



SOUTH EASTERN AND METROPOLITAN TRAFFIC AREA

DECISION OF THE DEPUTY TRAFFIC COMMISSIONER

**PUBLIC INQUIRY HEARD AT IVY HOUSE, IVY TERRACE, EASTBOURNE ON 13
MAY 2019**

OK2001494 ERRY TRANSPORT LIMITED

Decision

Breach of Section 26(1) (b) and (f) of the Goods Vehicles (Licensing of Operators) Act 1995 found.

Curtailment of licence to 3 vehicles for a period of 21 consecutive days to be served by the 30 June 2019. Details of the vehicles to be curtailed and the dates for the reduction to be notified to the Office of the Traffic Commissioner within 14 days of receipt of this letter.

Undertaking for an audit of the transport operation to be carried out not less than 3 and not more than 4 months from the date of this decision. All aspects of the transport management and in particular tachograph compliance and enforcement to be considered and a copy of the audit to be sent to the Office of the Traffic Commissioner within 14 days of receipt.

Variation application to increase the number of authorised vehicles deferred for consideration after the audit detailed above has been carried out.

Repute of transport manager Susan Le Montagne retained but tarnished.

Background

- 1. The operator Erry Transport Limited is the holder of a standard national licence authorising five vehicles and five trailers with four vehicles currently in possession granted on the 21 July 2017. The sole director of the company is Brendan Woods and the external transport manager is Susan Le Montagna.**
- 2. On the 13 July 2018 a variation application to increase the authorisation to ten vehicles and ten trailers was received. This prompted a maintenance investigation which was marked as mostly satisfactory. The examiner**

found that vehicles and trailers were not having the recommended quarterly rolling road brake tests, aspects of the preventative maintenance inspection sheets were not always being completed and the MOT pass rate was below the national average. In response to these findings Mr Woods and Ms Le Montagna stated that it had been agreed that remedial action would be taken. It was noted during the course of this correspondence that there had been a change in maintenance provider which had not been notified to the Traffic Commissioner.

3. On the 9 October 2018 authorised vehicle PL64 DPO driven by Daniel Dinica was stopped by the Metropolitan Police. A subsequent download of the tachograph data revealed offences and occasions when the vehicle had been driven without a card being inserted. There also appeared to be occasions when more than one driver's digital card had been used in the vehicle on the same day and the "change-over" between the two cards was completed in a comparatively short period. The driver Mr Dinica said that another driver Mr Badea had been sharing the driving with him on the days in question and this version of events was supported by Mr Woods. The investigating police officer Sergeant Beckers was of the view that it was more likely that Mr Dinica had been using both cards himself and produced a report which included this opinion. In the light of all the circumstances the operator and transport manager were called to a public inquiry and the driver Daniel Dinica to a concurrent conduct hearing.

The Public Inquiry

4. Director Brendan Woods, transport manager Susan Le Montagna attended the public inquiry together with witnesses Police Sergeant Becker and Police Constable Gibson. I heard first from Sergeant Becker who read through elements of his statement and confirmed his conclusions as detailed within it. In his report and in his evidence he also raised concerns over the arrangements in place whereby drivers working for the operator were deemed to be self-employed when advice from HMRC pointed to the need for them to be employees of the company in the circumstances pertaining to this case.
5. Driver Daniel Dinica then gave evidence and was assisted by an interpreter. He confirmed his version of what had taken place as stated to the police when stopped on the 9 October 2018. He said that the second person whose card had been used on particular days, Mr Badea, was a friend of his who didn't have much experience of driving lorries in the UK and in particular in the London area. It had been agreed with Mr Woods that Mr Badea would be permitted to drive the vehicle on occasions to give him this experience and this was what had happened. Payment had been agreed with Mr Woods of £100 per day to Mr Badea and this was paid to him via Mr Dinica. He accepted that both cards had been put into slot 1 of the tachograph unit and not alternate slots as should have been. When asked about the short amount of time that elapsed when the cards were exchanged he said he ejected his card and replaced it with Mr Badea's before they changed over seats in the vehicle. He said Mr Badea was now

working in another country and accepted that the transport manager Ms Le Montagne had never met Mr Badea despite her asking to do so.

