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Decision 82 05 036 MAY - 4 1982

ORIGINAL

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 PETE J. KOOYMAN, an individual, doing business as PETE KOOYMAN TRUCKING; RALSTON PURINA CO., a Missouri corporation; DOOLAN INDUSTRIES, INC., a Pennsylvania corporation; and CONSOLIDATED CONTAINER CORP., a California corporation.	)	OII 44 (Filed May 8, 1979)

Raymond A. Greene, Jr., Attorney at Law, for Pete J. Kooyman; and Richard B. Lombardi, Attorney at Law, for Consolidated Container Corporation; respondents.
Philip Scott Weismehl, Attorney at Law, and Edwin Hjelt, for the Commission staff.

SUMMARY OF DECISION

Pete J. Kooyman, dba Pete Kooyman Trucking, a California highway carrier operating under authority of a radial carrier permit, transported property at times in 1977 and 1978 for Ralston Purina Company, Doolan Industries, Inc., and Consolidated Container Corporation. In some instances through judgmental errors and in others through knowing participation in falsification of documentation and diversion of shipments, property was transported for less than applicable Minimum Rate Tariff 2 rates and charges.

Ralston Purina - undercharged $25,679.15. Carrier relied upon shipper to rate the traffic and shipper in some instances made judgmental errors. The occurrence of a natural disaster complicated the computation of substantial portions of other transportation. Parties stipulated to undercharges.

Doolan Industries - undercharged $982.15. Carrier offered no defense or rebuttal and respondent Doolan did not appear or answer. Staff computations adopted.

Consolidated Container - undercharged $13,879.52. Consignee by subterfuge set up a false on-rail facade at one off-rail location; then induced carrier to participate in scheme to falsify documentation to show consignment to first location while actually diverting numerous shipments to another location off-rail, while applying alternate rail rates to all. Respondents joined in obfuscatory tactics during investigation and at hearing to avoid consequences.

Penalties - In all instances carrier is directed to collect undercharges and is fined the amount of the undercharges under § 3800 of the Public Utilities (PU) Code. Carrier, considering the extent and persistence of his participation in the falsification scheme, is further penalized by having all his operating authorities suspended for 20 days under PU Code § 3774 and is directed not to serve Consolidated for an additional period of three months and to cease and desist from future violations.

Much of the decision is concerned with disposition of the many motions and objections raised by respondents Kooyman and Consolidated during the hearing process.

I N D E X

O P I N I O N

Statement of Facts

Pete J. Kooyman, an individual doing business as Pete Kooyman Trucking, was engaged in the business of transporting property for compensation over the public highways of this State under a certificate of public convenience and necessity as a highway common carrier issued January 28, 1975 and modified April 22, 1975, a radial highway common carrier permit issued February 1, 1960, and a dump truck permit issued May 27, 1970.

In October 1979 Kooyman maintained an office and terminal in Stockton as well as other terminals at Pittsburg, Fontana, and Wilmington. Employing 17 office personnel and 7 drivers as well as 4 shop mechanics and 3 salesmen, he operated 7 tractors, 51 40-foot flatbed trailers, and 8 40- to 48-foot vans. A very substantial proportion of his hauling was handled through subhaulers. Kooyman subscribed to applicable tariffs, distance tables, and supplements (as set forth in Exhibit 1 to this proceeding). For the year ending the first quarter of 1978, Kooyman's gross revenues were $3,022,400.

The Compliance and Enforcement Branch of the Transportation Division of the Commission exists to help ensure that for-hire carriers (1) possess the requisite authority for the services they are performing and (2) conduct their operations as prescribed by the Public Utilities (PU) Code and Commission rules. To secure compliance, its field personnel from time to time survey carriers' records and operations, spot-checking for violations. Most violations can be informally resolved, but carriers who commit flagrant violations, or those with a history of repeated violations, may be made the subject of orders instituting investigation (OII).

In the instant circumstance, staff asserts that a routine initial survey performed in January 1978 on Kooyman's records revealed what the staff investigator, Harald Paasche, associate-in-charge of the Stockton office, concluded were substantial discrepancies in the rates and charges assessed various of the carrier's larger accounts, including Ralston Purina Company (Ralston), Doolan Industries, Inc. (Doolan), and Consolidated Container Corporation (Consolidated).[1/]

Accordingly the informal survey ripened into a formal order on the Commission's own motion instituting investigation into Kooyman's operations, rates, charges, and practices as they involved Ralston, Doolan, and Consolidated - the instant OII. The scope was to include transportation services provided by Kooyman under his radial highway common carrier permit for (1) Ralston during the period October 11, 1977 through April 5, 1978, (2) Doolan during the period February 28, 1978 through March 24, 1978, and (3) Consolidated during the period October 5, 1977 through March 15, 1978. (The radial highway common carrier at the time relevant here was a statutory creature entitled to all the rights and privileges of a certificated highway common carrier, provided it did not operate between fixed points. Unlike

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1/ In the instance of Consolidated it was asserted by staff that a spur-track check routinely ordered by the investigator showed that Consolidated's Van Nuys Arminta Street facility was not on-rail although an on-rail assumption underlaid the actual rates applied; that there appeared to be an unusually large number of signatory individuals on the receiving end; that in some instances other delivery addresses appeared to have been added to the shipping papers; and finally, that an interview with a subhauler indicated that in some instances delivery might have been made to destinations other than those of record.

the highway common carrier, however, it was not required to publish a tariff but only to observe applicable minimum rate tariffs established by the Commission. Mostly it transported truckload shipments on an "on-call" basis, providing a service tailored to the business needs of truckload shippers. Radial highway common carrier permits were phased out in 1979 (PU Code § 1063.5).

The formal investigation was to determine whether, as to any of the respondents Ralston, Doolan, or Consolidated, Kooyman had charged less than the minimum rates set forth in Minimum Rate Tariff 2 (MRT 2) and its supplements, thereby violating PU Code §§ 3664 and 3737, and whether Ralston, Doolan, and Consolidated, or any of them, paid less than the applicable rates and charges for the transportation provided, and now owe Kooyman anything. A further purpose was to determine whether, as to respondent Consolidated, Kooyman had violated PU Code §§ 3667 and 3668 through use of the device of false documentation and billing.

In the event violations as charged were found to have occurred, a further purpose of the investigation was to determine:

1. Whether Kooyman should be ordered to collect from the shipper or shippers involved the difference between the charges actually collected and the charges properly due under the tariff;
2. Whether Kooyman should be fined an amount equal to the amount of the undercharges under PU Code §§ 3800;
3. Whether Kooyman should be ordered to cease and desist from any further violations;
4. Whether, as a punitive measure for the transgressions, the operating authority of Kooyman should be canceled, revoked, or suspended, or in the alternative, a fine should be levied on Kooyman; and

5. Whether Consolidated violated PU Code § 3669 in obtaining transportation from Kooyman at rates and charges less than the applicable minimum rates and charges through the device of false documentation and billing.

A duly noticed public hearing was held before Administrative Law Judge (ALJ) John B. Weiss in San Francisco in 1979 on October 30 and 31, and November 1, and in 1980 on January 15, 16, and 17, and on March 11 and 12. Staff, Kooyman, and Consolidated appeared and fully participated. Ralston appeared by stipulation, and Doolan did not appear.[2/] The matter was submitted May 12, 1980.

The Ralston Stipulation: As a result of ongoing consultations between Kooyman, Ralston, and the staff, a stipulation was reached pertaining to those issues involving the transportation Kooyman furnished Ralston during the period of the investigation, and on the second day of hearing this stipulation was submitted to the ALJ (and entered into the record as Exhibit 17) as the recommended basis for a decision on those issues. In it the parties stipulated that transportation had been provided at rates less than the applicable minimum rates and charges in violation of PU Code §§ 3664 and 3737, resulting in undercharges of $25,689.15. It was stipulated further that a fine in the amount of $25,689.15 should be paid by Kooyman, but that Kooyman should not be directed to collect

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2/ Notice was mailed to Doolan's address of record. However, Doolan, a Pennsylvania corporation, doing intrastate business in California, did not receive the notice, it being returned marked "not deliverable as addressed - unable to forward". Service was thereupon made, in accordance with the provisions of Section 2111 of the Corporations Code, upon the California Secretary of State.

undercharges from Ralston for any transportation prior to the date of the stipulation other than that set forth in the stipulation. Finally, the parties stipulated that no false documentation or billing had been involved in any of the transportation at issue. (On November 27, 1979 Ralston paid the $25,679.15 fine to the Commission.)

At the hearing, in addition to participation in introduction of the Ralston stipulation, staff, through its witness Paasche, introduced into evidence six exhibits related to the Ralston shipments. Through them, staff asserted, and the exhibits tended to show, that during the period involved in the Ralston portion of the investigation, Kooyman, in apparent violation of PU Code §§ 3664 and 3737, had undercharged Ralston a total of $87,872.04 for transportation. (The difference between the amount set forth in the staff exhibits and the amount in the stipulation should be noted. Unbeknownst to staff at the time its exhibits were prepared was the fact that a natural disaster which occurred just before the transportation had been performed had resulted in certain rail re-routings which changed the basis for the rates and charges to be applied, substantially reducing the magnitude of the undercharges ascribable to a portion of the Ralston shipments.) (See Discussion, p. 13.)

The Doolan Transportation: During the hearing, again through witness Paasche, staff introduced into evidence without objection two exhibits by which staff asserted, and the exhibits tended to show, that during the period set forth in the investigation order, Kooyman, in violation of PU Code §§ 3664 and 3737, undercharged Doolan a total of $982.15 for transportation. As stated earlier, Doolan made no appearance; and Kooyman, although afforded opportunity to do so as is evident by the duration of the hearing, produced no witness or evidence to contest the staff evidence relative to the Doolan transportation. (See Discussion, p. 18.)

The Consolidated Transportation: To lay a documentary foundation for its charges against Kooyman and Consolidated, staff at the beginning of the hearing introduced two exhibits related to the Consolidated shipments. Through them, staff asserted, and the exhibits tended to show, that during the period involved in the Consolidated portion of the investigation, Kooyman, in apparent violation of PU Code §§ 3664 and 3737, had undercharged Consolidated a total of $13,879.52 for transportation.

One of these two exhibits, Exhibit 6, is a bound volume containing 26 parts. Each part pertained to a suspect Kooyman freight bill/invoice and included the supporting bill of lading as well as the load tallies and delivery tags covering each delivery. All the documents purported to show delivery to Consolidated's Van Nuys Arminta Street facility, and each invoice showed application of a 60 cents per 100 pound rate, allegedly a negotiated rate slightly in excess of what was then the applicable alternative rail rate, if one was indeed applicable to that facility.

However, apart from the strictly documentary matter, each part to Exhibit 6 also contained a narrative. Some of these narratives referred to alleged interviews with the respective subhaulers; interviews in which Paasche assertedly had been informed that numerous shipments were in fact delivered to a location other than that indicated by the documents.

Kooyman-Consolidated Hearsay Objection: Both defendants vigorously objected to admission of these purely hearsay narratives, pointing out that potentially substantial punitive sanctions were involved in the proceeding and noting that in an OII proceeding staff has the burden of proving defendants guilty. In consideration of the quasi-criminal nature of an enforcement proceeding, involving the possibility of severe punitive fines and/or cancellation,

revocation, or suspension of an operating permit for Kooyman, as well as a potential punitive fine for Consolidated, the ALJ ruled that the narrative portion accompanying each individual part to Exhibit 6 would be admissible only to the extent the allegations made were subsequently corroborated by direct testimony of percipient witnesses. Subsequently, staff introduced testimony from four subpenaed subhaulers (Brock, Keathley, Leslie, and Marchio) and two subpenaed independent contractors (the Raders), affiliated with Consolidated, for partially corroborative purposes. (See Discussion, p. 19.)

Consolidated's Jurisdictional Objection: At the outset of the hearing Consolidated also posed an objection to the Commission's assumption of jurisdiction of the issue of Consolidated's on- or off-rail status, basing its objection on constitutional grounds to the point that assertedly the entire rail rate structure unfairly discriminates against shippers who may be off rail. Both staff and Consolidated requested opportunity to brief the subject. To avoid delaying the hearing, the ALJ took the objection under submission, to be ruled upon as part of the ultimate decision.

However, on the last day of hearing, following off and on the record comment by the parties of the limitations imposed upon the Commission by Section 3.5 of Article III of the California Constitution,[3/] Consolidated withdrew its initial objection only to replace it with an amended objection that the Commission should not assume jurisdiction in this matter at all. If we did, it should be to dismiss the charges against Consolidated because, according to Consolidated, based upon the evidence adduced

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3/ Section 3.5 of Article III of the California Constitution, adopted on June 6, 1978, provides that an administrative agency such as this Commission has no power to declare a statute unenforceable or unconstitutional.

during the proceeding, the rail rate structure, including the alternative rail rate structure, has been unconstitutionally applied to Consolidated as a shipper with resulting violation of procedural and substantive due process under the Fifth and Fourteenth Amendments of the United States Constitution, and/or parallel provisions of the California Constitution, namely, Article 1, Section 13.

Consolidated alleges that the thrust and content of the evidence goes to show that an unfair burden was imposed upon Consolidated by staff's conduct in the way staff regulated, investigated, and applied its interpretation of the rail rate structure to Consolidated in the period from 1972 to the hearing, all resulting in an unfair impediment to Consolidated's rights to travel, both intrastate and interstate, thereby imposing an impermissible burden upon commerce within California and among the several states.[4/]

The specific testimony and evidence relied upon by Consolidated to provide a foundation for its jurisdictional objection was entered by witnesses James Morris, a staff transportation

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4/ As is evident from the length of this proceeding, one almost entirely devoted to the charges involving Consolidated, it was a bitterly contested matter, this despite the relatively small amount of alleged Consolidated undercharges - $13,879.52. Both during the hearing and on brief it was asserted that there is more involved than meets the eye; that various threads of evidence coalesce and serve to create a persistent subliminal inference that some form of personal vendetta permeates this investigation; that it was instituted somehow as a consequence of a Consolidated switch back to Kooyman from Conti Trucking. There was testimony that this switch was made in the face of threats of loss of on-rail status by a gentleman who erstwhile was traffic manager for U.S. Steel Company (consignor of this shipment), but more recently appears cast as a sales agent soliciting traffic for Conti Trucking. The inference was that as long as Conti Trucking handled the traffic it flowed on an on-rail basis without interference from staff. Woven into this fabric is testimony that a member of the Stockton office staff appeared at an industry meeting in the guise of an associate of Conti Trucking.

analyst in the Commission's Panorama City office, Harvey Rood, a retired Southern Pacific Transportation Company (SP) traffic representative, Albert Melideo, president of both Consolidated and a sister firm, Fabricators, Kooyman, and Paasche (recalled by Consolidated as an adverse witness under Evidence Code § 776.) Again, the ALJ took the objection to jurisdiction under submission to be ruled upon as part of the ultimate decision, the parties being directed to include the issue in their respective post-hearing briefs. (See Discussion, p. 21.)

Consolidated's "Fruit of the Poisoned Tree" Objection: Early in the hearing while staff was providing a foundation for its documentary exhibits pertaining to Consolidated, having called Paasche as a witness to testify concerning his actions and observations while making inspections at the Van Nuys' Arminta Street Consolidated facility and the Sun Valley Bradley Street Fabricators facility (all relating to the on- or off-rail status of Consolidated), Consolidated entered a motion to suppress Paasche's testimony on the basis that his observations were the fruit of an illegal search in that he had entered upon the properties of Consolidated and Fabricators without a search warrant or an invitation. This objection subsequently was broadened to include Paasche's testimony with respect to the Morris observations and spur track report of 1978.

In denying the motion to suppress, the ALJ, while noting recent extensions in California of the suppression doctrine to proceedings involving administrative agencies, concluded that it would be inappropriate to apply it in the instant proceeding in that a trespass had not been proven and that there could have been no subjective expectation of privacy in the area at issue because that area was readily and clearly visible from a road open to the public use. (The full text of the ALJ's ruling appears in Appendix A of this decision.)

