

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

In re Penalty Assessment No. 96187)	DOCKET NO. TV-980725
)	
STARVING STUDENTS OF)	INITIAL ORDER ON BRIEF
SEATTLE, INC.,)	ADJUDICATIVE PROCEEDING
Respondent.)	GRANTING PARTIAL MITIGATION,
.....)	ON CONDITION

SUMMARY

NATURE OF PROCEEDING: This is a Brief Adjudicative Proceeding held on petition by Starving Students of Seattle, Inc. ("Starving Students"), a motor carrier doing business in the State of Washington, to determine whether penalties in the amount of \$12,300.00 assessed by the Washington Utilities and Transportation Commission ("Commission") on May 1, 1998, should be mitigated in whole or in part. This petition was heard upon due and proper notice before Administrative Law Judge Lawrence J. Berg on August 4, 1998, in Olympia, Washington.

APPEARANCES: Mr. Steven K. Levan, President, Starving Students, represented the respondent. Mr. Levan also testified as a witness along with Mr. Dean Markle, Northwest District Director of Operations, and Mr. Rick Caldwell, Senior Manager Trainer and Seattle Branch Manager. Ms. Ann Rendahl, Assistant Attorney General, Olympia, WA, represented Commission Staff. Mr. Robert Johnston, Commission Special Investigator, testified.

CONCLUSION: All proposed findings, conclusions, and supporting arguments of the parties have been considered. To the extent that the proposed findings and conclusions argued by the parties are in accordance with the findings, conclusions, and opinions stated in this Order they have been accepted, and to the extent that they are inconsistent they have been rejected. Certain proposed findings and conclusions have been omitted as not relevant or as not necessary to a proper determination of the material issues presented.

Mitigation by suspension of the penalties is granted in part, on condition. The purpose of penalty assessments is to secure compliance with the law. Where the company penalized comes forward and shows good faith efforts to comply and an intention to take such additional steps as are necessary to bring it into full compliance, conditional, partial mitigation by suspension is a means to both impress upon the company the importance of compliance, to ease the financial impact of the penalty, and to better enable the company to take all steps necessary to achieve full

compliance. Separate mitigation is ordered for safety record keeping and for economic penalty assessments.

PROCEDURAL BACKGROUND

This matter began as a Commission field investigation on November 12, 1997. The purpose of the investigation was to conduct a safety compliance review, an economic records check, and to explain any deficiencies or practices not in compliance with Commission rules or regulations. Mr. Johnston conducted the investigation. He reviewed all records of household goods moves performed by Starving Students from its Bellevue and Seattle terminals between October 1, 1997, and October 15, 1997. Fifty-seven moves contained one or more rule and/or tariff violations.

On May 1, 1998, the Commission served notice of Penalty Assessment No. 96187 upon Starving Students, alleging 55 violations of RCW 81.80.220 and WAC 480-12-330 for assessing rates and/or charges different from those contained in lawfully published tariffs, 17 violations WAC 480-12-180(6) for failing to maintain a driver qualification file on each driver employed, and 51 violations WAC 480-12-190 for failing to maintain hours of service records on each driver employed. A \$100.00 penalty was assessed under RCW 81.80.230 for each rate violation and RCW 81.04.405 for each safety record keeping violation for a total penalty assessment of \$12,300.00.

On May 15, 1998, Respondent applied for mitigation of the penalty. Commission procedures provide for Brief Adjudicative Proceedings under WAC 480-09-500 in penalty assessment mitigation matters. A duly noticed Brief Adjudicative Proceeding was held in Olympia, Washington, before Administrative Law Judge Lawrence J. Berg on August 4, 1998. The parties stipulated to the admission of all exhibits and they were received into evidence.

DISCUSSION

A. 55 violations of RCW 81.80.220 and WAC 480-12-330.

Commission Staff documented rate violations in three areas: failure to charge overtime rates on weekends resulting in undercharges; providing additional labor at reduced rates or free of charge; and utilizing a short haul rate schedule for Washington which does not comply with the published tariff weight/mileage rate base. Mr. Johnston's investigation and presentation at the hearing were thorough, and his testimony was credible. Mr. Johnston prepared a memorandum outlining a history of contacts with Starving Students and detailing his investigation which was admitted as Exhibit 2. The short haul rate schedule was admitted as Exhibit 3.

