

Decision No. 92328 October 22, 1980

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 DOLPHIN TRANSPORTATION, INC., a California corporation, and THE FIRESTONE TIRE AND RUBBER COMPANY, an Ohio corporation.

OII No. 38
(Filed March 13, 1979)

Application of DOLPHIN TRANSPORTATION, INC., seeking to modify restrictions concerning the use of subhaulers on shipments transported for Firestone Tire and Rubber Company and Mead Products, at rates authorized pursuant to Section 3666 of the Public Utilities Code of the State of California.

Application No. 59667
(Filed May 14, 1980)

Donald Murchison, Attorney at Law, for Dolphin Transportation, Inc., respondent in OII 38 and applicant in A.59667.
William C. Bricca, Attorney at Law, and Edward Hjelt, for the Commission staff.

O P I N I O N

Statement of Facts

Dolphin Transportation, Inc. (Dolphin) was engaged in the business of transporting property for compensation over the public highways of this State pursuant to a radial highway carrier permit issued March 2, 1971, and amended August 20, 1971, along with a highway contract carrier permit issued October 31, 1971.

In the course of operations in 1975 Dolphin was requested by one of its regular shippers, Firestone Tire and Rubber Company (Firestone), to seek authority from this Commission pursuant to

Section 3666 of the Public Utilities Code for a deviation from the minimum rates then in effect on shipments of tires and related items between Firestone's manufacturing plant in Southgate and various warehouse locations in the State. Firestone had been shipping these products by means of leased proprietary trucking (established earlier when rail rates made the cost of rail transportation or truck transportation at alternative rail rates prohibitive), but desired to discontinue its proprietary trucking operations if satisfactory public carrier rates could be obtained. Following several interim decisions, by Decision No. 86031 dated June 29, 1976, and supplemental Decision No. 86186 dated August 3, 1976, a deviation was granted. However, *inter alia*, this deviation provided that total annual tonnage northbound could not exceed 1/3 of the total annual covered tonnage southbound, and that in the event subhaulers were used, they were to be paid not less than the authorized deviation rate.^{1/}

About this same time Mead Products (Mead) in 1976 transferred its manufacturing operations from Sunnyvale and San Jose to Garden Grove. Thereafter, Sunnyvale was operated as a distribution warehouse. This change necessitated shipment of approximately 250 truckloads of paper products annually from Garden Grove to Sunnyvale. To avoid establishing its own proprietary trucking operation (which Mead anticipated would be cheaper than using public carriers), Mead requested Dolphin to seek a deviation from the rate provisions of Minimum Rate Tariff No. 2 (MRT 2) pursuant to the provisions of Section 3666 of the Public Utilities Code, so that Dolphin could offer

^{1/} By Special Deviation Docket Order No. SDD-613, issued July 26, 1977, this authority was extended to July 26, 1978.

rates commensurate with Mead's anticipated proprietary costs. By Decision No. 86908 dated February 1, 1977 an interim deviation was granted to Dolphin.^{2/} Inter alia, that decision provided that if subhaulers were employed they must be paid no less than the authorized deviation rate.

Today Dolphin maintains an office and terminal at Long Beach and another terminal at Union City. Employing eight office personnel and seven drivers, it operated 10 tractors, 10 40-foot trailers, and 43 half sets. In addition, Dolphin has nine owner-operators of tractors on lease arrangements, and regularly uses another 20 trip subhaulers. Dolphin currently subscribes to Minimum Rate Tariffs 2, 8, 9, 14, 15, and 19, along with the Exception Rating Tariff and the Distance Table. At the time in issue herein, 1977, Dolphin annually grossed \$1,567,079.

As a consequence of informal complaints that Dolphin was paying subhaulers only 62 percent of the deviation rate authorized it, an apparent violation of its deviation authority, Commission staff representatives in 1978 began examination of the carrier's records. After also finding an apparent tonnage imbalance, the informal investigation on March 13, 1979 ripened into a formal order instituting investigation of Dolphin and Firestone on the Commission's own motion--OII 38. The scope of the investigation was to include all transportation services performed for Firestone in the period June 29, 1976 through December 31, 1977 under the

^{2/} California Trucking Association (CTA) petitioned for and was granted rehearing of Decision No. 86908. Following two additional interim decisions extending the expiration date, the requested deviation[✓] was approved in Decision No. 89969 dated February 14, 1979. This latter decision also provided that subhaulers would not be used in the operation unless paid 100 percent of the deviated rate.