The Kooyman-Consolidated Motion to Dismiss Due to Alleged Prejudicial Misconduct of Staff Counsel: On November 1, 1979, during the course of hearing and as part of its case in chief, Consolidated called Rood, a retired SP traffic representative as a key witness. Rood provided extensive testimony intended to substantiate Consolidated's claim that it was on rail. At the end of the sixth day of hearing on January 17, 1980, Consolidated's case in chief and the cross-examination on it were completed, and the hearing was recessed until March 11, 1980 at which time respondent Kooyman was scheduled to present his defense.

At approximately 5 p.m., Monday, March 10, 1980, staff counsel telephoned witness Rood at his Los Angeles home to ask whether Rood had thought over his testimony of the previous November and wanted to change or add to it. Counsel told Rood that counsel had been in touch with the vice president purchasing agent of the spur owner, Dean Votruba, and that contrary to Rood's previous testimony, Votruba had denied ever giving Rood's permission to use the spur track for Consolidated. When Rood stated he stood on his testimony, counsel then asked if Rood were going to appear in court again. He was told that Rood did not plan on it.[5/] Immediately after counsel's call, Rood telephoned counsel for Consolidated to convey his displeasure over the matter.

The next morning, March 11, 1980, when hearing resumed, both Kooyman and Consolidated moved to dismiss the investigation, alleging prejudicial misconduct of staff counsel. In addition,

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5/ Subsequently Rood testified that following his November 1979 testimony he had been on a standby basis for both Consolidated and Kooyman. Rood was later called on March 12, 1980 by Kooyman when his turn came to present his defense. There Rood testified at length concerning the function of rail spikes in general, and in particular the use of a rail spike in the spur at issue in this proceeding.

Consolidated asserted, as further grounds for dismissal, that: (1) Staff had violated the discovery provisions of the Code of Civil Procedure as they apply to depositions (likening the telephone inquiry to an ex parte deposition of a witness regarding testimony that he had rendered which might provide material to prepare a rebuttal case); (2) Staff had tampered with a witness trying to get him to alter or change testimony previously given; and (3) Staff had intimidated the witness.

The ALJ, noting that a motion to dismiss, affecting as it does the final disposition of a proceeding, is a motion under these circumstances reserved to the Commission, took the motion under submission to be treated in the decision on the case. The parties were provided and took the opportunity to brief the issue. (See Discussion, p. 33.)

Consolidated-Fabricators-Sun Valley Stipulation: On the first day of hearing, October 30, 1979, staff, Kooyman, and Consolidated entered a stipulation (Exhibit 19) wherein, inter alia, the parties stipulated that the Consolidated-Fabricators premises located on Bradley Street in Sun Valley were off-rail for the purposes of the minimum rate tariffs.

At different times as the hearing progressed, in addition to those previously named, staff and Kooyman called other witnesses, and all three parties introduced numerous exhibits pertaining to the various issues. Staff also called Elwin L. Newkirk, president of Chandler Lumber Co. (Chandler), Woodrow J. Honold, assistant manager of the SP contract department, and Morris, a staff transportation analyst. Kooyman also called James A. Kooyman (J. Kooyman), traffic manager, and Robert L. McCulloch, terminal manager and dispatcher for the respondent firm, and Ronald D. Davis, consultant on transportation matters. Following the hearing, the OII was submitted on May 12, 1980, after receipt of post-hearing briefs from staff, Kooyman, and Consolidated.

Discussion

The Ralston Transportation: The six exhibits introduced by staff relating to this transportation included four bound volumes and two folders. Three of the bound volumes and one folder pertained to bundles of tin plate and bins of frozen tuna transported by Kooyman for the Van Camp Sea Food Company (Van Camp), a division of Ralston. The remaining bound volume and folder pertained to cases of canned goods transported for Ralston by Kooyman.

The bound volumes, apart from attachments and general notes, were divided into parts, 131 parts covering Van Camp shipments and 14 parts covering Ralston shipments. Each part pertains to a suspect Kooyman freight bill/invoice, and includes supporting Van Camp or Ralston bills of lading as well as delivery tags.

The folders, apart from introductory and reference material, included separate page parts corresponding to the parts in the bound volumes. Each separate page part presented a comparison of the rates and charges (1) as calculated by and actually collected for that shipment by Kooyman, contrasted with (2) the legal minimum rate charges and surcharges which should have been collected for the transportation, as calculated by the staff. The staff calculations purported to show undercharges in the total amount of $83,308.43 (tin plate $78,268.52 and frozen fish $5,539.91) for the Van Camp shipments, and $4,063.61 for the Ralston shipments. In all, the undercharges originally asserted by the staff relative to Ralston totaled $87,872.04.

The submission of the stipulation adopted by our staff, Kooyman, and Ralston (Exhibit 17) makes it unnecessary that we weigh and analyze all the evidence presented. The parties accept that the frozen fish and canned goods were shipped at less than applicable

minimum rates and charges in violation of PU Code §§ 3664 and 3737.[6] A different situation pertains to the tin plate shipments. The stipulation amount is essentially a compromise. It was learned prior to the hearing that the rail traffic upon which the alternate rates were assessed, as the consequence of a tropical storm disaster, had actually been rerouted through California during the period in issue.[7] Rather than take the time and expend the considerable effort which would be required to obtain a conclusive determination, the parties merely stipulated a compromise rate, and accepted that this transportation too had been performed at less than applicable minimum rates and charges in violation of PU Code §§ 3664 and 3737. The parties went on to further stipulate that no false documentation or billing had

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6/ The frozen fish shipments had been rated "exempt" as fish coming in from overseas. However, the fish in issue had been in storage after receipt from overseas and this transportation was actually a stock transfer between canneries, and therefore was ratable with a rail rate appropriate for the respective minimum weights under Item 20070, Pacific Southcoast Freight Bureau Freight Tariff 300-B (California commodities). The canned goods shipment violations appeared to have been caused by the shipper and carrier applying an alternative application rail rate with split deliveries when the rail tariffs provided no route. With minor exceptions, staff applied rail rates with appropriate minimum weights from Item 10428 or Item 19740, Pacific Southcoast Freight Bureau Freight Tariff 300-B, and appropriate stop in transit charges, unloading charges, and in nine instances, a rate for constructive miles from MRT 2.

7/ The tin plate bundles had been assessed what appeared to be a rail rate not applicable on intrastate traffic, one which apparently was derived from normal routing through Mexico on the San Diego and Arizona Eastern Railway between El Centro and San Diego (and therefore interstate between these points and not a common carrier rate as defined in Item 10, MRT 2, and not to be used in the alternative application of rail rates for the traffic at issue (see Pellco Trucking (1979) 84 CPUC 28).

been involved, and that Kooyman should pay a fine of $25,689.15,[8] but should not be directed to collect undercharges from Ralston for any transportation which occurred prior to the date of the stipulation other than that described above.

In the instant situation the stipulated undercharges ascribable to the canned goods and frozen fish are supported by substantial evidence on the record. With respect to the tin plate, the computation evidence is less thorough. However, considering the emergency nature of the situation at the time, and the single period circumstance applicable, we agree that it is just not in the public interest to expend the time and expense necessary to obtain a conclusive determination, and we will adopt the stipulated amount. Under the provisions of PU Code § 3800, the Commission will order imposition of a $25,679.15 fine upon Kooyman and will require Kooyman to collect these undercharges.[9]

The stipulation did not mention or provide for a punitive fine or alternative penalty as could be imposed under PU Code § 3774. Section 3774 provides that for stated offenses,

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8/ The addition in the stipulation is in error. The three components add to $25,679.15, not $25,689.15.

9/ The shipments which are the subject of this proceeding were transported during periods in 1977 and 1978 for the respective shippers by Kooyman under the authority of his radial highway common carrier permit. Concern was expressed during the hearing over possible statute of limitation considerations which might be applicable should Ralston, Doolan, and Consolidated decline voluntarily to pay undercharges if such were found. We would remind respondents and staff that the statute of limitations applicable to the efforts of permitted carriers to collect undercharges is that set forth in PU Code § 3671, and that the time from which the cause of action accrues under § 3671 is the effective date of the Commission decision finding undercharges, and not the date of the delivery or tender of delivery (Investigation of Mark A. Woods, Decision (D.) 92255 dated September 16, 1980 in Case (C.) 10030; Investigation of Newman Trucking Co., D.93647 dated October 20, 1980 in OII 47). On November 27, 1979 Ralston paid its $25,679.15 undercharge fine in full.

including (as relevent here) violations of any rule, regulation, or requirement of the Commission, or provisions of the Code, the Commission may cancel, revoke, or suspend the operating permit of an offending carrier, or in the alternative impose a fine not to exceed $5,000. This punitive section is intended to punish for past wrongdoing and to deter similar wrongdoing in the future. In public utility regulatory matters, protection of the public interest is a fundamental obligation and duty of this Commission. Here, the stipulation by its silence on the issue provides for no § 3774 punishment to be imposed. We recognize that at law stipulations are agreements between the parties signing them, and, as long as they are within the authority of the attorneys, are binding upon the signatory parties, and unless contrary to law or policy, are also binding upon the forum (Glade v Superior Court (1978) 76 CA 3d 738, 744). But in public utility enforcement matters, the setting of or amount of a fine, or the decision whether to impose either a punitive fine or an alternate measure as punishment, is a responsibility reserved to the Commission. While it is entirely proper to accept stipulations of counsel which appear to have been made advisedly and after due consideration of the facts, the forum cannot surrender its duty to see that the judgment to be entered is a just one; nor is the forum to act as a mere puppet in the matter (City of Los Angeles v Harper (1935) 8 CA 2d 552, 555). In summary, the parties in an enforcement proceeding cannot, by means of a stipulation, oust the Commission of the jurisdiction given exclusively to it by the Code. Nor can the Commission ignore the issue.

While intent is not an element in determining whether noncompliance with tariff provisions has resulted in a Code violation, in measuring the penalty to be imposed where there has been a violation, the Commission does consider the question of

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willfulness with respect to the stringency of the penalty to be assessed (Progressive Transportation Co. (1961) 58 CPUC 462).

In the instant proceeding, with reference to the Ralston shipments, the parties stipulated that no false documentation or billing had been involved. The undercharges arose out of application of wrong rates and charges. But as we examine the evidence to determine whether there has been culpable conduct, we observe that permeating the record there is the strong inference that interpretation of the tariff to determine what rates and charges should have been applied appears to have been largely left up to Ralston's traffic personnel. Ralston's Thompson and Mueller appear to have made the decisions, with Kooyman being content to abide by their interpretations. The errors appear to have been judgmental, but it is obvious that the carrier did not do his job. The carrier, not the shipper, has the prime duty of ascertaining the applicable rate to be charged, and it cannot be relieved of this burden by relying upon information supplied by the shipper (Dee Smith Trucking Co. (1966) 66 CPUC 343). Ignorance cannot continue to excuse the carrier. We take official notice of the fact that in C.9422, a 1973 matter, Kooyman in his defense pleaded reliance upon another shipper as the cause for the resulting undercharges, and in mitigation stated that he had acquired the services of an experienced rate clerk and had also retained the services of a traffic consultant to audit his bills. Here, as there, we found no intent to evade the tariff provisions, but we do serve notice that while in this instance we will assess no § 3774 punitive penalty for the Ralston shipments, in the future we will not accept the excuse of reliance upon the shipper for rates and charges determinations.

The Doolan Transportation: The two exhibits introduced by staff relating to this transportation were a bound volume and a folder. The bound volume, apart from general notes, was divided into three parts, each pertaining to a suspect Kooyman freight bill/invoice supported by Kaiser Steel or U.S. Steel load tallies and Doolan bills of lading. The folder, apart from introductory and reference material, included separate page parts corresponding to the parts in the bound volume. Each separate page part presents a comparison of the rates and charges (1) as calculated by and actually collected for that shipment by Kooyman, contrasted with (2) the legal minimum rate charges and surcharges which should have been collected for the transportation, as calculated by staff. The staff calculations purported to show undercharges in the total amount of $982.15 for these shipments of bundles of plate or sheet steel.

The staff evidence of these undercharges not having been addressed or rebutted by Kooyman at the hearing, and no appearance or answer having been entered by Doolan, we conclude that in fact the undercharges were incurred. Accordingly, under PU Code § 3800, the Commission will order imposition of a $982.15 fine upon Kooyman, and also order Kooyman to collect from respondent Doolan the $982.15 difference between the charges collected and the charges due under the respective tariff provisions set forth in the staff evidence.[10/]

Turning next to the question whether, under provisions of PU Code § 3774, the Commission should also either cancel, revoke, or suspend Kooyman's permit for the violations, or in the alternative impose a punitive fine, we note the absence from the record pertaining to the Doolan transportation of any evidence which would materially assist us in determining whether there had been willful misconduct

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10/ See footnote 9, supra.

involved. Available only is information identifying and describing three shipments involving undercharges, but nothing more. Absent some evidence which would support a reasonable finding of willful misconduct related to these shipments, we will not impose a punitive penalty.

The Consolidated Transportation: As noted earlier, during the course of the hearing our ALJ, in response to the Kooyman-Consolidated joint objection on grounds of "Inadmissible Hearsay" to the admission into evidence of the narrative portions to the individual parts of Exhibit 6, ruled that these narratives would be admissible only to the extent that the allegations which were purely hearsay were subsequently corroborated by direct testimony of percipient witnesses. Given the quasi-criminal nature of this enforcement proceeding, involving as it does the possibility of severe punitive fines and/or cancellation, revocation, or suspension of Kooyman's operating authority, and the then present possibility of misdemeanor findings with attendant potential fines and/or imprisonment for Consolidated or its president, or other penalties, we adopt the ruling of the ALJ as our own.

Continuing, in response to Consolidated's "Fruit of the Poisoned Tree" objection to admission of Paasche's testimony (and by inference that of Morris), and its accompanying motion to suppress, the ALJ during the course of the hearing denied the objection and refused the motion to suppress (see Appendix A to this decision for the text of this ruling). The motion was based on the testimony of Paasche, Morris, and Melideo relevant to the field site visits.

Paasche, relevant to this objection, testified to ordering a spur track report from Morris in the Panorama City office to check the on-rail status asserted by Consolidated and that later he had followed this up in April with his own site visit. He described how in April while en route to the Van Camp facility in San Diego,

and after seeing Morris' report, he had stopped off in Van Nuys and had driven around the Consolidated Arminta Street facility to the rear on Cabrito Street, a public road paralleled by railroad tracks and a drainage canal, and from outside the rear gates of the various properties opening to Cabrito Street, he had observed the physical layout of the Chandler spur. Paasche also described his "somewhat antagonistic confrontation" in June 1978 with Melideo when he visited Consolidated again. On this latter visit Paasche believed he had just talked to the front desk receptionist, giving her his PUC business card. On that occasion Melideo told him that a PUC man had been on Consolidated property without Melideo's permission and that someone was out to get him.

Morris testified that after receiving the 1978 spur track survey request from Paasche, he made a routine site survey visit to the Arminta Street facility in Van Nuys before preparing the report he sent to Paasche. In preparing his report he had recourse to and had used a map and decision excerpt taken from his local spur checkbook. Except for the addition of two street names to the earlier map, the map he sent with his new report was the same as the earlier 1972 map found in the spur checkbook. Morris told of gaining access to the property through a receptionist, being taken through to the rear and shown a large chain link fence in the rear yard identified for him as being the property line. He testified to having reviewed the spur and switch, to how he ascertained who the spur track owners were, and to his procedure in preparing the report then sent on to Paasche. He further described how he was subsequently asked to do a report on the Sun Valley Bradley Avenue facility and told of his contact there with employee Ricardo Vasquez, understood to be a foreman, who showed him the fenced-in property line of that facility.

Melideo, relevant to this objection and motion to suppress, testified that his employees had told him that a PUC person had been upon both his Arminta and Bradley properties without his permission, and that therefore he was not receptive when Paasche arrived shortly after, being resentful (in view of Patton's earlier threats while with Conti Trucking) that there were apparently investigations going on about him and that he had not been notified. He testified that on both locations he had numerous signs in both English and Spanish posted against trespassing, that no one was delegated authority to give permission to enter when he was unavailable, and that his employees would not even consider doing it without his permission. Finally, he testified that Ricardo Vasquez, apart from technical matters, has "some difficulty in understanding English."

