



Decision of the Deputy Traffic Commissioner for Scotland

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

JACKIE MCMURRAY - OM1089467

TRANSPORT MANAGER – JACKIE MCMURRAY

PUBLIC INQUIRY HELD AT EDINBURGH ON 28 FEBRUARY 2019

Decision

1. The operator's licence held by Mr Jackie McMurray is curtailed from 10 vehicles to 8 vehicles. The curtailment will take effect for 2 years – it will expire on 1st June 2021. After that date Mr McMurray will be free to apply for an increase in authorisation. No action is taken against Mr McMurray as transport manager.
2. Driver Joseph Kennedy's LGV entitlement is suspended for a period of 6 weeks with effect from 23:59 Friday 28 June 2019.
3. Driver Lee Mulheron's LGV entitlement is revoked with effect from 23:59 Friday 28 June 2019. He is disqualified from holding an LGV entitlement for 18 months from the date of revocation.

Background

1. Mr McMurray has held a Standard National Goods Vehicle Operator's Licence since 7 December 2009. Mr McMurray has been the Transport Manager since the grant of the licence. The Operator's Licence authorises Mr McMurray to operate 10 vehicles. At the date of the Public Inquiry Mr McMurray had 8 vehicles in possession.

The Call to Public Inquiry

2. Mr McMurray, as Operator and as Transport Manager, was called to Public Inquiry by letter dated 24 January 2019. Joseph Kennedy, Lee Mulheron and Kevin Brereton were called to conjoined driver conduct hearings by letters dated 30 January 2019.

The Public Inquiry and conjoined Driver Conduct Hearings

3. The Public Inquiry and the conjoined Driver Conduct Hearings took place on 28 February 2019.
4. Mr McMurray, Mr Kennedy, Mr Mulheron and Mr Brereton attended and gave evidence. Mr Wilkinson, Traffic Examiner, DVSA also attended and gave evidence.

The Evidence

5. Mr Wilkinson, Traffic Examiner, prepared briefs for the Public Inquiry and the Driver Conduct hearing. Mr Wilkinson's findings were not disputed other than by Mr Kennedy who disputed the number of times that Mr Kennedy had driven without a card.

The following is a summary of the evidence in the briefs prepared by Mr Wilkinson.

6. On 3 September 2017 one of Mr McMurray's drivers was stopped and issued with a prohibition for driving without a tachograph card in use and exceeding 4.5 hours cumulative driving time without the required break or breaks.
7. On 13 June 2018 one of Mr McMurray's vehicles was stopped by the DVSA. The DVSA found that the vehicle had been driven without a card on a number of occasions.
8. Rory Wilkinson, Traffic Examiner carried out a follow up investigation. Mr Wilkinson contacted Mr McMurray and obtained 6 month's worth of digital driver card data for all drivers employed by him between 8 January and 29 June 2018, and vehicle unit data for all vehicles used by him during that period.
9. Mr Wilkinson analysed the data and investigation and in the six month period from 8 January 2018 to 29 June 2018 identified the following apparent infringements:-
 - (1) George Ralston – 9 occasions of driving without a card
 - (2) Peter McLeod – 28 occasions of driving without a card
 - (3) Kevin Brereton – 30 occasions of driving without a card
 - (4) Joseph Kennedy – 4 occasions of driving without a card
 - (5) Lee Mulheron 15 occasions of driving without a card
 - (6) John Kennedy 6 occasions of driving without a card
 - (7) Stuart Honest 34 occasions of driving without a card

10. Mr Wilkinson interviewed the drivers in September 2018. Mr Honest admitted driving without a card at interview. He was the only one of the 7 drivers who admitted driving without a card to the DVSA.
11. On 27 September 2018 Mr Wilkinson went to Mr McMurray's operating centre for a pre-arranged visit. His findings are set out in the Traffic Examiner Operator Brief which begins at p.195 of the Brief. Mr McMurray told Mr Wilkinson that he had always ensured that vehicle unit data was downloaded every 28 days. Since June 2018 he had begun to download driver cards and vehicle unit data at least once every 2 weeks. Prior to June 2018 Mr McMurray did not compare vehicle unit data to driver card data to check for missing mileage or periods of driving without a card. Mr McMurray only checked driver card data for infringements. Since June 2018 Mr McMurray had been comparing the data and producing reports for missing mileage.
12. Mr Wilkinson interviewed Mr McMurray on 22 October 2018. Mr McMurray confirmed that on all of the occasions of driving without a card, with one exception on 4 June 2018¹, the vehicles that were being driven without a card were being driven by the drivers identified by Mr Wilkinson.
13. Mr McMurray said that he had held formal disciplinary meetings with all the drivers and, apart from Mr Honest, all of the drivers had been unable to explain the driving without a card. All of the drivers had been issued with a final warning.
14. Of the 7 drivers only 3, Joseph Kennedy, Lee Mulheron and Kevin Brereton held vocational driving licences.

