

ORIGINAL

Decision No. 78767

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

George M. Carr, Attorney at Law, for Victory Transportation Service, Inc.; and
Marvin Handler, Attorney at Law, for Lucky Stores, Incorporated, and Norman Williams Company; respondents.
Donald C. Meaney, Attorney at Law, for the Commission staff.

O P I N I O N

By Decision No. 77603, dated August 11, 1970, the Commission found that Victory Transportation Service, Inc. (Victory) violated Sections 3664, 3667 and 3737 of the Public Utilities Code by transporting split delivery shipments for Norman Williams Company (Williams), Lucky Stores, Incorporated (Lucky) and Triumph Sales, Inc. (Triumph) without having received written split delivery instructions prior to or at the commencement of the transportation of said shipments as required by Item 170 of Minimum Rate Tariff 2. Pursuant to Section 3800 of the Public Utilities Code, Victory was ordered to collect all undercharges (\$34,085.73) and to pay a fine equal to said amount. Victory was also ordered to pay an additional fine of \$1,000 in accordance with the provisions of Section 3774 of the Code. A petition of Williams and Lucky for relief from the

payment of undercharges was denied on the ground that Section 3800 is mandatory in the requirement that undercharges be collected. By Decision No. 77943 dated November 10, 1970, the Commission granted rehearing limited to oral argument on the construction of Sections 3667 and 3800^{1/} of the Public Utilities Code and the equities of the parties to this proceeding.

Oral argument was held before Examiner Daly at San Francisco on April 6, 1971.

The issues to be herein considered are: (1) Whether the Commission can dispense with the requirement to collect undercharges upon a finding of mitigating circumstances and, if so, (2) whether the circumstances in the instant proceeding justify such relief.

1/ "3667. No highway permit carrier shall charge, demand, collect, or receive for the transportation of property, or for any service in connection therewith, rates or charges less than the minimum rates and charges or greater than the maximum rates and charges applicable to such transportation established or approved by the commission; nor shall any such carrier directly or indirectly pay any commission or refund, or remit in any manner or by any device any portion of the rates or charges so specified, except upon authority of the commission."

"3800. 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 manner 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 and may impose upon the carrier a fine equal to the amount of such undercharges. All such fines shall be paid into the State Treasury to the credit of the General Fund. The remedy and penalty provided by this section are cumulative and shall not be a bar to or affect any other remedy or penalty provided for in this chapter, or to the exercise by the commission of its power to punish for contempt."

Section 3667 specifically prohibits the charging of rates less than those prescribed by the Commission as being minimum except upon authority of the Commission. Section 3800 sets forth a penalty that the Commission may impose upon a highway permit carrier for the violation of Section 3667. Prior to the enactment of Section 3800, the Commission, upon a finding that the minimum rates had been violated, was limited to ordering the carrier to collect undercharges and could either revoke or suspend the carrier's operating authority or could impose a fine up to \$5,000.^{2/} In many instances, the undercharges collected and retained by the carrier far exceeded the amount of the fine. To prevent any possible unjust enrichment by the carrier, the Legislature enacted Section 3800 which gave to the Commission the discretionary power to impose an additional fine equal to the amount of the undercharges. Section 3800 also provided that upon a finding by the Commission, after hearing, that a highway

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- 2/ "3774. The commission may cancel, revoke, or suspend the operating permit or permits of any highway carrier upon any of the following grounds:
- (a) Any illegally conducted highway carrier operations.
 - (b) The violation of any of the provisions of this chapter or of any operating permit issued thereunder.
 - (c) The violation of any order, decision, rule, regulation, direction, demand, or requirement established by the commission pursuant to this chapter.
 - (d) The conviction of the highway carrier of any misdemeanor under this chapter.
 - (e) The rendition of a judgment against the highway carrier for any penalty imposed under this chapter.
 - (f) The failure of a highway carrier to pay any fee imposed upon the carrier within the time required by law.