We have reviewed the ALJ's ruling and the testimony regarding this objection and motion to suppress. We conclude that the ALJ was correct in his result, namely, that no evidence need be suppressed. As the ALJ discusses, the evidence requested to be suppressed was obtained either from the Commission employees making observations from public streets or on the property of the Southern Pacific Transportation Company, where they had a right to be, or pursuant to validly obtained consent from Consolidated employees to enter Consolidated's properties accompanied by Consolidated employees. No convincing demonstration of trespass or violation of a reasonable expectation of privacy has been made.

The Commission adopts the ALJ ruling as its own to the extent the ALJ discusses the facts involved and determines that, by reason of plain view and consent, application of the exclusionary rule is unnecessary. Other than as to these matters there is no need to adopt the ALJ's ruling and we do not do so.

Before we can proceed to the substantive issues involved in the investigation involving the Consolidated transportation, we must also resolve the remaining objections and motions to dismiss which were entered by the attorneys for Kooyman and/or Consolidated. These

objections and motions, involving as they do, proposed final dispositions of the OII, were properly taken under submission and reserved for our disposition by the ALJ. Our disposition of each of these follows:

Consolidated's Jurisdictional Objection: We are asked either not to assert jurisdiction or to dismiss the charges against Consolidated because, it is asserted, the evidence introduced shows that the rail rate structure, including the alternative rail rate

structure, has been unconstitutionally applied to Consolidated in this proceeding as a shipper; that Consolidated is here faced with charges because of a report that Paasche kept in his desk for eight years, thereby denying Consolidated its constitutionally guaranteed procedural opportunity to have been advised or confronted during an investigatory process which really commenced in 1972.

Consolidated's objection apparently stems from its view that the entire OII as it pertains to Consolidated (really a de minimis shipper account when considered in comparison to Kooyman's overall volume) was somehow grounded in the malevolent conduct of certain members of the staff of the Commission's Stockton office.[11/] Consolidated considers that Paasche's conclusion that the Consolidated Van Nuys Arminta Street facility is off-rail - the foundation upon which the undercharge allegations must stand or fall - is derived from a contrived 1978 update of a 1972 spur track report in another investigation which had found Consolidated's facility to be off-rail; but that this 1972 report had been strangely but conveniently retained in Paasche's file for years, only to be suddenly and artfully updated for use in a contrived spot-check of this minuscule portion of Kooyman's total operations after Consolidated switched to Kooyman, away from Conti Trucking, a common carrier with a good friend on the Stockton office staff. The investigation, it is asserted, is therefore actually based upon this carefully nurtured and harbored 1972 report, the content of which Paasche denied any responsibility earlier to communicate to Consolidated. In effect, therefore, staff allegedly is using a nontestifying accuser in bringing the OII charges against Consolidated, denying Consolidated its procedural due process right to be confronted with an accusatory piece of evidence at the time the evidence became available, and creating an entrapment situation.

11/ See footnote 4, supra.

Germane to this objection, witnesses testified as follows:

Morris, as stated earlier, testified pertaining to the routine spur track report he had prepared for Paasche, describing his site visits and the updating of an earlier 1972 spur track report on Consolidated to arrive at the same conclusion as in 1972, namely, that Consolidated's Arminta Street facility was off-rail. Morris testified that he had notified no one at Consolidated of his conclusion that the Arminta Street facility was off-rail.

Paasche, relevant to the grounds of the objection, testified that after a routine file check of Stockton area carriers based on time since last checking and substantial volume, Kooyman had been selected for this survey. He testified that after sampling from the larger accounts, abstracts were taken and rated if truck rates were involved, or sent on to rate analysis if rail rates were involved. When discrepancies were found, subhaulers were interviewed. Paasche asked Morris for a spur track report to check the asserted on-rail status, and followed this up with a personal investigation of the site as well as interviews with the spur owner of one spur and SP management. He found that the spur track was "spiked" at the switch. He testified that he was told by SP that since there was no third-party agreement,[12/] the railroad would not spot cars there for Consolidated.

12/ A third-party agreement (officially termed "Agreement for Use of Industrial Track by Third Party"), according to Honold, assistant manager of SP's contract department who testified for staff, essentially exists to protect the railroad from liability. According to Honold, it is and was SP's policy to always require a third-party agreement before any third-party is authorized to use a spur track connected to the SP system, but owned and operated by another party. Honold testified that it is contrary to SP's policy for any informal "private" arrangements to be made, although he supposed they did occur.

He testified he had been told by Chandler's president that Chandler had no agreement to let Consolidated use its spur. From this he concluded that Consolidated was off-rail. He did not check with McDonald Brothers, the co-owner of the spur.

With regard to the 1972 spur track report, Paasche testified that it was but one of about 50 ordered in C.9422, an earlier enforcement matter involving Kooyman undercharges.[13/] He stated that after writing up his 1972 formal report in that matter, instead of returning the spur report to the Stockton office spur checkbook, he had apparently left it among his notes in his files and that it had remained there from 1972 through the start of the instant OII until midway through the hearing in this matter when he came across it again while making a general file search for anything pertaining to carriers Kooyman, Teresi Trucking (Teresi), and Conti Trucking, as ordered pursuant to a broad discovery request contained in a subpena duces tecum served on the staff by Consolidated. Paasche readily conceded that he had not advised Consolidated in 1972 of its off-rail status, stating that it is not the policy of the Compliance and Enforcement Branch of the Commission to notify shippers that they may be off-rail when such information comes to the attention of staff.

Rood, retired SP freight solicitor, testified to having in the early 1950s arranged on a trial basis for a third-party, Lane & Co. (Lane), to spot a car on the Chandler spur, and how, a couple of years later, SP had spotted a second car there for

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13/ The 1972 spur track report was undertaken in conjunction with an earlier formal proceeding involving Kooyman (see D.81127 dated March 13, 1973 in C.9422). In that enforcement proceeding, the Commission, by adopting Part 18 in Exhibits 2 and 5 of the staff pertaining to Kooyman deliveries from Stelex to Consolidated, formally determined that Consolidated was off-rail. The same law firm represented Kooyman in that proceeding as in this proceeding.

Lane.[14] He described how, accordingly, in 1973 or 1974, after Melideo told Rood at a lunchroom that he had an opportunity to purchase scrap steel if he could get a spur track to unload it, Rood had arranged through Chandler's Votruba on a trial basis to spot 2 cars for Consolidated on the Chandler track; this in anticipation of negotiating and working up a formal third-party agreement were the practice to continue. Rood testified vigorously, however, that he would not have done this on a continuing basis without arriving at a formal third-party agreement for SP, as to do so would have been contrary to SP's policy. He also conceded that no third-party agreement had ever been prepared because it developed that Consolidated had difficulty unloading the high side gondolas, and it did not look like it would be continuing movement. As the one developing and receiving the underlying information Rood stated he would have been the SP employee who would have typed up the rough draft for referral upstairs for approval and execution by the superintendent after review by SP's land development and legal departments. He had informed Melideo and Votruba that the arrangements

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14/ The so-called "Chandler spur" is really a 2-pronged spur. In Van Nuys the Budweiser track extension runs adjacent to the SP's San Francisco-Los Angeles mainline. It was constructed many years ago when Anheuser-Busch built its brewery. From the Budweiser extension there are various spurs serving local industries. One of these, the Chandler spur, crosses Cabrito Road and enters upon the property of McDonald Brothers. At that point of entry, adjacent to the McDonald Brothers gate, is a switch. One branch beyond the switch terminates in the McDonald Brothers property and the second branch proceeds through a triangular corner of the McDonald Brothers property and then through another gate to enter the Chandler property. McDonald Brothers and Chandler share ownership of the spur and maintain it. (See map, Appendix B hereto.)

were on a trial basis. Rood testified, interpreting SP's interoffice speedograms (Exhibits 13 and 14), that these indicated that before December 1973 Consolidated had received rail deliveries on the Chandler spur with permission of the spur owners. He further testified that in 1973 Consolidated was listed in SP's Raymer Yard under the Chandler spur number, stating that this meant rail shipments would automatically be routed directly to the Chandler spur if consigned to Consolidated. Without that listing and identification number, such shipments would instead have been routed to a team track (indicative of off-rail status). Rood conceded he had not gotten permission for continued regular spotting of cars on the Chandler spur for Consolidated.

Melideo testified that late in 1972 or 1973, wanting to receive rail shipments of plastic and steel at his Arminta Street facility next door to the McDonald Brothers property, he had obtained permission from Lou Borick, president of Superior Industries, then lessee of part of the McDonald Brothers property, to use the rail spur, and discussed this with Rood; that after Rood had gone to Chandler, he subsequently informed Melideo that the Chandler spur could be used. Melideo testified there was no mention of any trial period. Subsequently, early in 1974 Consolidated received about four shipments from U.S. Steel (followed by another four in 1975 and 1976). When unloading problems with the rail gondolas developed, Melideo testified that he talked to Boyd Patton, U.S. Steel traffic manager, who suggested switching to truck shipments, telling Melideo that Consolidated was on-rail, and showing copies of SP's speedograms (including Exhibit 13 with which Rood was involved) to confirm the statement. Patton also, according to Melideo, sent him a memo on January 9, 1974 reading:

"This should be sufficient to keep the PUC
off your back and consider yourself on Rail.
Regards Boyd" (Exhibit 37.)

Melideo had this filed after adding the comment: "Marsha - file & this is our protection for getting Rail Rates." Thereafter Melideo testified, after asking and getting confirmation of the on-rail status from Kooyman,[15] Consolidated shipped steel to the Arminta Street facility from U.S. Steel using Kooyman as carrier and applying alternate rail rates. Melideo also related that in 1974, at Consolidated's request, SP approved its inclusion on SP's authorized credit list for payment of transportation charges. He then introduced Exhibit 38, a confirming letter signed by SP's vice president and treasurer, McLean.

Melideo further testified that about 1975 or 1976 he transferred his trucking business to Conti Trucking when Patton left U.S. Steel and began acting as a soliciting agent for Conti Trucking. He described how Gene Conti also affirmed, after checking, that Consolidated was on-rail. Later after dissatisfaction with Conti set in, Melideo switched back to Kooyman in late 1976 or 1977, and Melideo testified that Patton threatened that if Consolidated left Conti Trucking, Patton would prove Consolidated was not on-rail, causing loss of alternative rail rates. Again Kooyman checked and confirmed that Consolidated was on-rail. Teresi was also used and it also told Melideo that Consolidated was on-rail. Melideo, questioned if ever he contacted the PUC on the on-off-rail issue, testified that in 1973 or 1974 he phoned and tried to discuss his location and rail rates, but could get no interest in his problem, and he does not recall whom he talked to. He testified that until

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15/ Melideo testified that Kooyman told Consolidated "he had checked with the PUC, had checked with U.S. Steel, and we were considered to be on rail."

the hearing he had never heard of a third-party agreement, and that the PUC had never advised him that Consolidated was off-rail.

Kooyman testified that in 1972 Consolidated and Patton had called to ask if Kooyman could handle trucking of steel from U.S. Steel to Consolidated; that after Kooyman took it on, U.S. Steel was to code the paperwork to show when rail rates applied. Ninety to ninety-five percent of the hauling was handled through subhaulers. Kooyman testified that he never seems able to get an answer from PUC whether or not a shipper is on- or off-rail, so he generally relies upon the answers he gets from rate people, U.S. Steel, or the railroad. Kooyman confirmed that possibly in 1974 he lost the Consolidated traffic to Conti Trucking after being told that Patton was involved in the switch, but that about 1976 it was returned to him, although Melideo then told him there would be problems over application of alternative rail rates; that somehow Patton had set it all up and could take it away. With reference to the 1972 audit, Kooyman stated that Paasche never advised him that Consolidated was considered off-rail. He said he had never seen a third-party agreement. Finally, Kooyman testified that Consolidated represented a very minor volume of his overall business, providing less than 2.5% of his revenue.

An OII is a law enforcement proceeding and necessarily is the product of enforcement actions by the staff of the Commission. A basic consideration common to all law enforcement actions, whether in the strictly criminal law area, or in the area involving public utility regulatory and judicial processes, is that such actions, to be valid, must comply with federal and state constitutional requirements for both substantive and procedural due process of law (In re Use of Communication Facilities (1966) 66 CPUC 675). Here, one of the largest highway carriers in the Stockton office territory, Kooyman,

had in 1978 not been checked recently for compliance with provisions of the PUC and Commission regulations. In line with his responsibilities as chief enforcement officer of that territory, Paasche recommended that an initial survey be made of Kooyman's operations, rates, charges, and practices. A check was authorized and routine investigation was initiated. Spot-checks disclosed clear discrepancies involving certain accounts including Consolidated. The ordering of a spur check report is the first step when alternative rail rate applications are involved.

It is alleged by Consolidated that somehow Conti Trucking had motivated the investigation in revenge for losing the Consolidated business several years earlier; that a staff employee working closely with Paasche in the Stockton office was in effect working both sides of the street and to accommodate Conti Trucking had helpfully instigated the "routine survey". To support this allegation, Consolidated points to the indelicate fact of the appearance of a Commission enforcement employee attending an industry association meeting, seated with, and for all intents and purposes, representing Conti Trucking.[16/] Consolidated and Kooyman query their being singled out when the same on-rail rates were charged earlier when Conti Trucking was doing the hauling. In this vein it is noted that after stressing in his testimony the routineness of the way Kooyman was selected for audit,when questioned about his initial comment that in initiating the survey he had centered in on a number of accounts based on "prior knowledge," Paasche explained that meant the type of account involved and its size, or if the name was familiar (in that he had run into it before for other violations), but that "In this particular survey, I hit the bigger accounts." (Emphasis added.) As

16/ Unfortunately, staff made no attempt to explain or otherwise controvert the inference that flows from these allegations.

respondents observe, Consolidated was by no means a "bigger account", representing as it did less than 2.5% of Kooyman's revenue. Much also is sought to be made of the retention by Paasche of the 1972 spur track report with its map, and the failure of Paasche in 1972 and Morris in 1978 to inform Consolidated that staff had concluded that the Consolidated Arminta Street facility was considered off-rail as far back as 1972.

It is obvious that the above-noted indications of possible shadows of malice by Patton, staff indiscretion in association and inadequate explanations of past reasons, and the coincidence of Paasche's subsequent discovery under subpena of that latent copy of the virtually identical 1972 spur report map in his personal file, make a search for the truth more difficult. However, whether considered alone or in combination, they do not constitute a denial of due process rights to Consolidated at any stage in this proceeding, nor do they evidence an entrapment.

Although there is evidence of Patton's 1976 threats after the switch was made back to Kooyman from Conti Trucking, no evidence was presented of any Patton involvement or contact with Paasche or staff during the current investigation period, and on cross-examination Paasche testified that no one from Conti Trucking had asked that he make a spur track request relating to Consolidated. Rather, Paasche testified that routinely he had sent out an estimated 30 spur track requests when he began the Kooyman survey, and that one of these related to Consolidated. Paasche testified credibly that he had forgotten he had the 1972 spur track report in his office. Certainly it is not unusual, considering the volume of work on different matters being handled at any time by staff members, that odds and ends of material may inadvertently remain in a staff employee's personal file when a particular matter is concluded. But

even had Paasche been aware of the 1972 report in his files, at no time was there any obligation upon him to advise Consolidated that it was off-rail. It is not the function of this Commission's Compliance and Enforcement staff to notify shippers of their rail status.[17/]

In addition, it cannot be said that Kooyman was unaware, or should not have been aware, that the 1972 spur track report had concluded that Consolidated was off-rail. D.81127 dated March 13, 1973 in C.9422 found undercharge violations by Kooyman totaling $12,059.03 involving three shippers. One of these, Stelex, had made a shipment via Kooyman to Consolidated's Arminta Street facility assessing on-rail rates (see Part 18 of the staff report in Exhibits 2 and 5 of that proceeding). This earlier investigation initiated the 1972 spur track report which concluded Consolidated was off-rail and resulted in undercharges of $123.58 for failure to assess off-rail rates. For this, Kooyman was fined and in turn ordered to collect (and did collect) from Stelex.[18/] Kooyman was also assessed a punitive fine. In that proceeding Kooyman was represented by the same law firm as in this proceeding. Whether Stelex attempted to charge back to Consolidated for this $123.58 is unknown, but at least Kooyman must be charged with actual or constructive knowledge that in 1972 Consolidated was off-rail.