Starving Students does not challenge the investigative findings that these violations occurred, but states that non-compliance was inadvertent, not intentional. Mr. Markle explained the business practices which resulted in undercharges to consumers and emphasized their cooperation with Commission Staff once these violations were reported. Computer programs which estimate, quote, and bill for intrastate moves were corrected within three days. Mr. Markle also testified credibly that organizational changes have been made in order to develop adequate local operations management and management training.

Mr. Johnston testified that similar prior violations by the respondent have occurred. Exhibit 7 is a penalty assessment against Starving Students dated March 10, 1989, for safety and economic violations, including four similar rate violations and seven violations of failure to keep sufficient records to audit rate compliance as required by tariff. Starving Students paid the penalty assessment. The fact that this prior violation occurred is balanced by the fact that the investigations are nine years apart, and it is considered as a minor aggravating factor. Exhibit 2 refers to an investigation which was conducted in 1991 and sixteen alleged violations of undercharging by Starving Students. No formal action was taken by the Commission and there is no evidence in the record that Starving Students was ever notified regarding the alleged violations. Accordingly, the 1991 investigation is not considered as a factor in this decision.

Mr. Levan stated that the undercharges were repeated as the result of a systemic error. He also argued that the nature of the violations did not warrant the maximum imposition of the \$100.00 penalty per each violation. Penalty assessments for undercharging are assessed pursuant to RCW 81.80.230 which states that each violation shall incur a penalty of not more than one hundred dollars for each violation. The penalty range is subject to the Commission's discretion. Furthermore, RCW 81.80.230 provides that each and every violation shall be a separate and distinct offense. Mr. Johnston stated while he makes penalty recommendations internally, the actual amount of the penalty assessment per violation is determined by management personnel. Commission Staff argued that \$100.00 is a common penalty assessment because it is not a lot of money in and of itself. Starving Students argued that the aggregate sum is substantial and the fine is burdensome based upon the relatively low revenue received from their average move.

The argument that a penalty assessment should bear some relationship to the cost of the underlying performance is without merit. Such a policy would be contrary to the goal of encouraging proactive diligent compliance in the first instance. However, when numerous violations can be traced to the same erroneous practice or assumption it is appropriate to consider the totality of the violations in mitigation. Furthermore, where the statutory basis for a penalty range includes both inadvertent and intentional violations, the character of the violation should also be considered in

the assessment of the appropriate penalty. The demeanor of the Starving Students witnesses supports the conclusion that they are credible. The quick corrective action taken and the comprehensive implementation of Commission Staff's corrective recommendations leads me to conclude that these violations were inadvertent.

B. 17 violations of WAC 480-12-180(6) and 51 violations of WAC 480-12-190. Penalties were also assessed for violations of safety regulations. As background, WAC 480-12-180(6) adopts United States Department of Transportation motor carrier safety regulations governing qualifications of drivers. Subsections (a) through (g) modify certain specific terms contained in 49 CFR, part 382, part 383, and part 391. WAC 480-12-190 adopts 49 CFR, part 395, which limits driver hours for safety reasons and requires that certain work records be maintained. Exhibit 4 is a Terminal Review prepared by Commission Staff detailing safety violations and recommendations for compliance.

Mr. Levan and Mr. Caldwell testified that it was legally unclear to them whether Starving Students violated regulations that require carriers to maintain driver qualifications records, but they also state that Starving Students presently complies with those regulations and will continue to do so. Mr. Levan stated his belief that Starving Students was exempt because it operated exclusively in intrastate commerce in Washington. Commission Staff disagreed and argued that all carriers are required to observe WAC 480-12-180(6) unless specifically exempted by subsections (a) through (g).

The language in the regulation establishing the exception is stated in the body of section 180(6) preceding subsections (a) through (g). Therefore, carriers operating exclusively in intrastate commerce are excepted from observing the rules and regulations adopted and modified in WAC 480-12-180(6), including subsections (a) through (g). However, Mr. Levan represented that Starving Students is a single legal entity and that it engages in interstate commerce. The applicability of WAC 480-12-180(6) is not determined by the origination or destination points of interstate commerce. If a carrier engages in any interstate commerce it must observe the adopted rules and regulations, including maintaining driver qualification files as required by 49 CFR, part 391.51. By its own admissions, Starving Students is not a carrier operating exclusively in intrastate commerce. Consequently, it committed violations of WAC 480-12-180(6).

