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DECISION OF THE TRAFFIC COMMISSIONER FOR THE NORTH WEST OF ENGLAND

In the matter of the
Goods Vehicles (Licensing of Operators) Act 1995 (The Act)

JONES METCALF LTD
trading as **EXPRESS FREIGHT SOLUTIONS**
(**OC0294924 + OD1143944**)

JAMES JOHN BLACKBURN – TRANSPORT MANAGER

MARK DEAN JONES – TRANSPORT MANAGER

Public Inquiry at Golborne
on 11 December 2018

Decision

OC0294924 - On findings in accordance with Section 26 (1) (b), (c) (ii) and (iii), (ca), (e), (f) and (h) of the Act, I make record a formal warning and direct the curtailment of this operator's licence as follows:

- From 80 vehicles and 57 trailers to 67 vehicles and 50 trailers with effect from 23:45 hours on 4 January 2019, this order continuing for a period of 3 weeks ending at the same time on 25 January 2019;
- Thereafter the licence will be curtailed indefinitely to 74 vehicles and 57 trailers.

I further direct that any vehicles removed from this operator's licence will be notified to my office by close of play on 2 January 2019 at the latest. Those vehicles may not be operated on any other licence during the period of substantive curtailment.

OD1143944 – On findings in accordance with Section 26 (1) (b), (c) (iii), (e), (f) and (h) of the Act, a formal warning will be recorded.

TM Mark Dean Jones – A formal warning is recorded against his repute in the role.

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Background

1. **Jones Metcalf Ltd (OC0294924)** and **(OD1143944)** is the holder of Standard National Goods Vehicle operator's licences in the North West of England since 2000 and more recently in the West Midlands. The OC licence authorises 80 vehicles and 57 trailers; OD has 3 vehicles and 3 trailers. Mark Dean Jones is the sole director of the company.
2. Until the resignation of James Blackburn on 12 November 2018, he shared Transport Manager (TM) duties on the North Western licence with Mark Dean Jones, whilst holding the post alone in the Midlands.
3. The North West licence has some regulatory history which dates back to Public Inquiries in 2003 (a formal warning) and 2004 (curtailment and the attachment of undertakings). More recently, however, a Preliminary Hearing in 2016 led to another formal warning. The West Midlands licence has no regulatory history.
4. The calling-in to Public Inquiry was triggered by unsatisfactory maintenance investigation outcomes in March 2017 and September 2017, and a serious overloading encounter in October 2017.
5. The principal outcomes of Vehicle Examiner (VE) visits were concerns about the nature and volume of prohibitions issued to vehicles and trailers:
 - On the OC licence: 15 prohibitions (vehicles) and 11 prohibitions (trailers) in 2 years; that is 25 prohibitions (vehicles) and 21 prohibitions (trailers) in 5 years;
 - On the OD licence, which has only been in force for 2½ years, there have been 2 prohibitions (both for vehicles) in that period, one of these was S marked.
6. The follow-up investigation by VE Wilson, who gave oral evidence before me, had been prompted by the accumulation of 5 delayed "S" marked prohibitions in the period of a fortnight from 16 August to 30 August 2017. In each case, company vehicles had been found to have AdBlue emulators fitted to them. Such devices when brought into operation have the effect of overriding the emissions control systems fitted by the manufacturer, and thereby allowing a greater volume of NO_x particulates to be released into the atmosphere, albeit that the extent of any greater emission of such material would not be quantifiable in individual cases.
7. Photographs of the device fitted to FJ10 DJE, encountered on 16 August 2017, showed it with LEDs illuminated and the device powered up.
8. Other recent "S" marked prohibitions had been no less serious. In November 2017 immediate prohibitions had been issued for a suspension anchor, shackle pin or bush excessively worn and the suspension unit deflated (all 6 airbags) on a trailer. In January 2017 for a vehicle's exhaust emitting excessive smoke such that it obscured stop lamps and affected other road users. The narrative for the prohibition had indicated at the defect had been listed by drivers continuously over a period.

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9. Load security issues were also raised, which were reflected in the accumulation of prohibitions already referred to above, and in the issue of fixed penalty notices.