The witnesses' evidence at the Public Inquiry and conjoined driver conduct hearings

Joseph Kennedy

15. Joseph Kennedy gave evidence that he had been a LGV driver for 20 years. He had worked for Mr McMurray for 5 years.
16. I asked Mr Kennedy about the 4 instances of driving without a card where Mr Kennedy was suspected of being the driver. Mr Kennedy denied that he was the driver on 2 occasions but accepted that he had driven without a card on 2 occasions.
17. Mr Kennedy denied being the driver on 4 February 2018. If Mr Kennedy had been the driver he would have driven for 5 hours 56 without taking a 45 minute break. Mr Kennedy said someone else drove without a card not him.
18. Similarly, Mr Kennedy denied being the driver on 22 March 2018. If he had been the driver he would have driven for 4 hours 39 minutes without taking a 45 minute break

¹ Mr Wilkinson had suspected that Mr Ralston had driven without a card on 4 June 2018. Mr McMurray confirmed that the driver had not been Mr Ralston.

19. Mr Kennedy accepted that he had driven without a card on 23 April 2018. The effect of the driving without a card was to conceal that he had driven for 5 hours and 12 minutes without a 45 minute break.
20. Mr Kennedy accepted that he had driven without a card on 10 June 2018. On that occasion he had recorded 1 hour 36 minutes driving on his card. He then drove without a card for 1 hour and 29 minutes. He could not explain why he had done this.
21. Mr Kennedy said that he realised that he had made a serious mistake by driving without a card and that it would never happen again.

Lee Mulheron

22. Mr Mulheron had been a LGV driver for 13 years. He had worked for Mr McMurray for 4 years.
23. Although Mr Mulheron denied that he had driven without a card when he had been interviewed by Mr Wilkinson, he admitted that he had driven without a card at the driver conduct hearing. Mr Mulheron accepted that he had driven without a card on the 15 occasions identified by Mr Wilkinson in the period from 16 January 2018 until 10 June 2018. 9 offences were all driving without a card to avoid a 4 and a ½ hour driving offence. 6 offences were recording breaks whilst the vehicle was moving.
24. His motive was to finish earlier. He said that his mother in law had been terminally ill at the time. He had not breached drivers' hours before or since.

Kevin Brereton

25. Mr Brereton had been a LGV driver for about 18 years. He had worked for Mr McMurray for 4 years.
26. Although Mr Brereton had denied driving without a card when he had been interviewed by Mr Wilkinson, he had admitted that he had driven without a card at the driven conduct hearing. Mr Brereton accepted that he had driven without a card on the 29 occasions identified by Mr Wilkinson. On 28 occasions he had driven without a card to disguise 4 and ½ hour driving offences. On the remaining occasion he had driven without a card but had not committed any other breach of the drivers' hours rules.
27. Mr Brereton explained that he had driven without a card because he wanted to get home early. He had problems at home. He had not committed any drivers' hours offences before or since.

Jackie McMurray

28. Mr McMurray explained that he had been working in distribution since leaving school, initially as a driver, then as a transport co-ordinator, a transport manager and a depot manager. The company that Mr McMurray had been working for had gone bust and Mr McMurray had decided to obtain an operator's licence. His business was delivering white goods with some installation. He employed 24 people including 14 drivers.
29. Mr McMurray accepted that he had been at fault in not comparing driver data with vehicle unit data to identify missing mileage and driving without a card. Mr McMurray had not been aware that he needed to do this. He was now downloading driver cards and vehicle units more often and analysing the data to identify missing mileage.

Rory Wilkinson

30. Mr Wilkinson stated that Mr McMurray's systems for controlling drivers' hours had been robust except for the failure to compare driver data with vehicle unit data. Mr McMurray had been cooperative in the investigation. Mr Wilkinson had given Mr McMurray advice on how to analyse the data from driver cards and vehicle units and Mr McMurray had taken that advice on board.