However, the significance of the 1972 spur track report to Consolidated would have been minimal at the most, in that Consolidated in these proceedings has based its asserted authority to use the Chandler spur on certain "permissions" which had their genesis in the Melideo-Rood luncheon conversation in 1973, and in the Borick-Superior Industries verbal authorization of 1973 (see Exhibit 39).

17/ The number of shippers frequently involved would impose an onerous burden were staff to be required to notify each. However, it was Paasche's testimony that as to the carriers, when the enforcement staff learns of a rate violation, it will bring it to the attention of the carrier involved, either by a conference or an enforcement action.

18/ Interestingly, Doolan was the consignor in that shipment.

Regrettable as is any public appearance of formal or informal relationship between a staff member and a regulated carrier, the record in this instance clearly shows that the staffer at issue played no role in this investigation except to perform quasi-clerical tasks such as photocopying documents for Paasche and pulling material from the files upon request. Paasche testified that to his knowledge the staff member had never worked for or received any compensation for services such as consulting from Conti Trucking and had taken no substantial leave of absence while working for Paasche. The respondents, had they wished to pursue this issue further, could have subpenaed the staff member to do so. But as it was developed, the record cannot support any conclusion that the staff member's activities in any way tainted this investigation; the most that can be sustained is less than a surmise.

Finally, we note that a significant number of the suspect shipments involved, consigned according to their respective shipping documents to the Van Nuys Arminta Street facility of Consolidated, were, according to staff's allegations and the sworn testimony of witnesses, in fact either delivered to or diverted to Consolidated's Sun Valley Bradley Avenue facility, raising issues quite apart from failure to assess off-rail rates. We will turn to these later.

After considering the above-stated evidence and arguments, we conclude that there was no Conti Trucking-staff complicity involved in the instant investigation, and the fact that Consolidated was not advised in 1972 or 1973 of its off-rail status, or that Paasche inadvertently retained possession of a copy of the 1972 Consolidated spur track report over the subsequent years, does not serve to deprive Consolidated of any constitutionally guaranteed procedural opportunity

to be confronted during an investigatory process. Nor did the use by staff in 1978 of an updated 1972 spur track report serve to back-date the commencement of this investigation to 1972, or initiate an entrapment situation. Accordingly, we deny Consolidated's motion that we either not assert jurisdiction or that we dismiss staff's charges against Consolidated.

Consolidated-Kooyman Motion to Dismiss because of Alleged Prejudicial Misconduct on the Part of Staff Counsel: On November 1, 1979, as part of its defense case in chief, Consolidated introduced testimony by witness Rood. As we have seen, this testimony related to the on-off-rail issues which are at the core of one segment of this enforcement proceeding. At conclusion of Rood's direct testimony, and after cross-examination by staff and Kooyman, Rood was excused. After three further days of hearing the following January hearings were recessed until March 11, 1980.

About 5 p.m. the evening of March 10, 1980, Rood received a telephone call at his home in Los Angeles from staff counsel in San Francisco with the apparent purpose of ascertaining whether Rood had thought over his earlier testimony and wanted to change or add to it. When hearing resumed the next morning, both Kooyman and Consolidated expressed indignation and asserted that the contact constituted prejudicial misconduct by staff counsel and intimidation to induce a change of testimony. Both respondents moved formally to dismiss this proceeding.

Consolidated recalled Rood who then testified to the telephone contact, stating that staff counsel had informed him that counsel had been in touch with Votruba who assertedly had denied ever giving him permission for use of the Chandler spur. Rood testified that he had not been threatened nor did he feel intimidated,

but that he was a little uncomfortable, did not think it proper, and disliked staff counsel's calling him at home and questioning him whether he wanted to change or add to his previous testimony. He stated that he told staff counsel that everything he had testified to previously had been the truth and that people could not bribe him not to tell the truth. Rood also testified that at the time of that telephone call he had been on a "stand-by basis" as a possible defense witness for Kooyman.

We first of all dispose of Consolidated's tangential argument that staff counsel by his actions violated provisions of Sections 2019 et seq. of the Code of Civil Procedure. It is unnecessary to discuss them further than to note that these sections deal with discovery depositions. In effect Consolidated would have us liken staff counsel's telephone inquiry to an ex parte deposition of Rood regarding testimony that Rood had rendered or might render to facilitate staff's preparation of a rebuttal case to Consolidated's defense. We reject this argument as a disingenuous smokescreen. There are important differences between the nature of an informal telephone interview, and the more formal procedures involved in the taking of a deposition. A lawyer talks to a witness to ascertain what, if any, information the witness may have relevant to his theory of the case and to explore the witness's knowledge, memory, and opinion - frequently in light of information counsel may have developed from other sources.[19] It contrasts with a deposition which serves an entirely different purpose - that of perpetuating testimony, to have it available for use or confrontation at the trial, or to have a witness committed to a specific representation of such facts as he

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19/ Of course, it is true that any such witness has the right to refuse to be interviewed if he so desires (Byrnes v U.S. (1964) 327 F 2d 825, 832, 9th Cir.), cert denied 377 U.S. 970. The witness may also insist that his views be given only upon deposition or at trial after being subpenaed.

may possess. A desire to depose formally might arise normally after preliminary interview has persuaded counsel to take a deposition, or it might not. It is common knowledge that in presenting his case, counsel will offer testimony which he deems important and supportive of his theory of the case, and disregard what he deems the chaff. Each party has the same privilege.

Here staff counsel, from the context of his questions to Rood during the telephone conversation (as subsequently testified to by Rood) apparently in possession of information gleaned from other sources including Votruba, was exploring Rood's recollection of the "permission" granted to use the Chandler spur. Apparently staff counsel elected not to pursue or develop anything he may have learned. That was his decision to make. But certainly he had a basic obligation as a lawyer to diligently pursue any avenue which in his judgment appeared fruitful. It is axiomatic that an attorney should represent his client zealously within the bounds of the law.[20/]

This brings us to the basic issues in respondents' motion: Was it improper under standards or rules of professional ethics or responsibility for staff counsel to have interviewed this witness of the opposing party in this proceeding? And if not, was there anything unethical or improper in the content or context of the interview?

20/ A staff attorney has no less an obligation. We recognize that a staff attorney cannot take for his only guide the standards of an attorney appearing on behalf of an individual client, considering his dual role, being obligated on one hand to furnish that adversary element essential to the informed resolution of any controversy, but being pledged on the other to the accomplishment of the objective of impartial justice. He is the attorney for this Commission, and while it is his primary duty not to convict, but to see that justice is done, he always retains a basic obligation to fully investigate all aspects of the case and to interview and examine witnesses as well as any other persons who might be able to assist in ascertaining the truth concerning the events in controversy.

While ethics generally are a matter of good practice rather than strict enforcement of rules, there do exist ethical guidelines, disciplinary rules, and court decisions which provide standards for professional conduct to be expected of lawyers. California has rules of professional conduct. These rules, promulgated by the State Bar with the approval of the State Supreme Court, provide a basis for disciplinary action and are binding on all members of the State Bar.[21/] Looking at the California rules we note that many, as part of their heritage, trace back to provisions found in the ethical standards established over the years by the American Bar Association (ABA). However, as it has been stated that the conduct of California lawyers is governed by the California Rules of Professional Conduct, and not by the ABA's Code of Professional Responsibility (People v Ballard (1980) 104 CA 3d 757, 761), we must start our consideration first with the California rules.

Rule 7-103[22/] comes closest to the issue of contact with persons associated with an opposing side, but it limits its scope to communications by an attorney with an adverse party represented by counsel. In the OII in issue, Rood appeared not as a party, but merely as a

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21/ See 3-B, West's Ann. Bus. & Prof. Code (1974-ed), foll. Section 6076 at p. 83.

22/ Rule 7-103. Communicating with an Adverse Party Represented by Counsel. A member of the State Bar shall not communicate directly or indirectly with a party whom he knows to be represented by counsel upon a subject of controversy, without the express consent of such counsel. This rule shall not apply to communications with a public officer, board, committee, or body.

witness. (Rule 7-107[23/] is not on point, dealing as it does more with inducing perjury, etc.) even when we go back beyond California Rule 7-103 to its ABA ancestor, ABA's corresponding Disciplinary Rule 7-104,[24/] we see that the latter's purview is similarly limited to communicating with a party represented by

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23/ Rule 7-107. Contact with Witnesses. A member of the State Bar shall not:

(A) Suppress any evidence that he or his client has a legal obligation to reveal or produce.

(B) Advise or directly or indirectly cause a person to secrete himself or to leave the jurisdiction of a tribunal for the purpose of making himself unavailable as a witness therein.

(C) Directly or indirectly pay, offer to pay, or acquiesce in the payment of compensation to a witness contingent upon the content of his testimony or the outcome of his case. Except where prohibited by law, a member of the State Bar may advance, guarantee, or acquiesce in the payment of:

(1) Expenses reasonably incurred by a witness in attending or testifying.

(2) Reasonable compensation to a witness for his loss of time in attending or testifying.

(3) A reasonable fee for the professional services of an expert witness.

24/ ABA Disciplinary Rule 7-104. Communicating with One of Adverse Interest. (A) During the course of his representation of a client a lawyer shall not: (1) Communicate or cause another to communicate on the subject of the representation with a party he knows to be represented by a lawyer in that matter unless he has the prior consent of the lawyer representing such other party or is authorized by law to do so. (2) Give advice to a person who is not represented by a lawyer, other than the advice to secure counsel, if the interests of such person are or have a reasonable possibility of being in conflict with the interests of his client.

counsel. But when we take the next step and trace back to the former ABA Canons from which the disciplinary rules evolved, in Canon 39 (adopted in 1928; see 53 ABA Reports 130; amended to this form in 1937; see 62 ABA Reports 352) we find the following squarely on point statement:

> "A lawyer may properly interview any witness or prospective witness for the opposing side in any civil suit or criminal action without the consent of opposing counsel or party. In doing so, however, he should scrupulously avoid any suggestion calculated to induce the witness to suppress or deviate from the truth, or in any degree to affect his free and untrammeled conduct when appearing at the trial or on the witness stand."

A considerable series of informal and formal opinions by the ABA's Committee on Ethics and Professional Responsibility have referred to, cited, or restated the content of Canon 39 in substantially the same form over the years. In general, the Canon reflects the general rule in this country on the subject.[25/] The reason is clear. Adversary proceedings are held for the solemn purposes of endeavoring to ascertain the truth, the sine qua non of a fair trial. As Judge Wright stated in Gregory v U.S. (1966) 369 F 2d 185, "A criminal trial, like its civil counterpart, is a quest for truth. That quest will more often be successful if both sides have an equal opportunity to interview the person who has the information from which the truth may be determined."

The applicability of that principle to the facts at hand had long been recognized. Over 70 years ago in State v Papa (1911) 32 R.I. 453, 459, it was said:

25/ See: 7 Corpus Juris Secundum: Attorney & Client, Section 54; and see also American College of Trial Lawyers Code of Trial Conduct, Section 15.

> "Witnesses are not parties and should not be partisan. They do not belong to either side of the controversy. They may be summoned by one or the other or both, but are not retained by either. It would be a most unfortunate condition of affairs if a party to a suit, civil or criminal, should be permitted to monopolize the source of evidence applicable to the case to use or not as might be deemed most advantageous. Such a proceeding in a criminal case would violate the provisions of the Constitution."

From the foregoing we cannot agree that there was impropriety in the fact of staff counsel interviewing Rood without the prior permission or outside of the presence of opposing counsel.

We turn next to consider whether there was in the telephone call any inducement to suppress evidence or deviate from the truth, or whether the fact of the call itself affected Rood's free and untrammeled conduct at the trial or on the witness stand.

Both respondents rely heavily upon the last sentence in ABA former Canon 39 to provide a foundation for their allegations of misconduct. Kooyman argues that staff counsel called Rood "for the express purpose of attempting to persuade him to change his testimony." Consolidated argues that the gist of the telephone interview was to unfairly discredit Rood in that it led Rood to believe his integrity was being challenged. Both argue that the thrust was to affect Rood's "free and untrammeled conduct when appearing at the hearing."

The trouble with this argument is that Rood had already testified on the permission to use the Chandler spur matter, had been extensively examined and cross-examined, and had been excused as a witness. Considerable time had lapsed since his testimony, and there had been absolutely no indication that he might be called again by Kooyman. Indeed, even Rood subsequently characterized his status

as being on "standby". When actually called later, his testimony was on a collateral matter relating to the role of a spike in the Chandler spur. Therefore, with no expectation of his possible call back, staff counsel deemed his role completed. Staff counsel therefore was not attempting to influence Rood's "free and untrammeled conduct when appearing at the hearing." Rather, relating to staff counsel's apparent interview or interviews with Votruba (a potential witness no one had called), staff counsel was interviewing Rood to seek further information from Rood relating to the Rood-Votruba conversations, information which might lead Rood, after possible refreshment of memory, to a voluntary retraction or change of testimony. Or it might not. At this point staff counsel was not necessarily seeking to induce further Rood testimony. As Rood testified (after being recalled by Consolidated for the purpose of providing an evidentiary foundation for the instant motion alleging misconduct), staff counsel telephoned to tell Rood of counsel's conversation with Votruba, a conversation wherein assertedly Votruba had denied ever giving permission to use the Chandler spur for Consolidated. Against the backdrop of that contradictory statement staff counsel was interviewing Rood to determine whether after reflection and possible refreshment of memory Rood might want to voluntarily retract or expand his earlier testimony.

While other counsel might have approached the matter of the apparent conflict in information differently, perhaps still making the telephone call but in association with a third person (for purposes of potentially impeaching the witness), this staff counsel adopted this direct, but nonetheless ethically permissible method, to interview Rood to try to ascertain, albeit belatedly, all the facts involved in Votruba-Rood conversations of an earlier year. If, after counsel had interviewed Rood, he had decided he wanted to introduce certain

additional evidence possibly gleaned out of the interview, he would not have been entirely foreclosed, because even though counsel himself would have probably been precluded from presenting impeachment or other such testimony himself of his conversation with Rood,[26] he might still have elected to subpena Votruba as a rebuttal witness and thus have entered any contradictory evidence. The fact that Rood had been already excused as a witness in no way made the call improper either. It is not improper for an attorney to secure or try to secure a retraction from a witness, even after a trial has resulted in a conviction.

Respondents would present a picture of a distraught individual, deeply shaken by the phone call, and hampered in his ability to freely conduct himself on the witness stand; one intimidated and unfairly discredited to an unconscionable degree. Such is just not the case, as our ALJ, with every opportunity to observe Rood's demeanor in the courtroom and on the stand, concluded. Rood upon recall was invited to present his version of what transpired the evening before in narrative form, or in any way he wished. He then calmly and straightforwardly told his version. When asked by the ALJ if the caller had made any threats, Rood readily answered "No, sir." When asked by the ALJ if he had been intimidated by the conversation he answered: "Well, not intimidated. I just felt like, why should he be asking me if I wanted to add or change any of my testimony?" Each party was given full opportunity thereafter to examine Rood about the telephone call. Rood testified that: "I wasn't happy about the whole thing. . . . I didn't like the idea." But he admitted freely that he had not been encouraged to change his previous testimony. He had just been presented the opportunity. He further testified that he had not been offered a bribe.

26/ This would involve counsel himself taking the witness stand.

Certainly to have one's recollection of long past events questioned can be uncomfortable. But an enforcement proceeding is not a sporting event involving mere matching of wits by the attorneys involved. If it is to be a meaningful quest for the truth, all leads, including those belatedly discovered,should be followed up, even if they serve to arouse discomfiture. Rood did not have to discuss the matter. He could have merely hung up the telephone had he chosen to do so, thereby effectively terminating the interview. But he did not. And the record shows nothing, as a consequence of his choice, to substantiate respondents' assertions that Rood's ability to conduct himself was affected to any degree, either then or later when he was called to testify further. At all times on the witness stand, he demonstrated the coolness of a seasoned negotiator.

Consequently, for the above-discussed reasons we are unable to find misconduct on the part of staff counsel relative to these issues; nor do we find anything in the events which would justify an order dismissing the investigation. Respondents' motions to dismiss will be denied.

Procedural issues resolved, we now turn to the underlying issues brought into focus by this investigation. These revolve about the question of the appropriate rates to be applied to Kooyman's transportation of steel coils, etc. for Consolidated.