10. The central focus of the hearing was directed to the circumstances in which those AdBlue emulator devices came to be fitted, and the role of Mark Jones, both as TM and as director, taking in to account his concurrent directorial roles in other businesses, which were also the holders of operator's licences.

11. That is for:

- Brad Trans International Ltd (OB224188) – a Standard International Goods Vehicle operator's licence for 3 vehicles and 3 trailers (with 2 vehicles in possession). There is a co-director Gavin Kellett, although Mr Jones has neglected hitherto to report that appointment to my office, even though both he and Mr Kellett were appointed simultaneously;
- Euro.SDB Ltd (OD1079705) - a Standard International Goods Vehicle operator's licence authorising 45 vehicles and 30 trailers (with 39 vehicles in possession). The fact that Gavin Kellett is a co-director alongside him had been properly disclosed;
- Evidale Consulting Ltd (OC1062759) - a Standard National Goods Vehicle operator's licence authorising 12 vehicles and 8 trailers (with 11 vehicles in possession). There is a co-director Gavin Kellett, although Mr Jones has again neglected hitherto to report that appointment to my office, even though both he and Mr Kellett were appointed simultaneously;
- JRS Traction Ltd (OB1098337) - a Standard National Goods Vehicle operator's licence for 35 vehicles and 20 trailers (with 25 vehicles in possession). There is a co-director Gavin Kellett, although Mr Jones has again neglected hitherto to report that appointment to my office, even though both he and Mr Kellett were appointed simultaneously.

He did not act as TM on any of those licences.

12. James Blackburn had notified his decision not to attend the Public Inquiry to which he had also been called since he was a TM at the material time. He had left the company to pursue a career away from transport. I shall issue a separate decision in respect of his repute in due course.

13. I heard evidence from Mark Dean Jones, from Daniel Marshall (Company Fleet Engineer) and from Grahame Robinson, Transport Consultant, who had provided a report into the company's operating systems. The company was represented by Mark Davies, Solicitor.

Findings and consideration

14. My findings, having heard evidence, asked questions and re-read closely the brief, as well as the papers and materials produced during the course of the hearing, including Mr Robinson's report, are set out below.

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AdBlue devices

15. This aspect of the case before me differed in some respects from many of the others (involving such devices) that I have been required to hear in the last 12 months or so, in the sense that:

- a) Whilst DVSA stopped 5 of the operator's vehicles in a short period and detected AdBlue devices fitted, the operator openly admitted that up to 12 such devices had been fitted to its fleet at some stage and that 7 devices were installed in vehicles at the time the first of the prohibitions was issued;
- b) It was claimed that the devices were fitted *prospectively*: that is that each was wired into each vehicle's engine management system in a fashion that would allow it to remain on "stand-by" until instructions were given to a driver to activate it (in the event the vehicle de-rated or went into limp mode). This process of bringing the device into operation being achieved by the driver disconnecting the main AdBlue system fuse;
- c) In evidence, I was told that 2 or 3 devices might conceivably have been enabled and active at one time to enable those vehicles to return to base;
- d) The use of such devices was admitted to have been researched, and the products sourced and fitted only by the company's trusted "Chief Technician" and Fleet Engineer Daniel Marshall;
- e) It was said he had not involved the company's team of fitters in this activity and had instead held the "stock" of devices privately in his own tool box;
- f) The devices had been ordered on the company's credit card from e-bay;
- g) The fitting of devices by him was covert, since it was admitted the usual process of the recording of any mechanical work carried out on company vehicles, was not followed in the case of these devices. It was also admitted that where the devices had been activated by drivers at roadside, that they would not be recorded in the relevant driver defect book. Drivers would have Daniel Marshall's number for use on a 24/7 basis. He would be told that a vehicle had gone into limp mode and would then give instructions about activating the device which was already fitted in place;
- h) These arrangements were said to have arisen in response to a common problem suffered by the company's DAF vehicles. Considerable numbers of other operators were said to have been subject to similar issues. That is, the company's vehicles suffering repeated emissions control problems of such a nature that the engine would derate and go into "limp mode", rendering continued use without repair otherwise impossible;
- i) Daniel Marshall said he had never reported to his managers that he had come up with a "fix", despite his taking part in weekly, yet un-minuted meetings to discuss