6. Brendan Woods said that he had agreed that Mr Badea could drive on occasions but not in London as he had no experience of doing so. He said that the payment of £100 was only made when he had done a significant amount of driving and not when Mr Badea was doing so just to gain experience. He had taken a copy of Mr Badea's Romanian driving licence and tachograph card but did not have any record of a CPS qualification for him. He also accepted that he had not discussed the arrangement with the transport manager until she raised the matter with him. In relation to the employment status of the drivers he said that he had been advised by his accountant that if the drivers each registered as limited companies this would be beneficial for them and he believed this to be a lawful method of giving them work and arranging the payment of income tax.
7. Susan Le Montagne said that she has been the external transport manager on the licence since the original grant and was also transport manager for two other operators. She visited the operating centre on two occasions each week and had implemented various procedures and systems. She accepted no disciplinary code for drivers had been introduced to date. In relation to Mr Dinica she revealed that a UK driver had contacted her in early October to say that Mr Dinica was using two driver cards and as result she downloaded records on the 9 October which revealed the use of a card belonging to Mr Badea. She called both drivers to see her but just Mr Dinica arrived saying Mr Badea was at work – he (Mr Dinica) handed over the card belonging to Mr Badea whom she never met.

Findings and Decision

8. The seriousness of this case and the consequent regulatory action I take in this case, both in relation to the driver Mr Dinica and the operator, rests mainly on my findings in respect of the use of the tacograph card belonging to Mr Badea. If, as asserted by Police Sergeant Becker Mr Dinicia was using two cards with the aim of disguising infringements and Mr Woods was complicit in this the consequences for the driver and operator would be severe. I therefore need to decide whether on the balance of probabilities, and based on the evidence before me, I am satisfied that this is the case. Taking each of the pieces of circumstantial evidence in turn the conflicting explanations are as follows: Short period of time between the exchange of cards – Sergeant Beckers believes this is indicative of one person remaining in the driving seat and changing the cards. Mr Dinica says that the change of drivers happened after the cards had been exchanged. Pattern of driving periods – Sergeant Beckers says that this is suspicious as normally when a vehicle is double manned the periods of driving are more extensive by each driver. Mr Dinica says that when this happened he was giving Mr Badea the chance to drive for a short time and he (Mr Badea) decided on occasions that he no longer wished to do so. Allegation made to Ms Le Montagne by UK

driver that Mr Dinika was using two cards. Mr Woods stated that the particular driver who was no longer employed by the operator was aggrieved because he was not able to complete the same work as other drivers in the time allowed and this was why he made the false allegation. Both cards being placed consecutively in slot 1 of tachograph unit. Mr Dinika says that this was a result of him not knowing the correct procedure to be followed. Mr Woods and Ms Le Montagne say that the correct procedure has now been explained and emphasised to the drivers.

9. Having considered all the conflicting evidence whilst I remain suspicious over the events detailed above I do not find that there is sufficient evidence for me to be satisfied on the balance of probabilities that Mr Dinika used both cards as opposed to Mr Badea being with him and driving on occasions. The arrangement he explained for changing the cards over in the time taken is feasible, the short periods of driving by Mr Badea match the claim that he was driving to gain experience and the fact that Mr Woods had copies of some of his documents adds weight to that claim. Whilst the revelation by Ms Le Montagne of the telephone call from the UK driver is a factor, neither I nor the driver or operator were able to ask him questions or challenge his claim in his presence.
10. Having made my findings in relation to the allegation concerning the use of two cards I nevertheless find that there have been breaches of Sections 26 (1) (b) and (f) of the Goods Vehicles (Licensing of Operators) Act 1995. The findings made during the maintenance investigation, the failure to notify the change of maintenance provider and the deficiencies found in relation to the tachograph compliance regime are factors which I take into account in making my decision. It is also the case that whilst I have not found against Mr Dinika and in turn the operator in respect of the use of two cards there are nevertheless infringements shown and failings in the management of the compliance regime by the operator and the transport manager. I do not make any findings in relation to the employment status of the drivers or their tax payments.

11. My decisions are therefore as follows:

Driver Daniel Dinika – I order a suspension of his vocational entitlement for a period of 21 days with effect from the 27 May 2019.

Operator Erry Transport Limited – I order a curtailment of the licence to 3 vehicles for a period of 21 consecutive days to be served by the 30 June 2019. Details of the vehicles to be curtailed and the dates for the reduction to be notified to the Office of the Traffic Commissioner within 14 days of receipt of this decision. I also seek an undertaking for an audit of the transport operation to be carried out not less than 3 and not more than 4 months from the date of this decision. All aspects of the transport management and in particular tachograph compliance and enforcement to be considered and a copy of the audit to be sent to the Office of the Traffic Commissioner within 14 days of receipt. I do not agree to the variation application to increase the number of authorised vehicles but am prepared

to defer this consideration until the audit detailed above has been carried out and a copy forwarded to me or another traffic commissioner.

Transport Manager Susan Le Montagne - Whilst I accept that Ms Le Montagne was unaware of the situation pertaining to Mr Dinica and Mr Badea she bears some responsibility for the other failings as found and I therefore mark her repute as retained but tarnished. A positive audit will assist in redressing this.

A handwritten signature in black ink, appearing to read 'John Baker', written in a cursive style.

John Baker
Deputy Traffic Commissioner

17 May 2019