3 entities at the Operating Centre as it became apparent in the evidence of James Smith that the vehicles specified on Sole Trader Licence operating in the Eastern Traffic Area regularly park at the Brigg Operating Centre. I conclude that this arrangement likely pre-dates the revocation of the James S Smith (Wrawby) Ltd Licence because the sole trader business needs had not materially changed. In this regard, James Smith conceded during the PI that this arrangement amounted to unlawful operation. Whilst the Eastern Licence has not called to this Public Inquiry, I am entitled to take into consideration anything that impacts on the repute of the Operator and Transport Manager. In this regard, the Transport Manager has admitted to the use of the Brigg Operating Centre, stating that he thought it was acceptable as this was where his maintenance was undertaken. This is not the level of understanding to be expected of an experienced Transport Manager, and Operator, in his own right. This situation simply shouldn't have been allowed to have arisen and the consequences well understood.
36. Further to the paragraph above, I view the Operator to be complicit in the unlawful use of the Ancholme House Operating Centre. Given that Ancholme Agriculture Ltd has the only valid authorised Licence for the Operating Centre, a reputable Operator would have challenged this arrangement, regardless of familial connection. Moreover, the Operator, David Smith, misled me on this point during the Public Inquiry. I asked a straight forward question as to whether his were the only vehicles parked at the Operating Centre and he stated that they were and never mentioned his brother's vehicles. When James Smith stated that in fact he was parking the vehicles on the Eastern Licence at the Operating Centre, I raised the conflict of evidence with Mr David Smith. He stated that he had not thought to mention the Eastern Licence vehicles. Given that this was a straight forward question, I am of the opinion that this was either a deliberate act to mislead me or, the reality of the historical situation of multiple licences working from the Operating Centre and the blurred lines between his business and that of his brother, had again clouded his thinking in answering the question. On balance, I find the latter more likely having considered the credibility and demeanour of Mr David Smith.
37. There is no evidence to suggest that the Operator or Transport manager knowingly fitted AdBlue emulators to its vehicles; both vehemently denied this and on balance I accept this to be the case. Equally, there is no evidence produced by DVSA to support the fact that the devices were working as intended to circumvent the AdBlue system (including photographs of Adblue dials and filler caps). I suspect that this may be due to the fact that this was one of the early AdBlue emulator cases and DVSA were still perfecting the appropriate evidence gathering. AdBlue was centralised at the time potentially across 3 licences (13 vehicles in total) within the Operating Centre, counting the 2 Licences of Mr James Smith. Usage was not monitored and the DVSA investigation could not quantify any potential commercial gain enjoyed by the Operator. I also note that the vehicles on the other 2 Licences were not inspected for emulators by DVSA. Therefore, the only indication of the emulators functioning is the concession by the Operator that AdBlue usage had markedly increased following the removal of the emulators. On balance, however,



given the admission of noticeably increased usage since devices were removed, I believe, it was more likely than not, that one or more of the emulators were working as intended.

38. Mr James Smith had purchased the vehicles for his own Licence before selling them on to his brother. Vehicle YM57CWW was purchased in February 2014. It was specified on the Ancholme Agricultural Ltd Licence in June 2014 and removed in July 2017 prior to the DVSA investigation. The Operator cooperated fully with the Vehicle Examiner, and offered the vehicle for inspection even though it had been taken off the Licence. It had been on the licence for 3 years since purchased from Mr James Smith, and I therefore I have weighted it in the balance in deciding the case. Of the other 2 vehicles found to have emulators, one was on the Licence for 18 months (BX09CYP) before an emulator was found and the other (FJ10XDN) only 2 months, although this vehicle had been in the possession of Mr James Smith since April 2016.
39. The identification of the 3 emulators on Ancholme's vehicles were amongst the first to be identified across the UK, however, the need for AdBlue should have been self-evident to anyone who understood the haulage business and had maintained a professional interest in the Sector. The indicators that devices are fitted highlighted in the evidence of the Vehicle Examiner are such that I cannot believe that there had never once over a protracted period been even the slightest of suspicions raised across the business that would have put any reasonably informed operator and transport manager on inquiry that there was something not right with either AdBlue consumption or vehicles systems. Whilst AdBlue levels were not monitored at the time, I judge that the management team must have had some knowledge of the AdBlue situation; however, as the vehicles were functioning, and nothing had been identified at annual test (as it is not checked on MOT), there was a choice not to investigate these issues further.
40. After the first emulator was found on 10 August 2017, I would have expected a compliant Operator to have taken urgent action to ascertain whether other devices were fitted to the fleet, not least due to the fact that it is well known that the issue of an 'S' Marked probation is usually followed up by a DVSA visit. The Operator stated that in 5 weeks until the DVSA follow up visit, other than YM57CWW which wasn't checked as wasn't in use, the other vehicles on the Licence, were inspected professionally for emulators. However, no evidence has been provided. In particular, the assertion that vehicle BX09CYP had been checked and what was thought to be an emulator found and removed is not supported by any evidence such as a main dealer invoice. That an emulator was found on this vehicle on 14 September 2017 would suggest that if any check was undertaken it was not by anyone qualified to identify emulator devices. The Operator had however, provided invoices showing that the Emulators had been removed by a main dealer. When my staff clarified this evidence with the Operator after the Public Inquiry, the Operator said that he had understood the question to be the provision of invoices for the removal of emulators. On balance, I believe that the Operator did make some effort to identify emulators, but this was undertaken by internal staff rather than a manufacturer approved technician. The Operator was either not totally clear on the arrangements for the checking of the vehicles or misled me during the Public Inquiry. Given the speed in which the invoices were provided (the day after the Public Inquiry), I do not conclude that there was a deliberate attempt to deceive me.
41. Fundamentally, with 3 of its 5 vehicles fitted with emulators, the Operator has gained a commercial advantage in not having to purchase as much AdBlue or maintain the vehicles AdBlue systems, which can run into thousands of pounds. In operating vehicles with ineffective emission control systems, emission standards have been breached and emissions of NOx increased by up to 3 times, causing a real risk to public health.