WAC 480-12-190 addresses a different duty to maintain records. Federal safety regulations were adopted that establish limitations on the hours that a motor carrier shall permit or require any driver to operate a commercial vehicle. In order to monitor compliance, a separate federal regulation imposes a duty on every motor carrier to require drivers to record duty status for each 24-hour period using prescribed methods and format. WAC 480-12-190 adopts the rules and regulations in

49 CFR §395, but provides an exception if the driver operates exclusively in intrastate commerce and wholly within a radius of one hundred miles. Additionally, the motor carrier who employs the driver must maintain and retain certain other records for a period of one year.

Three adopted restrictions are relevant in this case: § 395.3(a)(1) prohibits driving more than 10 hours following 8 consecutive hours off duty; §395.3(a)(2) prohibits driving for any period after having been *on duty* 15 hours following 8 consecutive hours off duty; and §395.3(b)(2) prohibits driving for any period after having been *on duty* 70 hours in any period of eight consecutive days.

In this case, Starving Students did not maintain proper records which would document driving time and time "on duty." It is likely that Starving Students' drivers are not required to comply with the adopted federal requirements; however, the state regulation that alternative records be maintained was not complied with either. While certain records disclose billable driving time and the "portal-to-portal" work time for employees, they do not comply with the prescribed format, and on duty time cannot be accurately calculated. Exhibit 6, weekly payroll detail reports, were used by Commission Staff to determine that violations occurred.

Mr. Johnson testified that on duty time can differ from portal-to-portal time due to additional factors such as performing services directly for the employer or waiting to be dispatched at the terminal. Mr. Levan testified that Starving Student records may not precisely document on duty time, but that any discrepancy was minimal. Starving Student drivers generally report to work at the appointed time for them to begin designated moves. Mr. Levan and Mr. Markle testified that while it is true that Starving Students did not maintain records that complied with 49 CFR §395.8, drivers employed by Starving Students did not drive in violation of 49 CFR §395.3. Mr. Levan argued that driving was a small portion of any local or short haul move.

Reviewing the evidence, all but one or two of the files reviewed by Mr. Johnson were local moves under thirty-five miles, and the other files were short haul moves wholly within a radius of one hundred miles of the Starving Student terminal. The maximum billed time involved in any of the move files reviewed by Mr. Johnson was 10 hours; therefore, no *known* violation of §395.3(a)(1) or (a)(2) occurred. Furthermore, presuming that the eight longest moves reviewed by Mr. Johnson occurred on consecutive days, the total billed time would have been 66 hours; therefore, no *known* violation of §395.3(b)(2) occurred. While these estimates are not conclusive and on duty time may vary from billed time, it is unlikely that Starving Students actually violated the regulation which §395.8 is intended to monitor. The likelihood that no driving violations occurred is a mitigating factor.

The public interest relating to safe driving practices is high, and the Commission takes compliance with relevant monitoring regulations very seriously. Exhibit 13 documents violations of Part 391 and Part 395 discovered in a Safety Compliance Review performed on November 28, 1995. Mr. Levan states that Mr. Rex Benedict, former manager of the Seattle terminal, did not notify corporate operations of the deficient Compliance Review. Mr. Benedict was subsequently dismissed because of his unsatisfactory job performance. While his dismissal may be based in part on his failure to implement policies and procedures to comply with these regulations, Starving Students cannot avoid its responsibility based upon the improper conduct of its manager. Corporate entities with out-of-state headquarters must take all necessary measures in order to ensure that its remote operations are legally compliant. The repeat violation by Starving Students is an aggravating factor.

Mr. Levan also argued that the nature of the safety violations did not warrant the maximum imposition of the \$100.00 penalty per violation. Penalties for economic and safety violations are authorized by different statutes. Penalty assessments for safety violations are assessed pursuant to RCW 81.04.405 which states that each violation shall incur a penalty of one hundred dollars for each violation. There is no penalty range subject to the Commission's discretion. RCW 81.04.405 provides that each and every violation shall be a separate and distinct offense.

The reorganization of Starving Students managerial ranks, their recent commitment to training and internal audit reviews, and the comprehensive implementation of Commission Staff's corrective recommendations are considered as mitigating factors.

C. Proposals for Mitigation. Both parties submitted proposals for mitigation. Starving Students requests that the Commission mitigate its penalty and assess a zero fine. Alternatively, Starving Students believes that a penalty assessment of \$10.00 per violation is more appropriate and equitable under the circumstances. I reject this proposal. Due to the prior violations by Starving Students, its proposal is inappropriate and does not reflect the several categories of violations which were discovered in the recent investigation.