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fleet issues, in which the continuing problem of vehicles going into limp mode had been raised and discussed;

- j) It was said by the operator that the fact that vehicles for which devices had been deployed would not consume AdBlue was not noticed, nor was it the case that drivers, who would individually have become aware of the fixing of limp mode issues by this means, raised the matter within the business. AdBlue consumption was not monitored at that time but such a system is now in place;
- k) It was Daniel Marshall's evidence that he first fitted an emulator to one of the vehicles back in late 2016 (some 12 months before the vehicles were caught with the devices in place). He said that then he had no reason to believe that what he was doing could be unlawful, or that what he did would bring the operator's licences to Public Inquiry.
- l) He (and Mr Jones) maintained that the cost of AdBlue itself was insignificant and that this would not of itself have driven a decision to fit the devices;
- m) He told me that it was only when the first vehicle was prohibited that realisation struck. He said that it was only at this stage he reported the circumstances to Mark Jones. He acknowledged that he had misled his employer though, as in his initial response he minimised the extent to which the fleet was affected by the devices being fitted to them;
- n) Whilst it was his evidence that all vehicles were clear of devices by the time of the DVSA follow-up visits on 6 and 8 September 2017, there was acceptance from him that some vehicles, which were typically out on the road Monday to Friday were not immediately recalled to base, after the first prohibition on 16 August 2017. The follow-up exercise conducted by DVSA on the above dates had located no further devices, when a fair number of vehicles were checked, although by then, 5 in total had been found at the roadside;
- o) The operator accepted that benefit was gained by it as a direct result of this activity, but it was argued that its underlying purpose was to enable any stricken vehicle to get back to their own premises, where repairs could be undertaken in its in-house facility. At the hearing, it was denied that there was a financial motivation or benefit gained from deferring repairs in the short term, despite a passage in its own response letter to DVSA as follows:

"We fitted emulators in order to get our vehicles out of power limiting mode and repaired back at our premises, mainly due to the high cost of getting a sub-contractor mainly DAF to repair roadside. The sheer expense of getting DAF to complete repairs when the vehicles are away from our premises runs into thousands of pounds". {Emphasis added by me}

It was offered that clumsy drafting might have led to a risk of misinterpretation (by me) of what was written.

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- p) Similarly, Mark Jones said he had no knowledge of the fitting of the devices, although he admitted he had some knowledge of the emissions control problems that the fleet had been suffering, because of the meetings referred to;
- q) He described a “severe lack of judgement” on the part of Daniel Marshall in acting in the way he did. He justified the issue to him of no more than a written warning, since his actions had not been a reflection of his attitude or work actually carried out. When pressed he acknowledged however that Mr Marshall’s lack of candour, when matters were discovered had not been factored into that decision;
- r) No attempt was made by Mr Jones to place blame for this state of affairs upon the departed transport manager, Mr Blackburn, whose role had been principally concerned with route management and drivers’ hours compliance.
- s) A further DVSA check of 10 vehicles, only a fortnight before this Public Inquiry did not disclose any further fitment of devices.

Prohibitions

16. The contention of the operator was that the recorded volume of prohibitions needed to be viewed in the context of the scale of the operator’s licence. There is of course some validity in that argument, since the official data indeed showed prohibition rates (based on encounters) for both vehicles and trailers over both 2 years and 5 years that broadly tracked the national averages applicable. Of course numbers alone provide only a part of the picture; it is what a licence holder does in response to the accumulation of prohibitions, to reduce their incidence or/and seriousness, that is the mark of the prudent operator.
17. Of particular and specific concern however, was that the OC licence had attracted “S” markings, on no less than 8 occasions in 5 years (close to 20% of all those issued). An “S” marking reflects a significant failure in an operator’s maintenance systems; such markings cannot be explained away by mathematics.
18. I was shown evidence of the completion of individual investigation reports into the circumstances of prohibitions: these reflected a good practice approach but were not effective in arresting the accumulation of such notices.