42. The Operator has failed to fulfil its undertaking to maintain its vehicles. This Operator has a prohibition and MOT first time failure rate for the last 5 years which is above the national average (although the latter has improved significantly in the last 2 years). As well as the prohibitions for the 3 emulators found, 2 of the vehicles inspected also received brake related prohibitions; one for the ABS warning light and another for the service brake lines for the trailer not attached. The latter is a significant failing on the part of the driver, which the Operator's systems, training and operating instructions should have prevented. Additionally, it was established that roller brake tests were not pre-planned in line with safety inspections and not undertaken in line with the DVSA's Guide to Maintaining Roadworthiness. There are also shortcomings in the Operator's defect reporting and rectification systems which directly impact on road safety.

#### *Operator*

43. Prior to making an assessment of the Operator's good repute I conducted a balancing exercise. In the positive, this is the first Public Inquiry the Operator has attended and the Transport Manager had recently undertaken CPC refresher training. There was an admission as to failings of knowledge on the part of the Operator, however, procedures had been put in place to ensure no repetition in the future. At the same time, Mr David Smith did seem genuinely remorseful. However, I must balance this against the following negative features below:
- i) The use of AdBlue emulators on its vehicles for a protracted period of time, in the case of one vehicle for 3 years, should have been spotted by the Company's management team given the many indicators of such use. Whilst I do not have evidence to suggest that emulators were fitted by the Operator and the only evidence of functioning emulators was the concession that AdBlue usage had increased since they were removed, I am of the opinion that the Operator would have been a degree of knowledge of the AdBlue issues arising from the fitting of these devices. However, the Operator entrusted his Transport Manager with the control of vehicle fleet related issues. Nevertheless, an unfair commercial advantage was gained as a result.
  - ii) A responsible Operator should have been alive to the fact that the use of an Operating Centre by an entity without authority, regardless of the fact that it was his brother, was illegal and challenged this situation.
  - iii) The Operator was employing a Transport Manager without a contract of employment or any form of remuneration.
  - iv) The Operator was failing in its undertaking to keep its vehicles fit and serviceable (see paras 16 and 17).

#### *Transport Manager*

44. In assessing the repute of the Transport Manager, I again undertook a balancing exercise. In the positive, a CPC Refresher course was undertaken, albeit as a result of an undertaking on Mr Smith's previous Licence as a result of a Public Inquiry, rather than a self-generated act to address professional knowledge deficiencies. To his credit, Mr Smith has researched emulators and put in place driver procedures to spot such devices in the future. He did seem genuinely remorseful. On the negative side were:
- i) Mr Smith's repute has already been recently tarnished at Public Inquiry (August 2017) for maintenance shortcomings and the failure to produce documents when requested by DVSA; his professional competence was also questioned at the Public Inquiry leading to the undertaking to undertake a CPC refresher course;
  - ii) Mr Smith signed the TM1 form on 25 June 2010 confirming that he had a contract with the Operator and that this contract specified the duties he was expected to perform. This was not the case and no such contract existed.