Findings in fact

31. As I have already identified the only disputed evidence was whether Mr Kennedy had driven without a card on 4 occasions, as Mr Wilkinson suspected from his analysis, or on 2 occasions as Mr Kennedy claimed. I am prepared to give Mr Kennedy the benefit of the doubt and to accept that he drove without a card on only 2 occasions.
32. Accordingly, I find that in the period from 8 January and 29 June 2018 Mr McMurray's drivers drove without a card on 124 occasions. Joseph Kennedy committed 2 offences, John Kennedy 6 offences, George Ralston 9 offences, Lee Mulheron 15 offences, Peter McLeod 28 offences, Kevin Brereton 30 offences, and Steward Honest 34 offences. The offences were spread over all 6 months.

Relevant considerations

33. It is clear that during the period from 8 January to 29 June 2018 there was a culture of drivers "pulling their cards" in order to disguise that drivers were not taking a 45 minute break after an accumulated driving time of 4 hours 30 minutes. Mr McMurray employed about 14 drivers during that period. 7 of those drivers were pulling their cards.
34. From Mr Wilkinson's Schedule of Offences (p.150 of the Brief) it can be seen that the maximum accumulated driving time was 7 hours 29 minutes – Lee Mulheron on 16 January 2018 – nearly 3 hours over the 4 hours 30 minutes limit for driving without taking a break. Most offences were less than 1 hour

over. A few were offences where the accumulated drive time was less than 4 hours 30 minutes and so the driver had no need to “pull his card”.

35. I have considered the positive and negative features set out in Statutory Document 10.
36. I accept that Mr McMurray did not know that his drivers were pulling their cards. Nor is there any suggestion that Mr McMurray’s scheduling of work put his drivers under pressure, or created a temptation for them to pull their cards.
37. Mr McMurray had systems for, and was carrying out, analysis of driver cards. Mr McMurray had a system for, and was, downloading vehicle units.
38. The problem was Mr McMurray was ignorant of the need to compare data from driver cards and vehicle units. As a result of Mr McMurray’s ignorance drivers could pull their cards, without any risk of being caught. It seems to be a reasonable inference from the scale of card pulling that drivers were aware that they could pull cards without being caught and that this was part of the culture. The reason that the drivers pulled their cards was to enable them to finish earlier – e.g. Mr Honest’s interview p.85-102 of the Brief, and the evidence of the drivers at the Driver Conduct Hearings.
39. Mr McMurray co-operated with the DVSA investigation. Mr McMurray heeded Mr Wilkinson’s advice and introduced new systems to make sure that missing mileage would be identified, investigated and, if necessary, disciplinary action would be taken.
40. Other than the issue of drivers pulling cards Mr McMurray did not have any previous history of non-compliance.
41. However Mr McMurray was at fault in not knowing that he needed to compare data from driver cards and vehicle units. I consider that this was a fundamental failure on the part of Mr McMurray which resulted in persistent falsification of drivers’ hours records by his drivers – 124 examples over a 6 month period. Moreover, Mr McMurray should have been alerted to the fact that his analysis was
42. Considering the positive and the negative I consider that Mr McMurray’s conduct can be summarised as being an isolated failure to prevent drivers from breaching the rules on drivers’ hours and tachographs for their own benefit, on the part of an otherwise compliant operator. That failure was, however, a fundamental failure on the part of Mr McMurray resulting in a large number of his drivers being able to flout the drivers’ hours rules on a significant scale.

Decision

43. Mr McMurray’s operator licence authorises 10 vehicles. Mr McMurray has 8 vehicles in possession. Mr McMurray stated at the public inquiry that he would like to retain his authorisation for 10 vehicles as he intends growing the

business. He explained that he had added a vehicle a year for the past few years and he hoped to continue to increase at that rate.

44. I consider that given the scale of the breaches by Mr McMurray's drivers this is a case which cannot be dealt with by a warning. It is, in my experience, all too common for operators to appear at public inquiry because they do not compare data from vehicle units and driver cards – this is a fundamental failure in any system to control drivers' hours because it means that the operator will not detect drivers driving without cards. It is important that operators understand that if they are using digital tachographs they must carry out a comprehensive analysis of data from vehicle units and driver cards. They have given an undertaking to make proper arrangements so that the rules on drivers' hours and tachographs are observed and proper records kept. The reason for the undertakings is to protect the safety of the public. In addition if drivers can breach the rules and get away with it, without any consequences for the operator, compliant operators will find themselves at a competitive disadvantage and will wonder why they should bother to put the effort into being compliant.
45. However, I accept that Mr McMurray believed that his systems were compliant, that he was shocked to discover the extent that his trust in his drivers was being abused and that his operation was otherwise compliant. In these circumstances I hold back from taking action that will materially affect Mr McMurray's transport operation as it stands. Instead I will remove Mr McMurray's margin and curtail his authorisation from 10 vehicles to 8 vehicles. The curtailment will take effect for 2 years – it will expire on 1st June 2021. After that date Mr McMurray will be free to apply for an increase in authorisation. Mr McMurray is also the transport manager. Given the action I have taken against Mr McMurray as operator, I take no action against Mr McMurray as transport manager.