Director - Mark Jones

19. Mark Jones accepted that the early years of the licence had been inauspicious but after the original Public Inquiries, when he had thought he was doing a good job, change had been brought about. His stated intention had been to invest in driver training, look after, and thereby retain the drivers and to deploy a properly maintained fleet.
20. Mr Jones described a plan to bring in further transport managers at the Burnley site and that an existing employee, Carla Harker was in fact awaiting her TM CPC results.
21. I was invited by him to accept that greater supervision was now exercised over Mr Marshall, and that he had reflected upon his own position following a series of acquisitions and that an application had been made for Mr Abbatt to replace Mr Blackburn had been pursued.

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22. He had concluded that it would be appropriate if he “stepped back from being TM” once the formalities were completed.

Submissions

23. Mr Davies, on behalf of the operator, accepted that benefit had been gained from the use of devices in the fashion described. He referred to the operator’s openness and that there was no attempt to hide of the circumstances. It was argued that there was a little or no literature at the time of the devices were fitted. He described a large operation in which spending on the fitting of emulators would not stand out and that very little saving (in terms of AdBlue consumption) would have been achieved through the fitting of devices.

24. I was provided with a spreadsheet of estimates, which sought to demonstrate the circumstances of a recent increase in the actual fleet size on the OC licence up to 74 vehicles (nominated at the time of the Public Inquiry). {REDACTED}

25. Mr Davies drew attention to the matters, which he proposed should be placed by me on the positive side of the balance, in carrying out any weighing exercise before reaching conclusions. Among those listed were the following;

- A positive compliance record, and a MOT pass rate rather better than the national average,
- The positive nature of Mr Robinson’s audit report, the company’s open approach to the DVSA enquiries, and that devices had been shown to have been removed,
- Ongoing compliance with a maintenance audit requirement through FTA, the narrow focus of the Public Inquiry, which played to the argument that other systems were satisfactory, together with training approaches in place.

26. It was Mr Davies’ contention that the starting point, if there was to be consideration of regulatory action against the licence, would fall into the category of “moderate” in the event that curtailment were appropriate, that is a fleet reduction which would not materially affect transport operations.

Findings and consideration

27. To the extent that it is necessary to make formal findings in respect of evidence at before me *that was not agreed*, on the balance of probabilities, I find:

- a) That the operator has, through Daniel Marshall (a senior member of staff), carried out acts that are discreditable in nature, affecting a significant number of vehicles within the fleet over a considerable period of time that is unbecoming of a licence holder. The operator, though its director, has failed to manage adequately the actions of that staff member;
- b) That it is inherently unlikely that Daniel Marshall, the operator’s professed technical expert, upon whom Mr Jones was prepared to place considerable reliance for his knowledge and skills, would not at some stage, during the period after he began deploying the AdBlue devices (if not at the outset), have come to know of, and to appreciate, their true nature;

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- c) That the actions of Daniel Marshall in acting covertly, since he was making no record of the fitting of devices in paperwork held on vehicles, or of declaring the extent of his activities to other maintenance staff, or to his superiors, pointed to a high level of probability that he knew what he was doing lacked legitimacy;
- d) That the actions of Daniel Marshall in causing drivers to participate and engage in this wrongdoing is unbecoming of a senior member of staff of an operator;
- e) That it is more likely than not that Mark Dean Jones closed his eyes to the prospect that the “fix”, generated through the efforts of Daniel Marshall, probably lacked legitimacy;
- f) That the weak and wholly inadequate disciplinary action taken by Mark Dean Jones in respect of his employee, Daniel Marshall, plays to the contention that he had closed his eyes to the reality of what was occurring, and was condoning of the misconduct;
- g) That clear gain or benefit of a substantial nature accrued to the operator in acting in the way that it did;
- h) That it is more likely than not that the contemporaneous response provided by the operator to DVSA, which I have reproduced at paragraph 15 (o) above provides a more accurate reflection of its intentions than that given during the hearing;
- i) That such benefit will have included:
 - a. the saving, identified by the operator itself to be considerable, from carrying out any remedial work to its vehicles within its own facility and not in the open market,
 - b. the capability to manage the timescale within which any device would be de-activated and appropriate remedial work carried out,
 - c. the avoidance of disruption to its commercial delivery activities, and
 - d. the contingent saving in AdBlue consumption;
- j) That the operator failed to recall with any level of urgency, all of its vehicles once it became clear that the installation of devices had led to a prohibition being issued. This was evident from the fact that the final one of that series of prohibitions was not issued until over a fortnight after the first.