- iii) Mr Smith had purchased all 3 vehicles found to have emulators for his own licence, before selling them within the confines of the same Operating Centre to Ancholme Agriculture Haulage Ltd; this places the vehicles under his responsibility as Transport Manager for a considerable period without detection. Whilst I haven't heard evidence to indicate that he deliberately fitted emulators, I find that he must have had a degree of knowledge that something was interfering with the vehicles Adblue system such that it didn't require AdBlue to function and maintenance of the AdBlue system was not being carried out. In this regard, he put his head in the sand as to the obvious.
- iv) Mr Smith's previous Licence, James S Smith (Wrawby) Ltd, was revoked on 12 April 2018, following dissolution of the Company on 27 February 2018. Mr Smith never informed the Office of The Traffic Commissioner throughout the winding up process and this undermines his credibility as an experienced Transport Manager, as well as an Operator in his own right.
- v) Mr Smith admitted that his Eastern Sole Trader Licence was parking its vehicles at the Ancholme Agriculture Ltd Operating Centre. This amounts to an admission of unlawful operation and the consequences of such actions should have been understood by a competent Transport Manager. This again leads me to question Mr Smith's credibility as CPC holder.
- vi) The maintenance shortcomings identified at paras 16 and 17 lead me to conclude that the degree to which the Transport Manager was not exercising continuous and effective management of the transport operation to the standards expected.

## Conclusions

- 45. In assessing the start point for consideration of regulatory action, in accordance with the Senior Traffic Commissioner's Statutory Guidance Number 10, Annex 3, I judge that conduct in this case is placed in the 'Severe' bracket. Having considered the positive and negative features, I conclude that consideration of regulatory action towards the bottom of the bracket is proportionate and appropriate. I hold back on removing the Operator's good repute by the narrow of margins, albeit repute is seriously tarnished. However, I concluded that the good repute of Transport Manager James Smith is forfeit. (Section 27(1)(b) refers).
- 46. I asked myself the Priority Freight Question, could I trust this Operator to comply in the future. This is a case where the Operator's repute is tarnished as a result of in part failing to identify AdBlue emulator devices, but also as a result of multiple shortcomings in terms of knowledge, and a blurred relationship within the Operating Centre and its multiple Licences. However, I have not found that any shortcoming has arisen by the Operator's wilful neglect. Fundamentally, Mr David Smith has been let down by his misplaced trust in his Transport Manager, and their relationship as siblings had clouded his judgement and decision making. I judge that with a reduced authority, some education (including attendance of an Operator Licence Awareness Training Course, which I am proposing as an undertaking) and the engagement of a new a professionally competent Transport Manager (with a written contract and remuneration), I would be prepared to let the Licence continue. Having answered the Priority Freight question in the affirmative, it follows that I answer the Bryan Haulage question in the negative, the Operator does not deserve to be put out of business.
- 47. I consider that a reduction in authority to 3 vehicles is appropriate and proportionate in this case. The Operator indicated that a curtailment of the Licence could be sustained although there would be commercial impact in the reduction of customer numbers. I would add, that I am trusting Mr David Smith to operate without the direct influence of his brother in any aspect of the transport operation. The reduction in authority will create time and space for the Operator to reset its transport operation, before any request for an increase can be considered. In this regard, I would expect any such variation request to be supported by evidence of education and an audit report undertaken by certified independent body. I would expect consideration of any

application to be considered by a Traffic Commissioner at a Preliminary Hearing if not Public Inquiry.

48. I allow a Period of Grace until 31 August 2018 for the Operator to engage a suitably qualified Transport Manager.

*Disqualification*

49. Having concluded that Mr James Smith'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. Across all 3 licences in which he has had an involvement there have been issues raised at this Public Inquiry that go to his repute as a Transport Manager. Furthermore, his repute is already tarnished as a result of a Public Inquiry only 9 months ago. Mr Smith's CPC qualification is over 25 years old and although he recently undertook refresher training as a result of an undertaking from a previous Public Inquiry, on his own admission much has changed. Given the broad range of shortcomings identified in the Public Inquiry I can no longer trust his CPC qualification. I see a 3 year period of disqualification as appropriate and proportionate in this case; there has been a failure to exercise continuous and effective management over a sustained period, despite previous intervention by the DVSA and attendance a previous Public Inquiry. I direct that he must retake and pass the Transport Manager CPC examination before returning to a Transport Manager role on any Operator's Licence.



Tim Blackmore  
Traffic Commissioner  
11 June 2018