The On- or Off-Rail Issue: First, there is the question whether Consolidated's Arminta Street facilities in Van Nuys were on-rail. Item 200 of MRT 2 clearly provides that common carrier rates may be applied in lieu of the motor carrier rates set forth in MRT 2 when the former result in a lower charge for the same transportation than would result from application of the MRT 2 rates. But that same tariff also declares that the same transportation means

"transportation of the same kind and quantity...between the same points..." Therefore, the problem to be resolved in on-rail questions is whether the trucker provided services which constitute the same transportation between the same points of origin and destination as that which would have been performed by a railroad. The meaning of "same points" resolves in the definitions of "point of origin", "point of destination", and "railhead" which are set forth in Item 11 of MRT 2. In this proceeding there is no issue over the points of origin. All parties agree that the loading point of the shipments in issue at U.S. Steel's facility in Pittsburg is on-rail. Therefore, we need concern ourselves only with whether Consolidated's Arminta Street facilities in Van Nuys meet the MRT 2 definitions of "railhead" and "point of destination". If they do, Kooyman was justified in assessing on-rail rates. If they do not, Kooyman was not.

As set forth in Item 11 of MRT 2, the terms are defined as follows:

> "Railhead means a point at which facilities are maintained for the loading of property into or upon, or the unloading of property from rail-cars. It also includes truckloading facilities of plants or industries located at such rail-loading or unloading point."
>
> "Point of destination means the precise location at which property is tendered for physical delivery into the custody of the consignee or his agent. All points within a single industrial plant or receiving area of one consignee shall be considered as one point of destination. An industrial plant or receiving area of one consignee shall include only contiguous property which shall not be deemed separate if intersected only by public street or thoroughfare."

While it is a well-established principle of transportation law that the provisions of a tariff must be literally construed,

considering the divergent facilities used by different consignees to receive property, it is also clear that it is not possible to apply a general rule to cover all situations. In each instance the physical configuration and characteristics of a consignee's claimed "point of destination" must be considered to determine his status. In this regard, a brief review of our determinations in earlier cases involving somewhat similar facilities can be helpful.

First of all, it is not essential that there be a rail spur extending onto consignee's property itself. In Investigation of Robert Sell (1958) 56 CPUC 277, and Investigation of Anderson Trucking (1959) 57 CPUC 225, we held that it suffices if consignee's property is adjacent to a spur track from which unloading can be done in the normal manner. In Sell, the consignee at issue was located on property leased from the railroad and the property used for unloading was part of the railroad's right-of-way. There was a team track belonging to the railroad 60 feet away. A fence and a gate separated the leased property and the team track area. The consignee used the railroad-owned area between the leased property and the team track to unload both trucks and rail cars. On these facts we concluded that inasmuch as the areas were contiguous we would consider the leased property and the area adjacent to the team track as constituting one single receiving area so that they became a single point of destination.

In Anderson we have three similar situations. The property of one consignee was situated adjacent to and alongside a spur track. Railroad cars were unloaded at the track and lumber was carried by a forklift through a gate 6 to 8 feet from the track onto consignee's yard. The consignee had an agreement with the railroad to spot cars alongside its yard on the spur track for loading and unloading. Another consignee had the 200-foot width of the rear of its property

bordered by a spur track. The consignee had a license from the railroad to use the spur track right-of-way, and railcars were unloaded on the side facing the consignee's yard and the property transported 10 feet by hand or forklift through a gate into consignee's yard. The third consignee's property was 140 feet from the rail spur track. The intervening property was part of the railroad's right-of-way and was leased to the consignee who used it to unload from the railcars and for storage of its property. In all three of these situations, the consignee had a right to use the unloading area and track, and we therefore concluded that the unloading areas were contiguous to consignee's property, and constituted a receiving area within the meaning of point of destination as set forth in the tariff.

In Ross Trucking (1960) 57 CPUC 570, the principal consignee and his predecessors since 1910 had taken rail deliveries on a spur track paralleling his property, and currently was regularly using a railroad-owned unloading platform on that spur for both truck and rail deliveries. A ramp from the platform led to the paved road (20 feet from consignee's entry), which was part of the railroad's right-of-way. Consignee used the road to store property and equipment. We concluded that the paved areas and the platform constituted a receiving area as used in the definition of "point of destination" in MRT 2 and that consignee was on-rail.

In Howard Child and Sidney Rain (8 Ball Line) (1969) 70 CPUC 501, we determined that under some circumstances a spur track on a public street where unloading was done could be considered as being within the reasonable receiving area of a consignee. This was in a situation where the landlord of both the consignee and several neighbors was the proprietor of a small industrial park which included a common area for truck unloading. The landlord had also caused a

rail spur to be constructed in the adjacent deadended public street to serve all his tenants. The spur and the public street deadended next door, abutting Nimitz Freeway. There was a loading dock next door for common use. Consignee had a choice of using the neighboring unloading dock, or if the dock was being used, of using the deadend public street area across the street from his plant to unload railcars. Either way, the distance to his plant did not exceed 90 feet. The public street, deadended next door, did not carry through traffic.

In the case at bar, both Kooyman and Consolidated assert that Consolidated's tenuous and informal permission to use the approximate 100-foot stretch of the railroad-owned lead area over the storm ditch in conjunction with part of the adjoining lead area of the Chandler spur track, facilities separated by a through traffic public street from Consolidated's property, serves to enable Consolidated to consider that area as being "contiguous property". Being "contiguous property," it is sufficient to bring it into the "single industrial plant or receiving area of one consignee" classification required to qualify it as consignee Consolidated's "one point of destination" under MRT 2. We cannot agree. Contrasting Consolidated's situation with the physical configurations and characteristics set forth in the foregoing cases, significant distinctions readily emerge. As we will discuss below, these lead us to conclude that Consolidated's Arminta Street facility was not a railhead.

In all the cases cited above, the consignee at issue enjoyed a <u>continuing</u> and <u>enforceable</u> right, either through ownership, lease, license, or other formal agreement, to use the off-premises unloading area in combination with a rail spur to unload railcars consigned to it. As stated in MRT 2: "Railhead means a point at which facilities are <u>maintained</u> for...the unloading of property from rail cars" (Emphasis added). Maintained means "to keep or keep up;

continue in or with; carry on" (Webster's New World Dictionary, 2nd College Edition (1972).) Nothing less than a continuing enforceable right to use an off-premises unloading area belonging to another can suffice to bring such an area within the concept of an adjunct property of the consignee to make it capable of being included in his "point of destination". Use on a trial basis or with occasional permission to receive a railcar on another's property does not serve to convert that other property into the industrial plant or receiving area of the consignee so as to meet the requirements of MRT 2 for railhead status.

In this case, to have qualified the SP-owned unloading area situated across the public street from its Arminta Street plant as its railhead, Consolidated at the least would have required not only some formalized written agreement for its regular use from the railroad,[27/] but it would also have required a written third-party agreement with the railroad and the two spur track owners, McDonald Brothers and Chandler, for the regular use of their spur. Consolidated

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27/ As evident from testimony of both Honold and Rood, the railroad was very conscious of its liability. Nonetheless, it is possible that Consolidated might have been able to lease a portion of the lead over the drainage ditch from SP. There was precedent for this locally. Rood testified that SP had previously leased Chandler a 35 x 40 foot area on its right-of-way to store lumber when its yard got full. Significantly, Rood negotiated that lease with Stanley Brown and Elwin Newkirk, chairman of the Board and president, respectively, of Chandler, and not with Votruba. However, whether SP would have done so on an extended unrestricted basis is open to question since SP was using the spur area in question daily to park mainline locomotives awaiting a turnaround for the trip back to Los Angeles from the Raymer Yard. The right to use the Chandler spur for this latter railroad purpose came under the original spur agreement McDonald Brothers and Chandler had with the railroad.

had none of these written agreements, but in their stead would have us accept verbal authorizations, or less.[28]

In today's litigious society it strains credibility to accept that responsible business executives would accept less than a formal written agreement before authorizing another company to regularly use their property and facilities in something so fraught with potential liability exposure as unloading railcars with scrap steel. It is significant here that both the railroad and Chandler wanted more. A one-shot accommodation was one thing, but regular continued use was another. Honold, assistant manager of SP's contracts department, testified that as a matter of company policy, the railroad requires third-party agreements, essentially to protect the railroad from liability. Even Rood, the former SP agent and architect of the arrangement that did exist, readily conceded that as a matter of business practice, on a regularly continuing basis, the railroad would not continue to spot cars for delivery to a consignee on another company's rail spur without a third-party agreement. In the last ten years of his employment with the railroad he knew of only two exceptions. However, in this situation Rood testified that things never got so far as negotiations for and working up a third-party agreement, that:

> "I was working on a one-shot experimental movement. And when it didn't materialize, it wasn't feasible to continue bringing in the scrap, I just wrote it off as some business that I couldn't obtain. I didn't tell him that now he is on spur track and he can keep on bringing stuff in, because

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28/ Melideo testified that Louis Borick, Superior Industries' president, had verbally authorized use of the Chandler spur in 1973. To substantiate this he introduced a letter dated January 14, 1980, confirming that a 1973 offer was made. Melideo stated that the consideration had been accommodations made to Superior Industries at that time. Melideo also testified that Borick had told him that his lease with McDonald Brothers allowed such subletting.

> that isn't the way I do business. If I thought there would be future movements, I would have gone through the procedure of getting a third party track agreement."

Although Votruba, vice president purchasing agent of Chandler, apparently gave Rood permission on a trial basis to spot the gondola shipments of scrap, Newkirk, president of Chandler, testified that if ever his company would have agreed to continued formal use of the spur lead,

> "I would have to have some kind of agreement whereby we would be protected as far as the hold harmless clause. I would want insurance certificates and I also expect to be reimbursed for cost in helping to maintain our spur, because we do spend money when we use the spur."

The evidence is clear that in fact Melideo did not have agreement from all three essential parties for continued use of the Chandler lead spur. Nor did Consolidated have an agreement with SP for the continued use of the SP right-of-way property where the unloading would have to be performed. The language of the "railhead" definition in Item 11 of MRT 2,

> "...a point at which facilities are maintained for...the unloading of property from railcars..."

is not broad enough to include situations, as here, where the industry concerned does not have an agreement with the railroad and the spur owners for continued use of the facilities where the unloading must be performed. Accordingly, the railroad right-of-way and the spur lead across Cabrito Road from Consolidated's property cannot constitute a "receiving area" within the meaning of the definition of "point of destination" in Item 11. The Consolidated plant itself does not include "facilities for the unloading of property from railcars", and therefore the transportation services performed

by Kooyman for Consolidated to the Arminta Street plant were not "transportation of the same kind and quantity...between the same points..."[29/]

Supporting our doubts of the real depth of Melideo's conviction that his Arminta Street facility was actually on-rail is the fact that after having supposedly established his status through Patton and Rood, and having received Patton's "insurance" memo of January 9, 1974 and the attending "documentation", he nonetheless, when he engaged Kooyman to truck in the shipments, testified that he had asked Kooyman to make sure and authenticate Consolidated's status before Kooyman started. Kooyman testified that he "assumed" it was his company's responsibility as the prime carrier to see whether Consolidated was on-rail before applying alternative rates. Kooyman, after talking to Melideo, in affirming Melideo's assertions of Consolidated's on-rail status, assertedly checked fruitlessly

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29/ In reaching our conclusions relating to the railhead status of Consolidated, we have placed little reliance upon the testimony of the "expert" witness sponsored by respondent Kooyman. In stating his qualifications, the "expert" testified that among other matters, he had performed an analysis of the monopoly position at issue in Alltrans Express (Application 54997) resulting in a report he had presented in that matter. ALJ Weiss was the ALJ in the Alltrans matter and recalled no such participation. Checking, it developed that the role of this "expert" in that matter had been, to put it kindly, grossly puffed. The "expert" had neither appeared nor presented testimony in Alltrans, but along with well over 100 other traffic personnel working for less than truckload carriers in California, he merely had routinely completed a simple form summarizing data totals pertaining to movements between each carrier's terminals for use in a Commission staff survey. Such over-reaching here serves to render any of his testimony sadly suspect.

with a PUC representative (unidentified) and talked to Patton at U.S. Steel. But he did not himself check, nor did he know if his company had checked with the railroad.

Thus it is that Kooyman, faced with the question whether Consolidated was on-rail for rating purposes, relied substantially upon opinions supplied him by the consignor and consignee involved. Furthermore, even after losing the business to Conti Trucking as a result of Patton's blandishments to Melideo, when he recovered the business after the Melideo-Patton falling out, and was told that Patton had said he would prove that Consolidated was not on-rail, Kooyman again was requested to check and make certain about the status. Again he relied upon the consignor. While we appreciate his desire to recover the business and the perplexing situation presented by it, as well as the fact that the Consolidated carriage was only a small part of his volume, the fact remains that the ultimate determination of what rates apply rests with the carrier. He does not have to apply alternative rail rates, but if he does, electing to rely upon the shipper for necessary information to properly rate his loads, he must suffer the consequences if the choice proves wrong (Investigation of Emmett Aiken (1958) 56 CPUC 329, 331). But here there is more. This issue and this particular consignee were not new to this carrier. In 1972 in an earlier proceeding this same consignee officially had been determined to be off-rail, and this carrier had been directed to collect an undercharge from Stelex on similar facts.[30/] Even without the earlier instance, the physical fact of the spur's location and awareness of the Patton threat were sufficient to make Kooyman especially alert. His disregard of these warning flags alone would have made application of rail rates a grossly negligent action, but when coupled, as we will see, with his participation in the truck diversions, his conduct becomes contemptuous.

30/ See footnote 11, supra.

Based upon the foregoing, the Commission must conclude that Kooyman willfully violated PU Code § 3664 by applying alternative rail rates to shipments consigned to the Arminta Street facility of Consolidated, thereby evading minimum rates applicable under MRT 2 and incurring undercharges.

Although potential consequences from it may now be academic, we would be remiss were we not to review certain of the evidence which inescapably poses the question: Was Melideo innocently led into a misunderstanding that Consolidated's Arminta Street property was on-rail, or was this all an artfully orchestrated scheme carried out to provide Melideo with a seemingly plausible foundation to assert that Consolidated was on-rail? As staff argues, the evidence strongly supports the latter.

It is very clear, even assuming that he was unaware of the 1972 Stelex undercharge, that Melideo long had been concerned about access to a rail spur. In mid-1973 he worked out a deal with Patton, then U.S. Steel's traffic manager at Pittsburg, to purchase plastics and steel scrap in railcar lots. But the deal allegedly depended upon access to a contiguous rail spur for its economics. In pursuit of it Melideo met Rood, the local SP agent, and discussed the problem, advising Rood that Borick at Superior Industries (McDonald Brothers' sublessee and co-proprietor of the Chandler Spur) would have no objection to Consolidated's use of the Chandler spur. In October 1973, Rood then telephoned Chandler's president, Newkirk, asking about a possible trial use of the spur. While Rood denies this contact, Newkirk remembers it although he is hazy on the details. But in support of his recollection, Newkirk produced a daybook wherein he records such calls (this one was begun on August 13, 1973) and in that daybook there was entered a sketchy outline of the content of

the call. However, nothing came of this contact. Rood, then recalling that much earlier on several occasions he had gotten an OK from Chandler's purchasing agent-vice president Votruba for another company, Lane, to spot a car on the spur, called Votruba and got a verbal OK to again spot a car or two on a trial basis. (Votruba did not testify and while Newkirk admits that Votruba may have done this, Newkirk stated Votruba had no authority to do so.) Assertedly with this OK in hand, Rood informed Melideo, who in turn contacted his friend Patton to order two carloads of scrap from U.S. Steel. Patton, arranging shipment, told SP-Oakland that Consolidated, the intended consignee, was on-rail, having authority to use the Chandler spur, and that Consolidated previously had used the spur. SP-Oakland, checking through channels, on December 10, 1973 by speedgram to SP-Los Angeles, asked McGrail at SP-Los Angeles to confirm with Melideo if there had been prior use. But Rood handled these matters in Los Angeles for McGrail, and after a decent interval, Rood, using McGrail's name, replied to SP-Oakland. Substantially stretching matters, Rood stated that SP-Los Angeles confirmed that Consolidated had taken delivery of cars on that spur, and that the spur owners "have given permission for Consolidated Container and other neighbors to use the lead because it does not interfere with their operation." SP-Oakland then advised Patton that he could proceed. Friend "Boyd" then sent friend "Al" the January 9, 1974 memo stating: "This should be sufficient to keep the PUC off your back and consider yourself on Rail." This is the memo Melideo gave to Marsha to file with the notation "this is our protection for getting rail rates."

