

DECISION OF THE TRAFFIC COMMISSIONER

Expanded written version of oral decision given at a public inquiry in Birmingham on 4 January 2019

**Bernard Berger t/a XWK International Haulage
Standard international licence OD0262005**

Decision

1. The standard international goods vehicles operator's licence held by Bernard Berger is revoked with immediate effect pursuant to Section 26(1)(a), (c)(iii), (f) and (h) and 27(1)(a) and (b) of the Goods Vehicles (Licensing of Operators) Act 1995.
2. Bernard Berger is disqualified for three years, until 7 January 2022, 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.
3. Malcolm Hillage has lost his good repute as a transport manager, pursuant to schedule 3 paragraph 1 of the 1995 Act. Under paragraph 16(2) of that schedule, he is disqualified, with immediate effect and for an indefinite period of time, from acting as a transport manager on any operator's licence in any Member State of the European Union.

Reasons for the decision

4. Bernard Berger is not the operator of this licence. For the past few years the licence has been operated in practice by HM Distribution Ltd, of which company Malcolm Hillage is a director (and 50% shareholder). HM Distribution Ltd paid for the maintenance of the vehicles and for fuel. It directed and paid drivers. It received the income from the work carried out by the vehicles. The only involvement of Mr Berger has been as the keeper of the vehicles and in that capacity hiring them out to HM Distribution Ltd/Mr Hillage. He took no part in operational matters. I therefore find that the licence has undergone a material change since it was issued (Section 26(1)(h) of the 1995 Act refers) in that Mr Berger has lent the licence to HM Distribution Ltd.
5. The vehicles have been kept at an unauthorised operating centre for around ten years (Section 26(1)(a) refers);
6. The licence has been managed by Mr Hillage in a highly non-compliant manner. When a DVSA traffic examiner visited in spring 2018 she discovered that Mr Hillage was not downloading vehicle units or drivers cards and was therefore carrying out no analysis of the data to identify driver infringements. The operator has therefore failed to fulfil its undertaking to ensure that rules relating to drivers hours and tachographs are observed (Section 26(1)(f) refers).

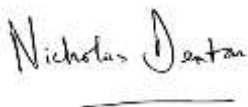
7. The operator has also failed to fulfil its undertaking to ensure that drivers report defects promptly and in writing. Drivers were recording defects but not reporting them to the operator until the end of the week.
8. The operator has failed to fulfil its undertaking to keep vehicles fit and serviceable. The operator's vehicles have had only three first time MOT passes from ten presentations over the last five years. Its vehicles have received four prohibitions and its trailers three prohibitions. Mr Hillage accepted that he had no idea of what form of brake test the maintenance contractor was carrying out (the PMI sheets recorded no type of brake testing at all).
9. The operator has also operated vehicles which were not specified on its licence. Although I have not concluded that the operator operated more vehicles at any one time than the four for which it was authorised, I find that the operator has failed to specify vehicles on its licence within the required deadlines, contrary to Section 5(6) of the 1995 Act.

Conclusions

10. Bernard Berger is not of good repute (Section 27(1)(a) refers). He has knowingly lent his operator's licence to Malcolm Hillage and HM Distribution Ltd. He has played no part in the operation of the vehicles under the licence. Lending licences in this way undermines the whole purpose of the operator licensing system: the licence must be operated by the entity to which the traffic commissioner has granted the licence, not by some other entity entirely. I note that Malcolm Hillage was previously the director of L&M Logistics Ltd which held licence OD1090289 which was revoked in August 2014 after it had entered liquidation. Mr Hillage was nominated as transport manager on Bernard Berger's licence in June 2014 – in effect therefore, he has continued as an operator despite the fact that his previous company's licence was revoked.
11. Malcolm Hillage is not of good repute as transport manager (Section 27(1)(b) refers). He operated vehicles through his company HM Distribution Ltd despite not having an operator's licence. As a professional transport manager he must have known that such an arrangement was not legal. The only alternative explanation, that he was so ignorant of the rules relating to operator licensing that he did not realise the arrangement was not legal, is scarcely better. Mr Hillage also failed to carry out many of the basic functions of a transport manager – he did not ensure that the operating centre used was the one authorised on the licence; he did not carry out the required downloads of vehicle tachograph units or driver cards; he did not specify vehicles on the licence within the appropriate deadlines. On the positive side of the balance, downloads have been carried out over the last six months or so and infringements identified, but this is insufficient to outweigh the fact that he has been the de facto operator of a licence granted to someone else.
12. As neither the licence holder nor the transport manager are of good repute, revocation of the licence is mandatory under Section 27(1)(a) and (b). I am also revoking the licence under Section 26(1)(a), (c)(iii), (f) and (h). As the operator took the vehicles off the licence the day before the inquiry and no vehicles are therefore currently specified, there is no need to allow a period of grace in which to wind down operations. Revocation therefore takes immediate effect.
13. For the reasons outlined in paragraph 10 above, I conclude that Bernard Berger deserves to be disqualified under Section 28 from holding a licence in the future. In deciding upon the length of his disqualification, I have taken account of paragraph

100 of the STC's Statutory Guidance Document 10. This posits a starting point of between one and three years for a first public inquiry (which this is). Given that Mr Berger has knowingly lent his licence to another entity and took no trouble at all to see that it was being operated compliantly, I conclude that a period of disqualification at the upper end of the range is appropriate. He is disqualified for three years, until 7 January 2022.

14. Having concluded that Malcolm Hillage'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.. He has undermined the licensing system by – in effect – operating vehicles which were on the licence held by someone else. He has neglected many of the most basic responsibilities of a transport manager. His own driving record shows numerous mode switch errors and failure to record other work: it is difficult to instruct drivers on the rules when you are flouting them yourself. Mr Hillage is a transport manager by virtue of acquired rights. His failings are such that the mere passage of time alone is unlikely to address them. I am therefore disqualifying him indefinitely from acting as a transport manager. Before he can act as a transport manager again, he must take and pass the transport manager CPC exam and demonstrate to a traffic commissioner that he has regained his repute.



Nick Denton
Traffic Commissioner
7 January 2019