"As an alternative to the cancellation, revocation, or suspension of an operating permit or permits, the commission may impose upon the holder of such permit or permits a fine of not exceeding five thousand dollars (\$5,000). All fines collected shall be deposited at least once each month in the State Treasury to the credit of the General Fund."

permit carrier charged less than the applicable minimum rates in violation of Section 3667, the collection of undercharges was mandatory in the absence of an order of the Commission authorizing the carrier to charge less than said rates.

Because of the language, "...except upon authority of the commission", in Section 3667 and the language "...without an order of the commission so authorizing,...", in Section 3800 the question is raised as to whether the authority referred to in each section means an order of the Commission authorizing deviation from the minimum rates and issued prior to the time that any less than minimum charges are assessed. If such an interpretation were placed upon Section 3800, the language, "...without an order of the commission so authorizing,..." would be meaningless, for if such an order of approval existed there would be no need for a hearing, no finding by the Commission that Section 3667 had been violated, and the Commission, therefore, would never reach the point of having to impose the fine and penalty provisions of Section 3800. Although the plain language, "...except upon authority of the commission", in Section 3667 is susceptible to such an interpretation, the Commission, nevertheless, has issued orders pursuant to said section granting the type of equitable relief herein requested, where special circumstances are found to exist and the parties have acted in good faith. (I. Lewis, doing business as Spee-Dee Delivery Service, Decision No. 59760, dated March 8, 1960, in Case No. 5432; Acme Truck Company, 65 Cal. P.U.C. 20 (1965); J. L. Talkington, 58 Cal. P.U.C. 720 (1961); Signal Trucking Service, Decision No. 77655, dated August 25, 1970, in Application No. 51932.)

The Commission therefore concludes that it has the authority pursuant to Sections 3667 and 3800 of the Public Utilities Code to grant the relief as requested by Williams and Lucky.

The investigation involved the transportation by Victory of split delivery shipments of liquor, moving in truckload quantities, from the suppliers of Williams and Lucky located in the Bay Area and Stockton to points in Southern California during the period April through June, 1969. The undercharges result from the fact that prior to or at the commencement of the transportation of said shipments Victory was not in receipt of split delivery instructions as required by Item 170 of Minimum Rate Tariff 2.^{3/} The failure to comply with the documentation requirements was attributable to a

3/ "SPLIT DELIVERY

"The carrier shall not transport a split delivery shipment unless at the time of or prior to the pickup of the shipment, written information has been received from the consignor showing the name of each consignee, point or points of destination, and the kind and quantity of property in each component part of such shipment. Preparation by the shipper of the required single split delivery bill of lading or comparable document referred to in paragraph (c) of this item, for execution by the shipper and carrier prior to or at the time of the pickup, will constitute compliance with this paragraph.

(c) At the time of or prior to the pickup of the shipment, the carrier shall issue to the consignor a single split delivery bill of lading or comparable shipping order for the entire shipment. It shall show the name of the consignor, point of origin, date of pickup, name of each consignee, point or points of destination, and the kind and quantity of property in each component part of such shipment, or, the single split delivery bill of lading or comparable shipping order shall refer to specifically designated documents attached thereto and forming a part thereof which show the component part delivery information.

(d) If split pickup is performed on a split delivery shipment or if written information does not conform with the requirements of paragraph (b) hereof, or if all of the shipment is not received at the carrier's established depot or picked up by carrier during one calendar day (see exception in multiple lot shipment), each component part of the split delivery shipment shall be rated as a separate shipment under other provisions of the tariff."

regulation of the Alcoholic Beverage Control Board (ABC), which provides that shipments from suppliers of Williams and Lucky must be delivered to one point, in order for quantity discounts to apply, before reshipment can be made to customers or other stores.

All of the shipments for Williams originated with two suppliers, i.e., American Distillers (American) at Union City and E. Martinoni Company (Martinoni) at South San Francisco.

Shipments were picked up by Victory from these suppliers and in the case of American were transported to William's Cotner Avenue location, Los Angeles, and in the case of Martinoni to Norman Williams, Home Junction Team Track, Los Angeles. In all instances bills of lading were prepared by Martinoni and American and given to Victory prior to pickup.

There were also combined shipments of Martinoni and American, which originated with Martinoni and were delivered to the Home Junction Team Track in Los Angeles. The documents on these shipments were usually prepared by Victory, but were never in the possession of Martinoni prior to or at the time of pickup.