Commission Staff recommended partial mitigation consisting of 50% suspension, conditioned on the following: balance of penalty assessment due payable within thirty days; 24-month suspension period; compliance with all regulations; periodic Commission Staff audits every six months; attendance at tariff and safety training sessions; and the distribution of a consumer satisfaction survey to each Starving Students customer. If the Commission determines that Starving Students is making inadequate progress towards compliance, suspended fines would become

immediately due and payable and the Commission would initiate a show cause proceeding. I will adopt the Commission Staff proposal, with modifications.

DECISION

Based upon the totality of the violations and the other mitigating factors, I find that a greater suspension of the penalty assessment than Staff proposes to be appropriate. The majority of rate violations were the result of failing to charge overtime on weekend moves. Due to the automated business practices of Starving Students, if it were to commit an undercharge on one weekend move, it would commit an undercharge on every weekend move. Mr. Levan testified that the Starving Students marketing plan is directed at competing for local weekend moves. All accounting details for moves performed by Starving Students on a national basis are centrally managed from its Los Angeles headquarters. Mr. Markle testified that the various states in which Starving Students operates have different regulations.

The fact that Starving Students focused its operations on local weekend moves means that its failure to charge overtime on weekends resulted in a high percentage of violations in its moves. The rate violations were readily apparent in Starving Students documentation of moves performed, and there is no evidence of any attempt to cover up or hide the violations. If the Commission Staff investigation had been expanded to cover a longer time frame it is apparent that Starving Students exposure to penalty assessments would continue to escalate. The fact that Starving Students was ready, willing, and able to modify its accounting programs immediately to fully reflect the applicable Washington tariff suggests that if current management had been aware of the problem sooner, it would have been corrected sooner. The response of management to notification of rate violations and its commitment to cooperate with Commission Staff is persuasive that a substantial suspension of the penalty assessment is justified. If Starving Students is unable to live up to its commitment, then the full penalty assessment will be enforced.

Conditional compliance with *all* regulations is over broad in the context of penalty assessments for violations of these specific regulations. In this case, if the Commission determines that Starving Students commits *any* similar rate or safety record keeping violation within the suspension period, the entire respective suspended penalty assessment will become immediately due and payable and the Commission will initiate a show cause proceeding. This is a zero tolerance policy based upon the extent of mitigation and the existence of prior violations. While Exhibit 2 summarizes a history of Commission contacts with Starving Students and a variety of violations, conditioning suspension on a zero tolerance policy towards all regulations would set Starving Students up for failure. Starving Students should be aware that upcoming investigative audits of its operations will address all aspects of

regulatory compliance and it should expand its internal compliance review process to address these other areas. Starving Students should understand that all future regulatory violations will be subject to substantial penalties and will be taken very seriously by this Commission.

A 24-month suspension period is unnecessarily long in order to ascertain whether Starving Students has remedied the specific violations in the penalty assessment. If Starving Students implements operational procedures that result in no similar violations during a 12-month period, I am confident that these problems will have been corrected.¹

The customer survey proposed by Commission Staff addresses consumer satisfaction issues. The violations which have resulted in penalty assessments are not directly consumer related. The proposed customer satisfaction survey is not sufficiently related to the violations in this case and mandatory distribution is inappropriate at this time. However, Starving Students should consider the benefits of voluntary distribution of a consumer satisfaction survey.

In light of the foregoing analysis, the decision which is incorporated by reference into the conclusions of law, *infra*, is that the penalties assessed should be mitigated conditionally, by 75% partial suspension, as follows:

<u>Violation</u>	<u>Assessed</u>	<u>Suspended</u>	<u>Balance</u>
Rate Violations:			
RCW 81.80.220/WAC 480-12-330	\$5,500	\$4,125	\$1,375
Safety Record Keeping Violations:			
WAC 480-12-180(6)/WAC 480-12-190	\$6,800	\$5,100	\$1,700
Totals	\$12,300	\$9,225	\$3,075

Partial mitigation via suspension of \$4,125 of the \$5,500 penalty assessment for rate violations and \$5,100 of the \$6,800 penalty assessment for safety record keeping violations is conditioned on Starving Students continued cooperation with Commission personnel in taking the steps necessary to fully comply with regulations. In summary, mitigation is also conditioned on the following terms: balance of penalty assessment due payable within fifteen (15) days of Commission approval of this Initial Order; 12-month suspension period; no similar rate or safety

¹ This matter should not be considered closed and the penalties finally mitigated until the Commission Staff reports in this docket the results of audits demonstrating compliance as noted in this Order.

record keeping violation within the suspension period; two Commission Staff audits during the suspension period; and attendance by key personnel at Commission tariff and safety training sessions.