On February 12, 1974 Patton shipped two trial railcar loads of steel in gondolas,[31] and in due course these passed through SP's Raymer Yard and were spotted for unloading on the Chandler spur. But then, as Melideo and Rood both stated, gondola cars proved too difficult to unload, and U.S. Steel would ship only in gondolas. Rood testified that when this problem was experienced, he ceased the experiment and did not negotiate or prepare the necessary third-party agreement. His foot in the door, Melideo, to create an aura of legitimacy to the embryonic on-rail status, now virtually still-born, on the strength of these trial shipment papers asked SP to be put on SP's authorized credit list (usually reserved for on-rail customers). On February 28, 1974 SP by form letter approved the request. Although he asserted that there were other rail shipments received,[32] Melideo strangely enough produced only the two rail freight bills noted above and was very hazy in his recollection just when these other shipments had been received. But thereafter Consolidated received its scrap steel from U.S. Steel by truck, using Kooyman and other carriers, and, on the strength of its asserted on-rail status, receiving alternative rail rates rather than paying the applicable MRT 2 rates. Melideo would also have us believe from his testimony, contrary to the evidence discussed above, that Patton started the

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31/ Melideo produced two freight bills. These covered the two gondola car shipments, one by gondola car SP 364122 and the other by gondola car SP 330435, both shipped February 12, 1974. The loads were of steel sheets (Waybills Nos. 21964 and 21963, respectively), consigned to Consolidated "C/o Chandler lead spur" from U.S. Steel, Pittsburg.

32/ Melideo recalled, but produced nothing to corroborate his general recollection, that he received about four railcars in 1973 (before the two gondola shipments), and four additional carloads after. But this completely conflicts, in time and in fact, with Rood's testimony, and with part of Melideo's own testimony and the documentation he introduced from SP and Patton. Melideo had no authority to use the Chandler spur before Rood obtained Votruba's approval for a trial use for the two gondola cars.

SP-Oakland-Los Angeles shell game exchange, designed to make it appear that Melideo was being "convinced" then that Consolidated was on-rail, after the trouble with the two gondola loads.

In addition, it appears to us that Rood's examination on the "computer numbers" with reference to SP's spotting system for railcars was only entered into evidence in an attempt to give a further aura of legitimacy to Melideo's previously noted hazy recollection of having received other rail shipments with SP's blessing, and to explain how this might be accomplished without the existence of a third-party agreement. However, on cross-examination the so-called "computer numbers" turned out to be no more than handwritten entries which customarily are entered into appropriate Southern Pacific Identification Number Systems (SPINS) books, books used by train operators to automatically route railcars to a specific spur. Whether Rood's recollected instructions ever got entered by the Raymer Yard or were ever used if they did get entered we do not know. No SPINS book with such entry was introduced into evidence. Apart from Melideo's hazy recollection we have no evidence of shipments by rail apart from the two gondola carloads. We find it significant that the only freight bills Consolidated saw fit to produce, or was able to produce, were the two pertaining to the gondola loads.

Did Kooyman and Consolidated, through the device of false documentation and billing, respectively provide and obtain transportation for property at less than the applicable minimum rates and charges established or approved by the Commission? The answer, as we will see, must be yes, and here the pivotal significance of the Van Nuys on-rail subterfuge becomes apparent. Since the Consolidated plants located in Sun Valley and Van Nuys are both located within Metropolitan Zone 204, as defined in the Commission Distance Table 8, and since both are

approximately equidistant from the nearest applicable SP team track, off-rail rates from U.S. Steel in Pittsburg for delivery to either destination would be the same. But, were the Van Nuys plant determined to be on-rail, truck deliveries to that plant would be entitled to the lower alternative rail rate, whereas truck deliveries to the Sun Valley plant cannot obtain rail rates. Therefore, if truck shipments could be consigned to an on-rail Van Nuys address and the transportation paid for at the lower alternative rail rates, but the shipments were actually to be diverted to an off-rail Sun Valley address, which should pay the full MRT 2 truck rates, the savings to Consolidated over a period of time would be substantial. And this was the fraud that Melideo and Kooyman perpetrated.

Here, during staff's initial survey of the Kooyman operations, and as a result of discrepancies perceived on the faces of certain of the freight bills looked at, staff determined that some of the deliveries apparently had been made to the Sun Valley location rather than to the Van Nuys' location listed and set forth in the freight bills and other documentation. Questioned by staff, Kooyman and his dispatcher steadfastly denied knowledge of any such diversions. But when staff prodded further and queried some of the subhaulers used, certain of these confirmed that many deliveries had indeed been made to Sun Valley, and as a regular practice. It also was turned up that deliveries were made to certain other locations as well.

At the hearing, despite vigorous obfuscatory tactics by respondents, staff, in support of its charges that numerous shipments set forth in Exhibit 6 had been delivered to destinations other than those stated on the documentation purporting to cover the deliveries, introduced testimony from four subhaulers who were subpenaed for that purpose. Norman C. Brock, questioned

about 6 loads consigned to Van Nuys, was vague about one, but stated that his son delivered two others, and that he had delivered the remaining three. But he delivered them not to Van Nuys, but to Sun Valley. He said he did this after being told to do so by Consolidated personnel after he showed up at Van Nuys with the first load. He said they had even drawn a map to assist him to get to Sun Valley via a back way. He further testified that later other drivers had informed him that all pup coil loads went to Sun Valley. Clarence Keathley, questioned about four loads consigned to Van Nuys, testified that he was told by either "Bob or Steve", Kooyman employees,[33/] to deliver all four loads to Sun Valley and that he did so. He said he was given the Sun Valley address and told to exit the freeway in Sun Valley at Penrose Avenue (the exit intersects one block away with Bradley Avenue where Consolidated is located in Sun Valley). Richard C. Leslie, queried about four loads consigned to Van Nuys, testified that he delivered one to Van Nuys but could not recall a second load. Two other loads were delivered by drivers in turn engaged by him. His records were all destroyed in a fire. The last subhauler called, Jack Marchio, questioned about six loads consigned to Van Nuys, testified to delivering one load there and four others to Sun Valley. He stated that a Kooyman employee, he recalls it being James Del Carlo,[34/] told him to do so. He also believed he had delivered the 6th load to Sun Valley, basing his recollection

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33/ Bob McCullock was the chief dispatcher for Kooyman. Steve McGee also dispatched at times.

34/ Del Carlo, although depreciated and described as a mere yardsman by the younger Kooyman, was obviously far more. He filled out and signed subhaul contracts for Kooyman, and did some dispatching.

on the fact that Steve Estrada, the Raders' forklift operator at Sun Valley, had receipted it.

Many of the delivery tags in Exhibit 6 bear the signature of "N. Rader" or "S. Estrada". Both work for George Rader, who, when called by the staff, testified that "most" of his sheet metal subcontract work for Consolidated was performed at Sun Valley. Rader signed for some loads, but stated he does not see well without glasses and does not concern himself with consignee addresses on delivery tags. Rader testified that when he or his daughter Nancy had to be away and a load came in at Sun Valley, his employee Steve Estrada would unload and would call one of them to subsequently process the metal. Staff also called Nancy Rader, who testified she received and processed loads at both Sun Valley and Van Nuys. In a deposition taken a scant two weeks before the hearing, Nancy Rader stated that a Kooyman employee would telephone whenever a load was to be delivered the next day and advise where it would arrive so she could arrange accordingly. But at the hearing she sought unconvincingly to recant, asserting that such was the current practice, whereas at the time in issue she had always learned from Consolidated when and where shipments would come in. She insisted that almost all loads came in to Van Nuys, but she could not remember any shipment in particular. Her testimony was faltering and hesitant, and contradictory in details to that of her father and subhauler witnesses.[35/] The ALJ, with ample opportunity to couple her demeanor at the hearing with her testimony, and to contrast the sum of these with the consistent thrust of her statements in the deposition, concluded that the contents of the deposition better reflected the situation existing at the time the shipments set forth in Exhibit 6 were received. We adopt his

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35/ One of the subhaulers competently described Nancy Rader, and testified that Sun Valley was the only location at which he ever saw her.

on the fact that Steve Estrada, the Raders' forklift operator at Sun Valley, had receipted it.

Many of the delivery tags in Exhibit 6 bear the signature of "N. Rader" or "S. Estrada". Both work for George Rader, who, when called by the staff, testified that "most" of his sheet metal subcontract work for Consolidated was performed at Sun Valley. Rader signed for some loads, but stated he does not see well without glasses and does not concern himself with consignee addresses on delivery tags. Rader testified that when he or his daughter Nancy had to be away and a load came in at Sun Valley, his employee Steve Estrada would unload and would call one of them to subsequently process the metal. Staff also called Nancy Rader, who testified she received and processed loads at both Sun Valley and Van Nuys. In a deposition taken a scant two weeks before the hearing, Nancy Rader stated that a Kooyman employee would telephone whenever a load was to be delivered the next day and advise where it would arrive so she could arrange accordingly. But at the hearing she sought unconvincingly to recant, asserting that such was the current practice, whereas at the time in issue she had always learned from Consolidated when and where shipments would come in. She insisted that almost all loads came in to Van Nuys, but she could not remember any shipment in particular. Her testimony was faltering and hesitant, and contradictory in details to that of her father and subhauler witnesses.[35/] The ALJ, with ample opportunity to couple her demeanor at the hearing with her testimony, and to contrast the sum of these with the consistent thrust of her statements in the deposition, concluded that the contents of the deposition better reflected the situation existing at the time the shipments set forth in Exhibit 6 were received. We adopt his

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35/ One of the subhaulers competently described Nancy Rader, and testified that Sun Valley was the only location at which he ever saw her.

conclusion. The gist of her deposition may be summed up in the following extract taken from it:

> Question: "But some one from Kooyman would call you and say it will be whatever number of truckloads arriving at a certain Consolidated location and you would go there and the trucks would come in at that point?
>
> Answer: "Right. They would call, they would call when they load them and I would go. That is correct."

Melideo's assertions that during the period at issue all truckloads were supposed to be delivered to Van Nuys are just not believable. Clearly, from the evidence presented, while some shipments did go to Van Nuys, numerous others not only went to Sun Valley, but it had been intended that they were to go there and arrangements had been made by Kooyman and/or Consolidated to that result. As we have heard,in one instance a Consolidated employee had even sketched out a map to aid in the diversion when delivery came to Van Nuys through the driver's innocent reliance upon his delivery tag address. It is suggested that the misdeliveries were unilateral acts by subhaulers. But misdeliveries to Sun Valley in the number made could not have happened without strong reaction, and there is not an iota of evidence to support the possibility of subhauler diversions. Furthermore, from his statements and demeanor at the hearing,it was abundantly clear that Melideo runs Consolidated, and that he is not the type of individual who would have stood for that. In addition, Nancy Rader testified that truckloads came to both facilities. We have already determined that she was regularly informed in advance from Kooyman concerning which location trucks were coming to. George Rader testified that "most" of their Consolidated work was at Sun Valley. Many of the delivery tags were receipted by Steve Estrada,

who, according to George Rader, was his man at Sun Valley, and who was identified by several subhaulers as being the forklift operator who unloaded them at Sun Valley. Finally, a number of the shipper's bills of lading (and even delivery tags) show that still other truckloads were delivered to Rich Steel and Mace Metals, both located at locations other than either Van Nuys (the ostensible consignee address) or Sun Valley.

For their part, the Kooymans vigorously assert that neither they nor their employees had knowledge that shipments consigned to Consolidated at Van Nuys were being delivered to Sun Valley. They went on plaintively to state that they had received no complaints to alert them! But this is nonsense. Who was to complain? It was all going just as Consolidated wanted and had planned for, and as Kooyman had compliantly agreed to. The subhaulers did as they were instructed. As one stated relevant to the diversions, he did "not really care where the stuff went." The subhaulers would have gotten the same payment for a delivery to either location, and besides, as was pointed out in another context, it was quicker to be unloaded at Sun Valley. Kooyman employees prepared or caused preparation of the documentation for the transportation to be provided and engaged the subhaulers used. In some instances Kooyman employees personally instructed these subhaulers to make the delivery to an address other than that documented; one even told subhauler Keathley which exit to use to reach the Sun Valley facility, although the delivery was consigned to Van Nuys. Kooyman employees routinely telephoned Nancy Rader in advance of dispatching shipments so she would know where to anticipate a delivery. Are we also to believe that it was by chance that truckloads consigned to Consolidated at Van Nuys instead arrived at Mace Metals or Rich Steel,

or that truckloads billed as being picked up at U.S. Steel in Pittsburg were actually picked up at United Can in Hayward, or Metal Purchasing Company in Oakland?

For these reasons, as stated earlier, we conclude that Kooyman, in violation of PU Code §§ 3664, 3667, and 3668, and Consolidated, in violation of PU Code § 3669, using the devices of false documentation and billing in conjunction with willful misrepresentation of the off-rail status of Consolidated, respectively provided and obtained transportation for property at less than the applicable minimim rates and charges established or approved by this Commission. In view of the evidence we have determined that the total of the undercharges represented by the freight bills included in the OII as they relate to the Kooyman-Consolidated transportation is $13,879.52. These undercharges are set forth in detail in Exhibit 8. Under PU Code § 3800, the Commission will order imposition of a $13,879.52 fine upon Kooyman, and Kooyman will be required to collect undercharges in a like amount from Consolidated.[36/]

But the matter cannot rest there. The detailed and dovetailing corollary preparation of the off-rail subterfuge at Van Nuys, the span of time involved, the number of truckloads, the conforming cooperation of Kooyman resulting in the consistent pattern of diverted deliveries to Sun Valley all convince this Commission that the practices here uncovered were more than an occasional lapse or the mere consequence of sloppy supervision on the part of both Kooyman and Melideo. The evidence compels the conclusion that it was a calculated scheme in which Kooyman and Melideo were active partners; a scheme of deception concocted and operated for the express purpose of evading the minimum rate tariffs

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36/ See footnote 9, supra.

by disguising deliveries to a known and accepted off-rail destination at Sun Valley by means of deliberate false documentation which purported to show delivery to an entirely different destination, one which upon casual or superficial examination would appear to be on-rail, but which in fact was not only off-rail, but was known to be off-rail by both Kooyman and Melideo.

Under PU Code § 3774, the Commission has authority to cancel, revoke, or suspend the operating authority of any highway carrier for violations, or in the alternative, impose a fine not to exceed $5,000. The Commission does not usually favor revocations or suspensions of operating authority unless there has been present some voluntary act in defiance of our statutes, Commission orders, etc. (Kinzel (1967) 66 CPUC 816). The reason is that such punitive action causes abrupt discontinuance or interruption of a carrier's operations, seriously inconveniencing those shippers otherwise regularly served by the carrier, about which service there have been no complaints. It also means the loss of a number of jobs and may deprive the permit holder of his livelihood. Therefore, fines are usually relied upon unless the severity of the offense or repetition of offenses shows that revocation or suspension of operating authority appears to be the only means of bringing about compliance with our statutes, orders, etc.

However, the Commission has also considered falsification of documentation to be a most serious offense,[37] one that

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37/ The issuance by the carrier of a freight bill which contains all the information necessary to determine whether or not the established minimum rates are applicable is obviously essential to proper enforcement (In re Rates, Rules & Regulations of Common Carriers & Highway Carriers (1938) 41 CRC 671). Furthermore, the overlying carrier is responsible for any errors or omissions in documentation irrespective of whether he, a subhauler, a shipper, or anyone else prepares it (Leonard F. Schempp (1966) 66 CPUC 578).

should be punished by the imposition of suspensions or heavy fines (In re Minimum Rate Tariff 7 (1964) 64 CPUC 689; La Marr Dump Truck Service (1966) 66 CPUC 337). In this instance our staff has recommended most strongly that in view of the gravity of Kooyman's offense, all of Kooyman's operating authorities should be suspended for 20 days, believing that a mere monetary fine is not enough. Staff notes that 90 to 95% of Kooyman's operations are conducted through subhaulers; accordingly, innocent parties such as these subhaulers would be relatively unaffected as they could continue to haul during the suspension period, although it would be for another prime carrier.

