

ORIGINAL

Decision No. 77603

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Investigation on the Commission's own motion into the operations, rates, charges and practices of VICTORY TRANSPORTATION SERVICE, INC., a California corporation; NORMAN WILLIAMS COMPANY, a California corporation; LUCKY STORES, INCORPORATED, a California corporation; TRIUMPH SALES, INC., a California corporation; and A. E. STALEY MANUFACTURING COMPANY DIVISION OF CHEMURGIC CORPORATION, a California corporation.

Case No. 9005
(Filed December 30, 1969)

George M. Carr, for Victory Transportation Service, Inc.; Marvin Handler, of Handler, Baker & Greene, for Lucky Stores, Inc.; and Norman Williams Company; respondents. John Paul Fischer and Martin J. Rosen, for Pacific Motor Trucking, System 99, and Delta Freight Lines; and M. L. Frost, for System 99; interested parties. Donald C. Meaney, Counsel, and J. B. Hannigan, for the Commission staff.

O P I N I O N

By its order dated December 30, 1969, the Commission instituted an investigation into the operations, rates, charges and practices of Victory Transportation Service, Inc. (Victory); Norman Williams Company (Williams); Lucky Stores, Incorporated (Lucky); Triumph Sales, Inc. (Triumph) and A. E. Staley Manufacturing Company Division of Chemurgic Corporation (Staley).

Public hearing was held before Examiner O'Leary at San Francisco on April 7, 8, 9 and 10, 1970. The matter was submitted upon the filing of concurrent briefs on May 22, 1970.

Victory operates pursuant to radial highway common carrier and highway contract carrier permits. On August 9, 1967, the appropriate tariffs and distance table were served upon Victory. Its main office and terminal is located in San Jose; another terminal is located in Los Angeles. At the time of the investigation, Victory's equipment consisted of nine tractors, three bobtail trucks, 24 semi-van trailers, and two semi-flatbed trailers. It employed eight line haul drivers, twelve local drivers, two lumpers, four office personnel, two dispatchers, and one salesman. Its gross revenue for the four quarters ending June 30, 1969, was \$731,836.

The staff alleges that Victory performed transportation at rates less than the established minimum rates for respondents, Williams, Lucky and Triumph. The staff also alleges that respondent Victory operated as a highway common carrier without proper authority and also handled C.O.D. shipments in violation of General Order No. 84-F.

With respect to transportation performed by Victory for Williams, Lucky and Triumph, the staff alleges undercharges aggregating \$13,054.02, \$19,394.99 and \$1,636.72, respectively. The undercharges as to all three shippers occurred because written information as required by paragraph (h) of Item 170, Minimum Rate Tariff No. 2, was not furnished to Victory prior to or at the time of pickup of the shipments.

The staff recommends that a punitive fine of \$2,500 be ordered because of Victory's alleged wilful and improper preparation of split delivery instructions.

As to the allegation that Victory operated as a highway common carrier without proper authority, the staff recommends that Victory be ordered to cease and desist from such operations until proper authority is obtained from the Commission. By Decision No. 77270

in Application No. 51807 dated May 22, 1970, authorization was granted to Victory to acquire a certificate of public convenience and necessity as a highway common carrier. Said certificate authorizes operations between the points the staff alleges Victory served without proper authority. As a result of Decision No. 77270, the allegation of unlawful highway common carrier operations has become moot and need not be discussed further herein.

It was stipulated that Victory handled C.O.D. shipments on five occasions without having a bond on file as required by General Order No. 84-F. On July 23, 1969, the required bond was procured and has been in effect continuously since that date.

No evidence was presented in connection with respondent Staley.

With respect to the shipments wherein the staff alleges undercharges respondents Victory, Lucky and Williams contend that the documentation could not be accomplished because of a regulation of the Alcoholic Beverage Control Board (ABC) which requires shipments of liquor to be delivered to one point, in order for quantity discounts to apply, before reshipments to customers or stores. Victory is no longer performing transportation for Williams and Triumph. The transportation presently being performed for Lucky has been altered so as to conform to the documentation requirements of Minimum Rate Tariff No. 2, Item No. 170.

On March 3, 1970, respondents Lucky and Williams filed a petition for relief from payment of alleged undercharges, requesting that they be relieved from any obligations to pay undercharges pursuant to Section 3667 of the Public Utilities Code. Lucky and Williams claim and the evidence discloses that had the documentation requirements been

met the amounts paid would have been correct. They point out that their cost for the transportation performed would more than double in the case of Lucky and would increase by more than 60% in the case of Williams should they be required to pay the undercharges.

In their brief Lucky and Williams cite a number of previous Commission decisions wherein the Commission has utilized said section as a basis for granting relief from collection and payment of undercharges in situations similar to those of record herein.