FINDINGS OF FACT

1. On May 1, 1998, on the basis of facts discovered during the course of a ten month investigation by Commission Staff, the Commission issued and served on Starving Students, Inc. (a motor carrier with operations in Seattle and Bellevue, Washington and providing jurisdictional motor carriage in the State of Washington) a Notice of Penalties Incurred and Due for Violations of Laws, Rules, and Regulations.
2. On May 14, 1998, Starving Students petitioned for mitigation of the penalty assessment, and a Brief Adjudicative Proceeding was held before a designated presiding officer of the Commission on August 4, 1998.
3. Starving Students failed to charge overtime rates on weekends resulting in undercharges, provided additional labor at reduced rates or free of charge, and utilized a short haul rate schedule for Washington which does comply with the published tariff weight/mileage rate base.
4. The Starving Students marketing plan is directed at competing for local weekend moves.
5. All accounting details for moves performed by Starving Students on a national basis are centrally managed from its Los Angeles headquarters.
6. Upon learning of the alleged violations, Starving Students immediately corrected its computer system to fully reflect the relevant tariff.
7. Starving Students timely implemented organizational changes in order to develop adequate local operations management and management training.
8. Starving Students was assessed a penalty for similar tariff violations which occurred in 1989.
9. The rate violations were repeated as the result of a systemic error and were inadvertent.
10. Starving Students is a single legal entity and it does not operate exclusively in intrastate commerce.

11. Starving Students failed to maintain driver qualifications records as required by WAC 480-12-180(6).

12. Starving Students failed to require drivers to record duty status for each 24-hour period, using prescribed methods and format, or to maintain other relevant records as required by WAC 480-12-190.

13. It is unlikely that Starving Students' drivers actually committed violations of safety regulations, and it is likely that they are exempt from federal record keeping requirements.

14. Starving Students was notified that similar safety record keeping violations existed in 1995.

15. Starving Students comprehensively implemented Commission Staff's corrective recommendations, and initiated management training and internal audit reviews to prevent violations from reoccurring.

CONCLUSIONS OF LAW

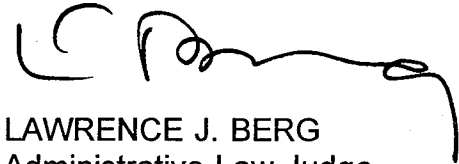
1. The Commission has jurisdiction pursuant to Title 81, RCW.
2. Starving Students failure to charge overtime rates on weekends resulting in undercharges, providing additional labor at reduced rates or free of charge, and utilizing a short haul rate schedule for Washington which does comply with the published tariff weight/mileage rate base violates RCW 81.80.220 and WAC 480-12-330, and supports maximum penalties in the amount of \$5,500.
3. Starving Students failure to maintain driver qualifications records and failure to require drivers to record duty status for each 24-hour period, using prescribed methods and format, or maintaining other relevant records violates WAC 480-12-180(6) and WAC 480-12-190, and supports penalties in the amount of \$6,800.
4. Mitigation by partial, conditional suspension of penalties, consistent with RCW 81.04.405 and RCW 81.80.360 and the Commission's policies, practices and procedures in penalty assessment matters, is warranted under the facts and circumstances of this case and should be ordered as set forth in the Decision section of this Order, *supra*.

ORDER

IT IS ORDERED That:

1. Within fifteen (15) days after the date the Commission serves its Final Order, Starving Students must pay penalties in the amount of \$3,075;
2. Penalties assessed against Starving Students in the additional amount of \$9,225 are suspended, subject to the conditions described in the body of this Initial Order; and
3. The Commission retains jurisdiction over this matter to effect the provisions of this Order.

DATED at Olympia, Washington and effective this 14th day of August 1998.



LAWRENCE J. BERG
Administrative Law Judge

Notice to parties: Administrative reviews of Brief Adjudicative Proceedings are governed by RCW 34.05.488 and 491, and by WAC 480-09-500. Any party may request review of an initial order in a brief adjudication by stating the request to the Commission within 21 days after service of the initial order. A request for review shall contain an explanation of the party's view of the matter, with a statement of reasons why the initial order is incorrect, and a certificate of service showing service on all parties. Responses may be filed within 10 days after service of a request for review.