We conclude that the evidence shows nothing less than a clear intent on the part of Kooyman to participate contemptuously and fully with Melideo in this scheme to circumvent and disregard the minimum rate tariff. Furthermore, Kooyman's persistence, through the investigation and during this protracted hearing, in attempts to conceal falsification of documents, as for example, in the Sun Valley diversions, only serves to show continuing disdain for Commission authority. Carriers such as Kooyman must be made to realize that falsification of documents will not be tolerated. In this instance the violations were not sporadic occurrences; on the contrary they were routine and came to represent a consistent pattern with respect to Consolidated. Kooyman is a repeat offender. More than a mere monetary fine is indicated; imposition of the maximum fine permitted under PU Code § 3774 would not be a sufficient deterrent. Therefore, we will adopt staff's recommendation and suspend all of Kooyman's operating authorities for a period of 20 calendar days. In addition, seeing the disregard for the Code which the Kooyman-Consolidated combination appears to nurture, we will impose a further cooling-off period, and also order Kooyman not to serve Consolidated for an additional period of three months.

We regret that as a consequence of the working of the Statute of Limitations, it appears we cannot reach Consolidated and/or Melideo to impose civil penalties under PU Code § 3804 for its and/or his nefarious role in these violations.

Findings of Fact

1. During 1977 and 1978 Kooyman was engaged in the business of transporting property for compensation upon the public highways under a radial highway common carrier permit issued February 1, 1960.

2. Kooyman was served with all applicable minimum rate tariffs and the distance tables, together with all supplements and additions.

3. On various dates in 1978 staff conducted a routine investigation into the operations, rates, and practices of Kooyman relative to transportation services provided by Kooyman to Ralston from October 11, 1977 through April 5, 1978, to Doolan from February 28, 1978 through March 24, 1978, and to Consolidated from October 5, 1977 through March 15, 1978.

4. Staff's investigation disclosed that Kooyman had assessed and collected from Ralston, Doolan, and Consolidated rates and charges less than the applicable MRT 2 rates and charges, resulting in alleged undercharges of $87,872.04, $982.15, and $13,879.52, respectively.

5. As a consequence of staff's investigation, the Commission on its own motion on May 8, 1979 instituted this proceeding, OII 44, naming Kooyman, Ralston, Doolan, and Consolidated as respondents.

6. Public hearing on the issues was held on various days between October 30, 1979 and March 12, 1980, with the matter being submitted for decision on May 12, 1980 upon receipt of briefs.

7. Early in the public hearing, Kooyman, Ralston, and staff joined in a stipulation which essentially compromised the issues in that part of then alleged undercharged shipments relating to the Ralston tin plate shipments, while adopting staff's determination of the undercharges relating to the Ralston frozen fish and canned goods shipments at issue.

8. The stipulation between Kooyman, Ralston, and staff is an equitable and just resolution of the issues. It provides that Kooyman charged and collected from Ralston a total of $25,679.15 less than the lawfully prescribed minimum rates, that there was no false documentation or billing involved in the Ralston transportation, and that Kooyman should collect the $25,679.15 undercharges from Ralston.

9. The minimum rates and charges applicable to the Doolan shipments as computed by staff and set forth in Exhibits 7 and 11 are correct.

10. As detailed in Exhibits 7 and 11, Kooyman charged and collected from Doolan a total of $982.15 less than the lawfully prescribed minimum rates.

11. There was presented no evidence of culpability on the part of either Kooyman or Doolan pertaining to the shipments Kooyman transported at less than minimum rates for Doolan.

12. Consolidated failed to make a prima facie case of an illegal entry or search of its Van Nuys or Sun Valley premises to support its motion that this Commission should invoke the exclusionary rule to reject the testimony and/or evidence of witnesses Paasche or Morris.

13. There was insufficient evidence to support any finding of Conti Trucking-staff complicity involved in the staff investigation or in this proceeding.

14. The facts that Consolidated was not advised earlier of its off-rail status by staff, or that Paasche inadvertently retained a copy of the 1972 spur track report, do not serve to deprive Consolidated of any right guaranteed under either the federal or state constitution to be confronted during investigation.

15. There is no California Rule of Professional Conduct, or ethical standard in the American Bar Association's Code of Professional Responsibility, that prohibits communication by staff counsel without consent of opposing counsel with a witness for an adverse party, even though a second adverse party subsequently elects to call the same witness.

16. Within the physical confines of its Van Nuys' property, Consolidated did not maintain facilities for the unloading of property from rail cars.

17. Melideo at all times relevant was aware that Consolidated's Van Nuys' property was off-rail, as was the Sun Valley property.

18. Melideo's original dealings with Patton, Rood, and Votruba were entered into in an effort to enable Consolidated to obtain scrap steel shipments from U.S. Steel by rail via the Chandler spur.

19. Melideo, Rood, and Patton, acting in concert, subverted the SP verification process to enable Consolidated to receive the initial two trial rail shipments from U.S. Steel in February 1974 on the Chandler spur.

20. When the initial two trial rail shipments by gondola cars in February 1974 proved the unfeasibility of unloading scrap shipped by rail, Melideo carried through to obtain SP credit arrangements to create an impression that Consolidated was entitled to and would continue to receive rail shipments, whereas Melideo really was seeking

a cover behind which thereafter he could apply on-rail rates for continuing shipments of steel to be made, not by rail, but by truck to Consolidated's Van Nuys plant.

21. Melideo then used the on-rail cover created for the Van Nuys property to provide a subterfuge behind which, and with the collusion of highway carriers including Kooyman, many truck shipments could be diverted to Sun Valley while applying the Van Nuys on-rail rates.

22. Melideo, in collusion with Kooyman, caused falsification to be made of the documentation covering most of the shipments at issue to show delivery to Van Nuys while arranging and causing the actual delivery to be made to Sun Valley and other locations.

23. Melideo and Kooyman were active partners in a calculated scheme of deception concocted and operated for the express purpose of evading the minimum rate tariff through extensive use of false documentation and subterfuge in diverting truck shipments consigned to Van Nuys to Sun Valley.

24. The only rail deliveries to Consolidated over the Chandler spur track which can in any sense be deemed to have been authorized by both the Chandler spur owners and SP, were the two trial shipments of steel scrap in gondola cars from U.S. Steel in February 1974.

25. Since Consolidated had no enforceable contractual authorization (i.e., third-party agreement) which entitled it to a continuing usage of not only the Chandler rail spur but also the SP right-of-way property across Cabrito Road (where any unloading of rail cars would have to be performed), Consolidated's Van Nuys property cannot be deemed to include any contiguous property upon which facilities for the unloading of property from rail cars are maintained.

26. Kooyman had repeated indications that the Consolidated property at Van Nuys was not on-rail, and after learning of the Patton threat, was under a particular obligation to verify for himself the actual situation.

27. Kooyman employees, while consigning shipment after shipment to Consolidated at Van Nuys, and applying rates assertedly

slightly higher than on-rail rates, repeatedly and by design diverted the subhaulers transporting many of the truckloads of steel to Consolidated at Sun Valley.

28. Nancy Rader and her father subcontracted receiving and sheet metal processing services to Consolidated, primarily at Sun Valley.

29. Kooyman employees would regularly telephone Nancy Rader before dispatching truckloads of steel scrap, thereby alerting her in advance of their arrival and actual destination point.

30. The minimum rates and charges applicable to the Consolidated shipments, as computed and set forth in Exhibits 6 and 8, are correct.

31. Kooyman and/or his employees working under his direction repeatedly falsified or caused the falsification of shipping documents, and charged and collected from Consolidated for the transportation furnished a total of $13,879.52 less than the lawfully prescribed minimum rates.

32. Kooyman is a repeat offender.

33. Imposition of the maximum monetary fine permitted under PU Code § 3774 would not be a sufficient deterrent against future offenses.

Conclusions of Law

1. Kooyman violated PU Code §§ 3664 and 3737 by reason of undercharging for the transportation services furnished Ralston.

2. Kooyman should pay a fine under PU Code § 3800 in the amount of $25,679.15

3. Kooyman should collect from Ralston the difference between the charges collected and the proper charges as determined under the stipulation, in the amount of $25,679.15 under PU Code § 3800.

4. With respect to the transportation services provided Ralston no other penalties or sanctions are warranted.

5. Kooyman violated PU Code § 3664 by reason of undercharging for the transportation services furnished Doolan.

6. Kooyman should pay a fine under PU Code § 3800 in the amount of $982.15.

7. Kooyman should be ordered to collect from Doolan the difference between the charges collected and the proper charges in the amount of $982.15 under PU Code § 3800.

8. With respect to the transportation services provided Doolan no other penalties or sanctions are warranted.

9. No basis was shown for the Commission to decline to accept jurisdiction or to dismiss the proceedings insofar as they relate to the Kooyman-Consolidated transportation.

10. Consolidated's motion to exclude testimony or evidence of witnesses Paasche and/or Morris was correctly denied.

11. Consolidated was not deprived of the constitutional right of early confrontation.

12. There was no misconduct on the part of staff counsel in communicating with an adverse party's witness without consent of opposing counsel during the course of the hearing.

13. Consolidated's Sun Valley facility was not on-rail as that term was contemplated under Item 11 of MRT 2.

14. At no time during the time at issue was Consolidated's Van Nuys Arminta Street facility on-rail as that term was contemplated under Item 11 of MRT 2.

15. Kooyman violated PU Code §§ 3664, 3667, and 3668 by reason of undercharging for the transportation services furnished Consolidated, and by using known false billing.

16. Kooyman should pay a fine under PU Code § 3800 in the amount of $13,879.52.

17. Kooyman should be ordered to collect from Consolidated the difference between the charges collected and the proper charges in the amount of $13,879.52 under PU Code § 3800.

18. All Kooyman's operating authorities should be suspended, under PU Code § 3774, for a period of 20 calendar days.

19. Kooyman should be ordered not to serve Consolidated for an additional period of three months.

20. Kooyman should be directed to cease and desist from violating the rates and the rules of the Commission.

21. Consolidated violated PU Code § 3669.

22. The Statute of Limitations applicable to the efforts of permitted carriers to collect undercharges is that set forth in PU Code § 3671, and the time from which the cause of action accrues under § 3671 is the effective date of the Commission decision finding the existence of undercharges, not the date of delivery or tender of delivery.

O R D E R

IT IS ORDERED that:

1. Pete J. Kooyman shall pay a fine in the aggregate sum of $40,540.82 to this Commission under PU Code § 3800 on or before the 40th day after the effective date of this order.

2. Pete J. Kooyman properly collected from respondent shipper Ralston Purina Company and is ordered to collect from respondent shippers Doolan Industries, Inc. and Consolidated Container Corporation (Consolidated) the difference between the charges collected and the charges due as set forth respectively in Findings 8, 10, and 31 above and shall proceed promptly, diligently, and in good faith to pursue all reasonable measures to collect unpaid undercharges, having due regard to Conclusion of Law 22 above. In the event the undercharges ordered to be collected by this order, or any part of such undercharges, remain uncollected 60 days after the effective date of this order, respondent Pete J. Kooyman shall file with the Commission, on the first Monday of each month after the end of the 60 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. Failure to file any such monthly report within 15 days after the due date shall result in the automatic suspension of respondent's operating authority until the report is filed.

3. Pete J. Kooyman is placed on notice that failure to collect the undercharges will not serve as an equitable cause for a reduction in the undercharge fine under PU Code § 3800.

4. Pete J. Kooyman 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, or from using false billing devices.

5. All operating authorities issued to Pete J. Kooyman are suspended for a period of 20 consecutive days commencing on the effective date of this order.

6. Pete J. Kooyman shall cease and desist from offering or performing any transportation services to Consolidated for a period of three months commencing upon expiration of the 20-day suspension period set forth in Ordering Paragraph 5.

The Executive Director shall have this order personally served upon respondent Pete J. Kooyman and served by mail upon all other respondents.

The order shall become effective for each respondent 30 days after order is served.

Dated MAY 4 1982, at San Francisco, California.

JOHN E. BRYSON
President
RICHARD D. GRAVELLE
LEONARD M. GRIMES, JR.
VICTOR CALVO
PRISCILLA C. GREW
Commissioners

I CERTIFY THAT THIS DECISION WAS APPROVED BY THE ABOVE COMMISSIONERS TODAY.

Joseph E. Bodovitz, Executive Director

APPENDIX A
Page 1

ALJ's Ruling on Consolidated's
"Fruit of the Poisoned Tree" Objection

"Violations under the Public Utilities' Code are not penal code violations; rather, they are civil offenses punishable as set forth in the Public Utilities Code. Administrative proceedings such as the instant proceeding are conducted to determine whether prohibited acts were committed and what should be the indicated punishment if the acts were done. These proceedings partake in part the nature of a quasi-criminal proceeding.

"The primary objective of evidentiary rules is to protect those who may be factually innocent, by requiring credible, probative evidence. But although evidentiary rules are relaxed in our administrative hearings, that fact has no bearing on the applicability of exclusionary rules in administrative proceedings.

"Exclusionary rules arise out of the Fourth Amendment to the Federal Constitution, which amendment prohibits, as relevant here, unreasonable searches. The rules developed out of the WONG SUN decision (Wong Sun v U.S. (1963) 371 US 471), holding that the fruit of the poisoned tree should be suppressed; that evidence obtained as the consequence of an illegal search should not be allowed into the record as it is evidence obtained in violation of constitutional due process. Its primary development has been in the criminal law arena. In California, while the courts have applied the exclusionary rules to civil proceedings which were imbued with quasi-criminal aspects, in certain instances illegally obtained evidence which was neither coerced nor obtained in ways that shock the conscience has been held to be admissible.

"Further, in California, the State Supreme Court has held that exclusionary rules are not part of administrative due

process. However, the court has also held that circumstances can exist under which fundamental due process requirements could not countenance the use of evidence which is unlawfully obtained in such a proceeding conducted by a government agency. The court in California holds that a balancing test must be applied in administrative proceedings, and consideration given to the consequences of applying exclusionary rules in a given situation. Thus it is clear that a state agent, acting under color of his authority, may so act as to violate Fourth Amendment strictures, forcing suppression of the evidence he has obtained illegally.

"More recently, it has been held that an administrative agency's representative, entering without consent upon a portion of a commercial premises not open to the public, accomplishes his agency's objective illegally. By so doing he may exceed constitutional bounds if his investigation extends beyond reasonable perimeters. If he observes things which are in plain sight from a place in an office where he has no right to be, or where he is uninvited, the intrusion may also be unlawful unless there are exigent circumstances, or jeopardy to life or property, which compel his presence. Administrative convenience is not an exigent circumstance.

"Now the courts have also looked to the surrounding area to see if the area was open to public use; if so, the occupant cannot claim to expect privacy from all observations. This doctrine has been carried to the extent of establishing in effect a hierarchy of protected places. That is, some places are regarded as so public in nature that searches are justified (e.g. open fields). The test is whether there was a subjective expectation of privacy in the site.

"Now in the instant proceedings, if the evidence were to show that the state agents, Paasche and Morris, entered the Consolidated building improperly and without identification; then crossed through the building to gain entry to the rear enclosed areas without permission, and accomplished this by stealth or by other means of trespass that unreasonably violate the proprietor's reasonable expectations of privacy, the evidence they obtained in this manner could be tainted, and a motion to suppress would then be upheld.

"Certainly Consolidated is entitled to the privacy of its office premises.

"But in this case how did Morris and Paasche get to the rear area where the spur and switch are located? Neither the spur nor the switch are on Consolidated's property. Neither Chandler nor McDonald nor their sublessees are complaining of any trespass here. Morris testified that he went to the front door, entered, saw a receptionist, and identified himself to her. He was conducted, he testified, through to the rear area. He did not recall whether it was a man, woman, or who it was. Paasche testified he also entered the plant at Arminta Street, talked to the receptionist and asked to see the owner or manager and gave his card. He and Mr. Melideo had an argument.