Joseph Kennedy

46. Mr Kennedy pulled his card on two occasions. On one of those occasions the reason that he pulled his card was to disguise the fact that he had driven for more than 4 hours 30 minutes without taking a break. Mr Kennedy denied that he had pulled his card when questioned by DVSA.
47. Mr Kennedy told me that he realised that he had made a serious mistake by pulling his card and promised that it would never happen again. So far as his personal circumstances were concerned he was single. He did not know if he would be able to find other work if his LGV entitlement was suspended.
48. I have had regard to Statutory Document No. 6 Vocational Driver Conduct and in particular Annex A: Entry Points. It suggests a starting point of 4 weeks suspension per offence for pulling digicards. I take into account Mr Kennedy's motive was not financial. I consider that in Mr Kennedy's case as he committed 2 offences of pulling his card it is appropriate to suspend his LGV entitlement for a period of 6 weeks. The period of suspension will begin at 23:59 on Friday 28 June 2019.

Lee Mulheron

49. Mr Mulheron denied that he had driven without a card when he had been interviewed by Mr Wilkinson. He admitted that he had driven without a card at the driver conduct hearing. Mr Mulheron accepted that he had driven without a card on the 15 occasions identified by Mr Wilkinson in the period from 16 January 2018 until 10 June 2018. 9 offences were all driving without a card to avoid a 4 and a ½ hour driving offence. 6 offences were recording breaks whilst the vehicle was moving.
50. His motive was to finish earlier. He said that his mother in law had been terminally ill at the time. He had not breached drivers' hours before or since. Mr Mulheron is married with two adult children who live with him. His wife does not work. If Mr Mulheron lost his LGV driving entitlement he believed that he would lose his house as he would be unable to pay the mortgage. He accepted that he might be able to obtain other work driving vehicles that did not require LGV driving entitlement.
51. Mr Mulheron said that he knew that what he did was wrong. His motive had been to be with his family to provide support. He regretted his actions and he said that there would be no repetition.
52. I have had regard to Statutory Document No. 6 Vocational Driver Conduct and in particular Annex A: Entry Points. It suggests a starting point of 4 weeks suspension per offence up to 5 offences and revocation and disqualification for 12 months for more than 6 offences. I take into account the fact that Mr Mulheron has no previous history. However, I consider that Mr Mulheron by pulling his card on 15 occasions has shown that he is not fit to hold an LGV licence and that his LGV entitlement should be revoked. So far as the period of disqualification is concerned Mr Mulheron has committed more than twice the number of offences that would merit a disqualification of 1 year. If I applied an arithmetical approach this would suggest a two year period of disqualification. I consider, however, that as Mr Mulheron's motive was not financial gain but personal he should be disqualified from holding an LGV entitlement for 18 months. Mr Mulheron's LGV entitlement will be revoked from 23:59 Friday 28 June 2019.

Kevin Brereton

53. Mr Brereton had denied driving without a card when he had been interviewed by Mr Wilkinson but he admitted that he had driven without a card at the driven conduct hearing. Mr Brereton accepted that he had driven without a card on the 29 occasions identified by Mr Wilkinson. On 28 occasions he had driven without a card to disguise 4 and ½ hour driving offences. On the remaining occasion he had driven without a card but had not committed any other breach of the drivers' hours rules.
54. Mr Brereton explained that he had driven without a card because he wanted to get home early. He had problems at home. He had not committed any drivers' hours offences before or since. Mr Brereton had been a LGV driver for about

18 years. He supported two daughters from a previous marriage. He thought that if he lost his LGV entitlement he would lose his house and his job. He did not know if he would be able to find other work. He had been under pressure. His mother had died. He was having difficulties in his marriage. He had behaved stupidly and had not been thinking straight. He assured me that he would not breach the rules about drivers' hours in the future. He had been stopped and checked by the DVSA since the offences and he had been compliant.

55. During the driver conduct hearing I was under the misapprehension that Mr Brereton held an LGV entitlement. Mr Brereton does not hold an LGV entitlement. He holds a PCV entitlement. I am considering taking regulatory action against Mr Brereton's PCV entitlement. Mr Brereton will be given the opportunity to make representations about whether or not I should take regulatory action against his PCV entitlement before I make any decision about him.

Hugh J Olson
Deputy Traffic Commissioner for Scotland

7 June 2019