28. Having considered the evidence both written and oral with care, I have concluded that the allegations made in respect of breaches of Section 26 (1) (b), (c) (ii) and (iii), (ca), (e), (f) and (h) of the Act are proved in respect of the OC licence.

29. In respect of the OD licence, breaches of Section 26 (1) (b), (c) (iii), (e), (f) and (h) of the Act are proved.

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30. As far as the good repute of the operator is concerned, by the narrowest margin, I am able to find that the good repute of this operator is retained.
31. The extent to which devices were fitted to the operator's vehicles, and later brought into operation, represented acts that were discreditable, anti-competitive in nature and increasing of the risk to the public from the greater release of NO_x particulates into the atmosphere. These devices have commonly been characterised as "cheat devices". Such a description appears to me suitably apt in portraying both the nature of the "tricking" of the engine management system into believing that emissions controls were operating in accordance with the manufacturer's fitted equipment, but also "fooling" any interested witness that a vehicle was meeting Euro 5 emission standards, when it was not.
32. The period over which the misconduct persisted is significant.
33. These matters however need to be balanced against the positives, such as they are, which I have set out above and which were outlined by the operator's advocate. I should add to those listed that there is no clear evidence before me that any devices remained *installed and active* (as opposed to ready for action) for longer than was necessary for vehicles to return to base, albeit this was done at the operator's convenience, and was therefore longer than was necessary.
34. Having concluded that revocation of licence need not be the necessary outcome of my findings, I turn to consider whether the exercise of my powers to suspend or curtail these licences is appropriate and proportionate. In that regard, I remind myself of the submissions made to me, including those that relate to the impact of possible orders. I seek to determine as best I am able, where within the starting points contained in the *Senior Traffic Commissioner's Statutory Guidance Document No. 10: Principles of Decision-Making and the Concept of Proportionality* the facts of these cases suitably sit, taking into account the differential impacts likely on the licences because of their respective scales.
35. I note that the Guidance refers to "*severe to serious*" regulatory directions, which might follow persistent operator licence failures with inadequate response or previous Public Inquiry history. By contrast, I note that "*serious to moderate*" regulatory directions may be likely to follow two or more negative features not already detailed in the list of conduct items listed, but alongside some positive features.
36. I conclude, having balanced the positives and negatives that the impact of suspension of the licence, taking into account the scale of the OC licence that such a direction would be likely to have a significantly disproportionate effect upon it.
37. I find however that a period of curtailment, which is time-limited but which will materially affect transport operations for a period is both appropriate and proportionate. I take into account the evidence offered about the impact upon the business of any decision I make, and have factored this into my decision, especially in setting down the particular date when my direction will take effect.
38. The OC licence will be curtailed from 80 vehicles and 57 trailers to 67 vehicles and 50 trailers with effect from 23:45 hours on 4 January 2019, this order continuing for a period of 3 weeks ending at the same time on 25 January 2019. Thereafter the licence will be

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curtailed indefinitely to 74 vehicles and 57 trailers. The substantive curtailment from the current fleet size of 74 vehicles and down to 67 vehicles reflects my conclusion that a 10% fleet reduction for time-limited period is appropriate.

39. I further direct that any vehicles removed from this operator's licence and which will be notified to my office by 2 January 2019 at the latest, may not be operated on any other licence during the period of substantive curtailment.

40. I have concluded that despite the findings I have made concerning AdBlue devices apply with equal force to the OD licence that proportionality demands that I step back from the directing simultaneous curtailment of the licence also.

41. I have considered whether action ought to be taken in respect of the repute and professional competence of Mark Jones as a TM. As I have stated above, I consider entirely appropriate the indication given by him that he will step down from the role. On the basis that he does so by the end of February 2019 at the latest, I close that matter for him with a formal warning, which reflects his failure to take proper responsibility for the continuous and effective management of transport operations in the business. Quite how in a business this size he could possibly conclude that the important weekly meetings held to discuss transport, for a fleet with potentially 80 vehicles in it, could be held without recording in written form the outcomes, frankly beggars belief.



Simon Evans
Traffic Commissioner
for the North West of England
18 December 2018