"Now, earlier Paasche had been there and had driven around the property. Both Arminta Street and Cabrito are public ways. From Cabrito it is possible to observe the area through fences where the spur and the track and the switch are involved. The testimony presented by Mr. Paasche is that he was on S.P. property and on a public street. He surmised the borders by the fence perimeters. We have testimony that there are signs on the fences indicating it is private property.

"There was no trespassing. And certainly, I think, with the fence, the reasonable interpretation would be that the property

beyond the fence, that is, inside the fence, is that which is protected. There is no evidence that Cabrito is not a public way, whatever its state of improvement. In fact, Mr. Melideo testified that the property owners had unsuccessfully tried to get together to get the city to improve it by paving.

"Now, opposed to this, we have Mr. Melideo's testimony and what his policy regarding visitors is. But the problem there is that Mr. Melideo was not present at the complained of visits when the evidence was obtained. He has no personal knowledge of what took place. Indeed, the inference is that he learned after the fact of Morris' and Paasche's visits, presumably from his employees, and that this is what induced his June outburst with Mr. Paasche on the subsequent visit.

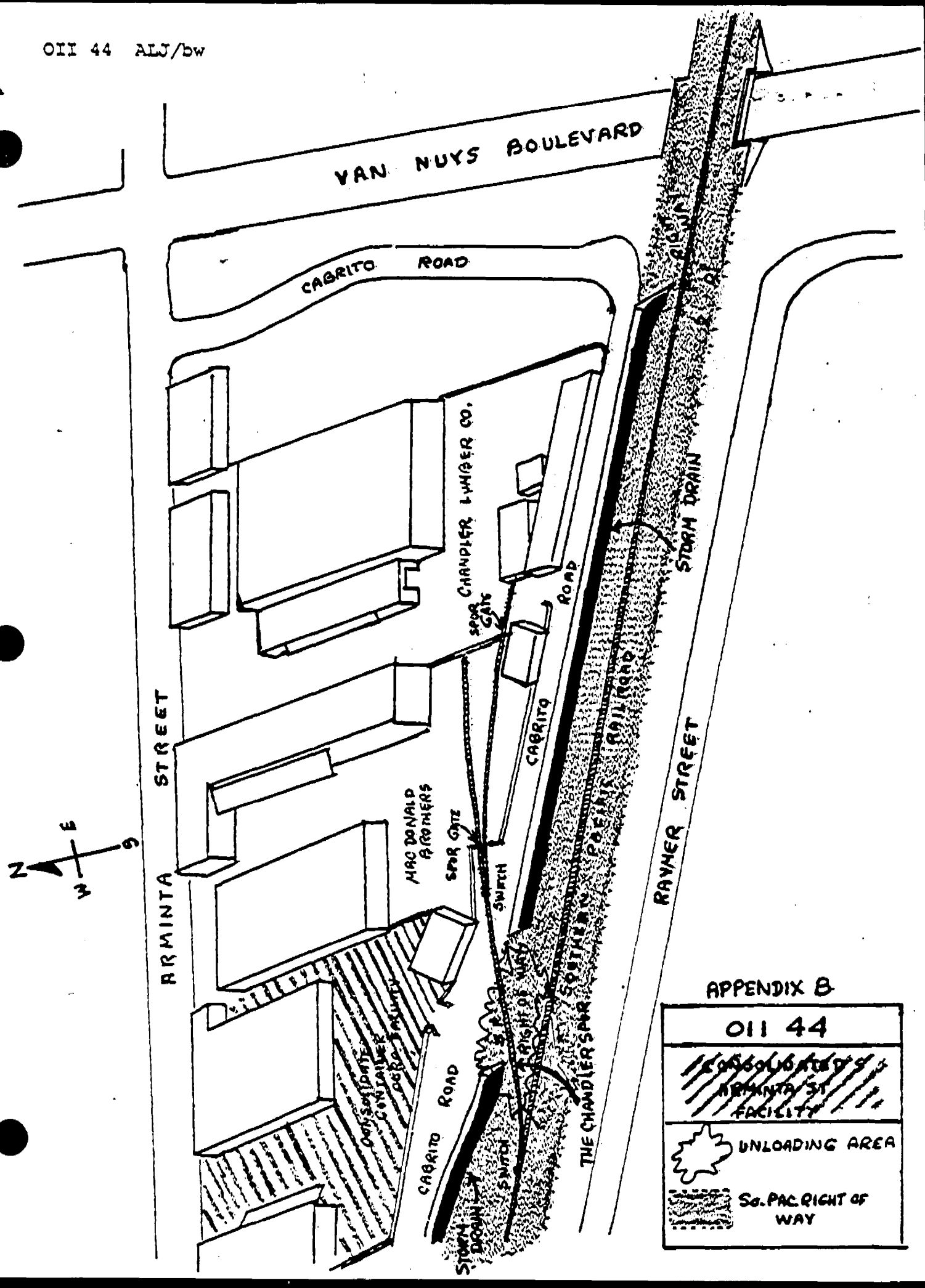
"Certainly the company records would show who was on the reception desk on the dates of the Morris and Paasche visits. And that receptionist could have been subpoenaed or brought in, or at least a deposition taken if she could testify to the contrary. There has been nothing presented as to who the conductor might have been.

"Now, that policy would not permit the entry of Morris and Paasche is one thing, but that does not mean that the complained of visits did not happen as Morris and Paasche testified. We have abundant testimony in the case of both SP and Chandler witnesses to indicate that policy is not always identical to actions of employees and intent of the policymakers. Honold's and Newkirk's testimony was on policy, but we see that Rood and Votruba did not adhere to policy.

"As I stated earlier, in these situations the defendant has the burden of coming forward and establishing a prima facie evidence of an illegal search. It is my ruling that respondent

Consolidated here has failed to make the prima facie case required to invoke the exclusionary rule. Therefore, the evidence will be allowed to remain in the record, and the motion to suppress is denied."

(END OF APPENDIX A)


VAN NUYS BOULEVARD
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ARMINTA STREET
MAC DONALD AROMERS
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CONSOLIDATED'S ARMINTA ST. FACILITY
UNLOADING AREA
So. PAC. RIGHT OF WAY

willfullness with respect to the stringency of the penalty to be assessed (Progressive Transportation Co. (1961) 58 CPUC 462).

In the instant proceeding, with reference to the Ralston shipments, the parties stipulated that no false documentation or billing had been involved. The undercharges arose out of application of wrong rates and charges. But as we examine the evidence to determine whether there has been culpable conduct, we observe that permeating the record there is the strong inference that interpretation of the tariff to determine what rates and charges should have been applied appears to have been largely left up to Ralston's traffic personnel. Ralston's Thompson and Mueller appear to have made the decisions, with Kooyman being content to abide by their interpretations. The errors appear to have been judgmental, but it is obvious that the carrier did not do his job. The carrier, not the shipper, has the prime duty of ascertaining the applicable rate to be charged, and it cannot be relieved of this burden by relying upon information supplied by the shipper (Dee Smith Trucking Co. (1966) 66 CPUC 343). Ignorance cannot continue to excuse the carrier. We take official notice of the fact that in C.9422, a 1973 matter, Kooyman in his defense pleaded reliance upon another shipper as the cause for the resulting undercharges, and in mitigation stated that he had acquired the services of an experienced rate clerk and had also retained the services of a traffic consultant to audit his bills. Here, as there, we found no intent to evade the tariff provisions, but we do serve notice that while in this instance we will assess no § 3774 punitive penalty for the Ralston shipments, in the future we will not accept the excuse of reliance upon the shipper for rates and charges determinations.

Melideo, relevant to this objection and motion to suppress, testified that his employees had told him that a PUC person had been upon both his Arminta and Bradley properties without his permission, and that therefore he was not receptive when Paasche arrived shortly after, being resentful (in view of Patton's earlier threats while with Conti Trucking) that there were apparently investigations going on about him and that he had not been notified. He testified that on both locations he had numerous signs in both English and Spanish posted against trespassing, that no one was delegated authority to give permission to enter when he was unavailable, and that his employees would not even consider doing it without his permission. Finally, he testified that Ricardo Vasquez, apart from technical matters, has "some difficulty in understanding English."

We have reviewed the ALJ's ruling and the testimony regarding this objection and motion to supress. We conclude that the ALJ was correct in his result, namely, that no evidence need be suppressed. As the ALJ discusses, the evidence requested to be supressed was obtained either from the Commission employees making observations from public streets or on the property of the Southern Pacific Transportation Company, where they had a right to be, pursuant to validly obtained consent from Consolidated employees to enter Consolidated's properties accompanied by Consolidated employees. No convincing demonstration of trespass or violation of a reasonable ~~expection~~ expectation of privacy has been made.

The Commission adopts the ALJ ruling as its own to the extent the ALJ discusses the facts involved and determines that, by reason of plain view and consent, application of the exclusionary rule is unnecessary. Other than as to these matters there is no need to adopt the ALJ's ruling and we do not do so.

Before we can proceed to the substantive issues involved in the investigation involving the Consolidated transportation, we must also resolve the remaining objections and motions to dismiss which were entered by the attorneys for Kooyman and/or Consolidated. These

objections and motions, involving as they do, proposed final dispositions of the OII, were properly taken under submission and reserved for our disposition by the ALJ. Our disposition of each of these follows:

Consolidated's Jurisdictional Objection: We are asked either not to assert jurisdiction or to dismiss the charges against Consolidated because, it is asserted, the evidence introduced shows that the rail rate structure, including the alternative rail rate

"This should be sufficient to keep the PUC
off your back and consider yourself on Rail.
Regards Boyd" (Exhibit 37.)

Melideo had this filed after adding the comment: "Marsha - file & this is our protection for getting Rail Rates." Thereafter Melideo testified, after asking and getting confirmation of the on-rail status from Kooyman,[15/] Consolidated shipped steel to the Arminta Street facility from U.S. Steel using Kooyman as carrier and applying alternate rail rates. Melideo also related that in 1974, at Consolidated's request, SP approved its inclusion on SP's authorized credit list for payment of transportation charges. He then introduced Exhibit 38, a confirming letter signed by SP's vice president and treasurer, McLean).

Melideo further testified that about 1975 or 1976 he transferred his trucking business to Conti Trucking when Patton left U.S. Steel and began acting as a soliciting agent for Conti Trucking. He described how Gene Conti also affirmed, after checking, that Consolidated was on-rail. Later after dissatisfaction with Conti set in, Melideo switched back to Kooyman in late 1976 or 1977, and Melideo testified that Patton threatened that if Consolidated left Conti Trucking, Patton would prove Consolidated was not on-rail, causing loss of alternative rail rates. Again Kooyman checked and confirmed that Consolidated was on-rail. Teresi was also used and it also told Melideo that Consolidated was on-rail. Melideo, questioned if ever he contacted the PUC on the on-off-rail issue, testified that in 1973 or 1974 he phoned and tried to discuss his location and rail rates, but could get no interest in his problem, and he does not recall whom he talked to. He testified that until

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15/ Melideo testified that Kooyman told Consolidated "he had checked with the PUC, had checked with U.S. Steel, and we were considered to be on rail."

had in 1978 not been checked recently for compliance with provisions of the PUC and Commission regulations. In line with his responsibilities as chief enforcement officer of that territory, Paasche recommended that an initial survey be made of Kooyman's operations, rates, charges, and practices. A check was authorized and routine investigation was initiated. Spot-checks disclosed clear discrepancies involving certain accounts including Consolidated. The ordering of a spur check report is the first step when alternative rail rate applications are involved.

It is alleged by Consolidated that somehow Conti Trucking had motivated the investigation in revenge for losing the Consolidated business several years earlier; that a staff employee working closely with Paasche in the Stockton office was in effect working both sides of the street and to accommodate Conti Trucking had helpfully instigated the "routine survey". To support this allegation, Consolidated points to the indelicate fact of the appearance of a Commission enforcement employee attending an industry association meeting, seated with, and for all intents and purposes, representing Conti Trucking.[16/] Consolidated and Kooyman query their being singled out when the same on-rail rates were charged earlier when Conti Trucking was doing the hauling. In this vein it is noted that after stressing in his testimony the routiness of the way Kooyman was selected for audit,when questioned about his initial comment that in initiating the survey he had centered in on a number of accounts based on "prior knowledge," Paasche explained that meant the type of account involved and its size, or if the name was familiar (in that he had run into it before for other violations), but that "In this particular survey, I hit the bigger accounts." (Emphasis added.) As

16/ Unfortunately, staff made no attempt to explain or otherwise controvert the inference that flows from these allegations.

Regrettable as is any public appearance of formal or informal relationship between a staff member and a regulated carrier, the record in this instance clearly shows that the staffer at issue played no role in this investigation except to perform quasi-clerical tasks such as photocopying documents for Paasche and pulling material from the files upon request. Paasche testified that to his knowledge the staff member had never worked for or received any compensation for services such as consulting from Conti Trucking and had taken no substantial leave of absence while working for Paasche. The respondents, had they wished to pursue this issue further, could have subpenaed the staff member to do so. But as it was developed, the record cannot support any conclusion that the staff member's activities in any way tainted this investigation; the most that can be sustained is less than a surmise.

Finally, we note that a significant number of the suspect shipments involved, consigned according to their respective shipping documents to the Van Nuys Arminta Street facility of Consolidated, were, according to staff's allegations and the sworn testimony of witnesses, in fact either delivered to or diverted to Consolidated's Sun Vally Bradley Avenue facility, raising issues quite apart from failure to assess off-rail rates. We will turn to these later.

After considering the above-stated evidence and arguments, we conclude that there was no Conti Trucking-staff complicity involved in the instant investigation, and the fact that Consolidated was not advised in 1972 or 1973 of its off-rail status, or that Paasche inadvertently retained possession of a copy of the 1972 Consolidated spur track report over the subsequent years, does not serve to deprive Consolidated of any constitutionally guaranteed procedural opportunity

considering the divergent facilities used by different consignees to receive property, it is also clear that it is not possible to apply a general rule to cover all situations. In each instance the physical configuration and characteristics of a consignee's claimed "point of destination" must be considered to determine his status. In this regard, a brief review of our determinations in earlier cases involving somewhat similar facilities can be helpful.

First of all, it is not essential that there be a rail spur extending unto consignee's property itself. In Investigation of Robert Sell (1958) 56 CPUC 277, and Investigation of Anderson Trucking (1959) 57 CPUC 225, we held that it suffices if consignee's property is adjacent to a spur track from which unloading can be done in the normal manner. In Sell, the consignee at issue was located on property leased from the railroad and the property used for unloading was part of the railroad's right-of-way. There was a team track belonging to the railroad 60 feet away. A fence and a gate separated the leased property and the team track area. The consignee used the railroad-owned area between the leased property and the team track to unload both trucks and rail cars. On these facts we concluded that inasmuch as the areas were contiguous we would consider the leased property and the area adjacent to the team track as constituting one single receiving area so that they became a single point of destination.

In Anderson we have three similar situations. The property of one consignee was situated adjacent to and alongside a spur track. Railroad cars were unloaded at the track and lumber was carried by a forklift through a gate 6 to 8 feet from the track unto consignee's yard. The consignee had an agreement with the railroad to spot cars alongside its yard on the spur track for loading and unloading. Another consignee had the 200-foot width of the rear of its property

2. Pete J. Kooyman properly collected from respondent shipper Ralston Purina Company and is ordered to collect from respondent shippers Doolan Industries, Inc. and Consolidated Container Corporation (Consolidated) the difference between the charges collected and the charges due as set forth respectively in Findings 8, 10, and 30 above and shall proceed promptly, diligently, and in good faith to pursue all reasonable measures to collect unpaid undercharges, having due regard to Conclusion of Law 23 above. In the event the undercharges ordered to be collected by this order, or any part of such undercharges, remain uncollected 60 days after the effective date of this order, respondent Pete J. Kooyman shall file with the Commission, on the first Monday of each month after the end of the 60 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. Failure to file any such monthly report within 15 days after the due date shall result in the automatic suspension of respondent's operating authority until the report is filed.

3. Pete J. Kooyman is placed on notice that failure to collect the undercharges will not serve as an equitable cause for a reduction in the undercharge fine under PU Code § 3800.

4. Pete J. Kooyman 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, or from using false billing devices.

5. All operating authorities issued to Pete J. Kooyman are suspended for a period of 20 consecutive days commencing on the effective date of this order.