Split deliveries were subsequently made from the two Los Angeles locations. The bills of lading were in most cases prepared by Victory, occasionally by Williams,^{4/} but in no instance were the bills of lading delivered to Victory prior to pickup from Martinoni or American.

4/ The record contains conflicting testimony as to the extent an employee of Williams in Los Angeles prepared the shipping documents, but it was stipulated that Williams occasionally prepared the split delivery bills of lading covering the movements from the two Los Angeles locations.

The shipments for Lucky originated with five suppliers in the San Francisco Bay Area and Stockton. Each supplier prepared and delivered to Victory a proper bill of lading covering prepaid movements from the point of pickup to Lucky Stores, San Leandro. Except for shipments from two of the suppliers (Max Sobel and Julliard Alpha), which were consolidated with Stockton shipments at San Leandro, Victory transported all of the other shipments directly to Lucky Stores in Southern California rather than to San Leandro. On some of these shipments an employee of Lucky signed shipping orders indicating that they had been delivered at San Leandro in good condition when in fact they bypassed San Leandro. The split delivery bills covering the movements to the stores in Southern California were always prepared by Victory, but were never in its possession prior to pickup from the suppliers.

There is no question that had the documentation requirements been complied with, the rates actually charged were proper. Having failed to meet the requirements of split-delivery shipments the staff rated each component part as a separate shipment. The freight charges paid and the undercharges claimed, with allowance for the prepayments made by the suppliers of Lucky, are:

	<u>Paid</u>	<u>Claimed</u>
Lucky	19,081.20	19,394.99 ^{5/}
Williams	21,864.34	13,054.02

^{5/} It is possible that on shipments from the suppliers Max Sobel and Julliard Alpha, which were delivered to San Leandro before being transported to Southern California, that cases of liquor moving to the same store in Southern California could have been consolidated and treated as single shipments in compliance with the minimum rates and thereby reduce the amount of undercharges by approximately 10 percent.

Victory commenced hauling for Williams and Lucky in 1968. Prior to that time Hills Transportation Company and Di Salvo Trucking Co. transported the shipments from Martinoni; United Expressways transported the shipments from American and Valley Motor Lines handled the shipments for Lucky. According to the record Victory, with slight modification, continued to serve these accounts in the same manner that they were served by its predecessors, both as to the physical handling of the shipments and in the method of documentation. Neither Williams nor Lucky have a transportation department and relied upon Victory to see to it that the documentation requirements were complied with. Respondents claim that they were not aware of any irregularities with respect to the handling and documentation of the shipments until the Commission instituted its investigation.

Upon being informed of the Commission investigation Williams and Lucky immediately employed counsel and sought tariff assistance. New procedures were formulated and put into operation. The suppliers of Williams prepay the shipments to the Home Junction Track in Los Angeles and Williams then provides Victory with the necessary documentation for split delivery service prior to the departure of the trucks from Los Angeles. All shipments from the suppliers of Lucky are now brought to San Leandro by local drivers. The trucks remain at San Leandro until the arrival of the last truck. When the split delivery bills of lading have been prepared the trucks are then taken by the local drivers to Victory's San Jose Terminal, from whence line-haul drivers continue the trip to Southern California points. The new method of handling the Lucky account has substantially increased Victory's operational costs.

Williams and Lucky argue that they have acted in good faith; that they are responsible business concerns who had no reason to believe that they were not in full compliance with the Commission's rate requirements, but being unskilled in transportation matters, relied upon the carrier to provide the proper documentation and billing; that all shipments moved in truckload lots and, except for complying with the documentation requirements, the full amount of minimum rates were paid; that the documentation deficiencies were the direct result of the concurrent jurisdiction of the ABC and this Commission; that payment of the undercharges would be an unreasonable penalty and, in particular, a financial burden upon Williams, who assertedly has suffered a financial loss of \$300,000 since commencing business as a wholesale liquor broker several years ago.