Section 3800 was added to the Public Utilities Code in 1963. It provides in part:

"Whenever the Commission, after a hearing, finds that any highway permit carrier has charged, collected, or received for the transportation of property, or for any service in connection therewith, rates or charges less than the minimum rates and charges applicable to such transportation established or approved by the Commission, or has directly or indirectly refunded or remitted in any matter or by any device any portion of such minimum rates or charges, or has paid a commission without an order of the commission so authorizing, the Commission shall require such carrier to collect the undercharges involved. . . ." (Emphasis supplied.) Section 14 of the Public Utilities Code provides "Shall" is mandatory and "may" is permissive.

All but two of the decisions cited in the brief filed by Williams and Lucky, in support of the request for relief from payment of alleged undercharges were decided prior to the addition of Section 3800 of the Public Utilities Code. The two decisions cited which were decided subsequent to the addition of said section were Acme Truck

Company, 65 Cal. P.U.C. 20 (1965) and Pittsburg Plate Glass Company v. American Cartage Company, (Unreported), Decision No. 58048. The Acme Truck Company decision, although it made reference to previous Commission decisions granting relief, did not grant the relief requested, but ordered submission of the matter set aside and ordered further public hearing be held. Subsequently the requested relief was denied by Decision No. 72802 (unreported). The Pittsburg Plate Glass Company v. American Cartage Company decision while dealing with transportation subsequent to the addition of Section 3800 to the Public Utilities Code is distinguishable from the instant case in that the relief sought was based on a request that a specific common carrier published rate be found to be unreasonable which is not the case here. We construe Section 3800 to prohibit the granting of retroactive relief pursuant to Section 3667 of the Public Utilities Code as is requested herein.

After consideration the Commission finds that:

1. Victory operates pursuant to radial highway common carrier and highway contract carrier permits.
2. Victory was served with appropriate tariffs and distance tables.
3. Written split delivery instructions as required by Item 170, paragraph (b), were not received by Victory prior to or at the commencement of the transportation of split delivery shipments.
4. Victory charged less than the lawfully prescribed minimum rates in the amounts set forth in Exhibits 8, 9 and 14 which resulted in undercharges in the amount of \$34,085.73.
5. By Decision No. 77270 dated May 22, 1970, in Application No. 51207 Victory was authorized to acquire a certificate of public convenience and necessity authorizing highway common carrier operations between the points the staff alleges highway common carrier operations were conducted by Victory without authority.

6. Victory handled C.O.D. shipments without having a bond on file as required by General Order No. 84-F.

7. Williams and Lucky have filed a petition for relief from payment of alleged undercharges.

The Commission concludes that:

1. Victory Transportation Service, Inc. violated Sections 3664, 3667 and 3737 of the Public Utilities Code, should collect the undercharges and should pay a fine pursuant to Section 3800 of the Public Utilities Code in the amount of \$34,085.73. Also, a fine, pursuant to Section 3774 of the Public Utilities Code, should be assessed against Victory Transportation Service in the amount of \$1,000.00.

2. The petition for relief from payment of alleged undercharges filed by respondents Lucky and Williams should be denied.

The Commission expects that Victory Transportation Service, Inc. will proceed promptly, diligently and in good faith to pursue all reasonable measures to collect the undercharges. The staff of the Commission will make a subsequent field investigation into the measures taken by Victory and the results thereof. If there is reason to believe either Victory or its attorney has not been diligent, or has not taken all reasonable measures to collect all undercharges or has not acted in good faith, the Commission will reopen this proceeding for the purpose of formally inquiring into the circumstances and for the purpose of determining whether further sanctions should be imposed.

O R D E R

IT IS ORDERED that:

1. Victory Transportation Service, Inc. shall pay a fine of \$35,085.73 to this Commission on or before the fortieth day after the effective date of this order.

2. Victory Transportation Service, Inc. shall take such action, including legal action, as may be necessary to collect the amounts of undercharges set forth herein, and shall notify the Commission, in writing, upon the consummation of such collections.

3. Victory Transportation Service, Inc. shall proceed promptly, diligently and in good faith to pursue all reasonable measures to collect the undercharges, and in the event undercharges ordered to be collected by paragraph 2 of this order, or any part of such undercharges, remain uncollected sixty days after the effective date of this order, Victory Transportation Service, Inc. shall file with the Commission, on the first Monday of each month after the end of said sixty days, a report of the undercharges remaining to be collected, specifying the action taken to collect such undercharges and the result of such action, until such undercharges have been collected in full or until further order of the Commission.

4. Victory Transportation Service, Inc. shall cease and desist from charging and collecting compensation for the transportation of property or for any service in connection therewith in a lesser amount than the minimum rates and charges prescribed by this Commission.

5. The petition for relief from payment of alleged undercharges filed by respondents Lucky and Williams is denied.

The Secretary of the Commission is directed to cause personal service of this order to be made upon respondents.

The effective date of this order shall be twenty days after the completion of service upon Victory Transportation Service, Inc.

Dated at San Francisco, California, this 11th day of AUGUST, 1970.

August Chairman
William J. Vukasin, Jr.
[Signature]
Yvonne L. [Signature] Commissioners

Commissioner J. P. Vukasin, Jr., being necessarily absent, did not participate in the disposition of this proceeding.