The difficult, non-conforming method of documentation and manner of operation obviously resulted from the desire of Williams and Lucky to combine the economic benefits of the liquor discounts with the rate advantages of the split delivery shipments, as well as the desire of Victory to secure the accounts, while performing the transportation service at the lowest possible operating cost. But these very same difficulties and irregularities should have been sufficient notice to all parties that reasonable inquiry was required to remove the vincible ignorance to which they have laid claim. This is clearly indicated by the testimony of the president of Victory:

"It sounded good to say that you should be able to have all of these documents prepared and in the right places at the right time and it seems like it might be able to work but no matter how we turned it -- we spent over a year and a half trying to turn it around to comply and on paper you could make it look good but you just couldn't physically do it." (Vol. 1, Pg. 208, Line 21.)

The very fact that many of Lucky's shipments were transported from the liquor suppliers directly to the Lucky stores in Southern California, without complying with the supplier's shipping instructions to deliver them to San Leandro, was notice to Lucky of non-compliance justifying further inquiry. And Victory was just as aware then as it is now of the additional operating costs that would result and have resulted from transporting the shipments of Lucky in the manner that they presently are being transported.

After consideration the Commission finds that:

1. During the period April through June 1969 Victory transported split delivery shipments of liquor, in truckload lots, for Williams and Lucky from liquor suppliers located at various points in the San Francisco Bay Area and Stockton to points in Southern California.
2. Because of a requirement of the ABC that all shipments of liquor be delivered to single points, before liquor discount rates could apply, prior to reshipment to customers or stores, the documentation relating to said shipments failed to comply with the provisions of Item 170 of Minimum Rate Tariff 2.
3. Failure to comply with the provisions of Item 170 of Minimum Rate Tariff 2 requires that the component parts of each shipment be rated as a separate shipment, which results in undercharges in the amount of \$13,054.02 on the shipments transported for Williams, \$1,636.72 on the shipments transported for Triumph and \$17,454.99 on shipments transported for Lucky. The latter amount makes allowance for a 10 percent reduction on those shipments of Lucky that could have been combined at San Leandro for delivery to a single store.

4. Although Williams and Lucky were without the benefit of traffic departments or of employees familiar with the application of Minimum Rate Tariff 2, they were aware of the fact that their desire to combine the advantages of the liquor discount with the lower split delivery rates resulted in a more complicated method of documentation, of which Williams had knowledge, and a nonconformity between the actual movements of the shipments as compared with the shipping instructions of the suppliers, of which Lucky had knowledge. These conditions should have prompted further inquiry on the part of both parties.

5. The circumstances in this proceeding do not warrant the relief requested by Williams and Lucky.

The Commission therefore concludes that Decision No. 77603 should be affirmed with the following modifications:

1. The fine should be reduced to \$33,145.73 to reflect the 10 percent allowance for the consolidation of shipments of Lucky from San Leandro to a single store.

2. Because Victory is financially unable to immediately pay the full amount of the fine, the time for payment shall be as follows:

- (a) \$1,000 to be paid within twenty days after the date hereof;
- (b) \$13,054.03 to be paid within 10 days after the collection of undercharges from Williams;
- (c) \$17,454.99 to be paid within 10 days after the collection of undercharges from Lucky; and
- (d) \$1,636.72 to be paid within 10 days after the collection of undercharges from Triumph.

O R D E R

IT IS ORDERED that:

1. Ordering paragraph 1 of Decision No. 77603 is hereby amended to read as follows:

1. Victory Transportation Service, Inc. shall pay a fine of \$33,145.73 to this Commission as follows:

- (a) \$1,000 to be paid within twenty days after the date hereof;
- (b) \$13,054.02 to be paid within ten days after the collection of undercharges from Norman Williams Company;
- (c) \$17,454.99 to be paid within ten days after the collection of undercharges from Lucky Stores, Incorporated; and
- (d) \$1,636.72 to be paid within ten days after the collection of undercharges from Triumph Sales, Inc.

2. In all other respects the ordering portion of Decision No. 77603 shall remain the same.

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 Diego, California, this 22d day of JUNE, 1971.

Chairman

William L. Sturgeon

[Signature]

Vernon L. Sturgeon

[Signature]

Commissioners

I abstain
J. B. Williams, Jr., Chairman