provisions of Decisions Nos. 86031 and 86186, and Order No. SDD-613, and all transportation services performed for Mead, February 1, 1977 through December 31, 1977, under the provisions of Decision No. 86908. The investigation was to determine whether, against the background of Decisions Nos. 86031, 86186 and Order No. SDD-613, as to Firestone: Dolphin had charged less than the minimum rate set forth in MRT 2, thereby violating Sections 3664, 3667, and 3737 of the Public Utilities Code; whether Firestone paid less than the applicable rates and charges for the transportation and now owed Dolphin anything; and whether Dolphin has violated the above decisions and Section 3737 of the Code by paying subhaulers less than 100 percent of the authorized deviation rate. A further purpose was to determine whether, against the background of Decision No. 86908, as to Mead: Dolphin had violated that order and Section 3737 of the Public Utilities Code by paying subhaulers less than 100 percent of the authorized deviation rate.

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

- (1) Whether Dolphin should be ordered to collect from Firestone the difference between the charges collected and the charges due under the tariff;
- (2) Whether Dolphin should be fined an amount equal to the amount of the undercharges;
- (3) Whether Dolphin should be ordered to pay the subhaulers involved the difference between the amounts paid them and the amounts due them under Decisions Nos. 86031, 86186, Order No. SDD-613, and Decision No. 86908;
- (4) Whether Dolphin should be ordered to cease and desist from any future violations; and
- (5) Whether as a punitive measure for its transgressions, the operating authority of Dolphin should be canceled, revoked, or suspended, or in the alternative, a fine should be levied upon Dolphin.

Initially set for hearing in May 1979 before Administrative Law Judge Bernard J. Peeters in Los Angeles, the matter was continued on Dolphin's motion to June 1979. On June 11, 1979 however, Dolphin filed a further motion to continue the matter pending issuance of a decision in Case No. 10278, Phase II, Topics 5 and 6 (pertaining to subhaulers and subhauling). That motion was granted. Following issuance of Decision No. 91247 on January 15, 1980 in Case No. 10278 (a decision not helpful to Dolphin's interest here), a duly noticed prehearing conference was held on April 10, 1980 in Los Angeles before ALJ Peeters. At this conference progress was made toward a stipulation on the issues, and a further continuance was granted.

However, on May 14, 1980 Dolphin filed Application No. 59667 by which it sought to eliminate retroactively the restrictions concerning payments to subhaulers contained in Decision Nos. 86031 and 89969. Dolphin also requested that any hearing on OII 38 be held in abeyance pending Commission decision on this application. On May 20, 1980 OII 38 was reassigned to ALJ John B. Weiss. On June 3, 1980 Application No. 59667 was also assigned to ALJ Weiss, who then consolidated the two matters for hearing.

A duly noticed public hearing was held on July 8, 1980 in Los Angeles before ALJ Weiss with a further day reserved for hearing. As a result of further consultations between Dolphin and the staff a stipulation between the parties as to the issues involving Dolphin in OII 38 was reached, and at the outset of the hearing this stipulation was submitted to the bench as the recommended basis for a decision on the issues involving respondent Dolphin. At the hearing the staff, through its witnesses F. D. Aylesworth and Dallas M. Cooper, introduced into evidence three exhibits apart from the stipulation. Through this evidence the staff asserted, and the evidence tended to show, that during the period involved in its investigation, Dolphin, in violation of

Sections 3664, 3667, and 3737 of the Public Utilities Code, had undercharged Firestone \$14,135.57 for transportation performed under the tonnage imbalance provisions of Decisions Nos. 86031, 86186, and Order No. SSD-613.^{2/} Further, through this evidence the staff also asserted, and the evidence tended to show, that during the respective periods involved in the Firestone and Mead investigations, Dolphin, in violation of Section 3737 of the Public Utilities Code, and Decisions Nos. 86031, 86186 and Order No. SSD-613 (relative to the Firestone shipments), and Decision No. 86908 (relative to the Mead shipments), had underpaid the subhaulers \$61,435.51.^{4/}

By the stipulation submitted, expressly limited to the facts and issues of the instant OII and the transportation covered in the two documentary Exhibits of the staff, and to be admissible in no proceeding other than the instant OII and any subsequent proceedings involving alleged violations of any provision of the stipulation and this order, Dolphin neither admitted nor denied the truth or accuracy of the two documentary exhibits entered by the staff. Nonetheless, in order to avoid expenditures of further time and money, Dolphin agreed that the two documentary exhibits reflected that underpayments to certain subhaulers totaling \$61,435.51 were due and owed, and that it would pay those subhaulers on a uniform monthly schedule within a period of five years from the

^{2/} As imbalance shipments this transportation should have been charged to the shipper under provisions of MRT 2 rather than under the deviation rate which was used.

^{4/} Shipments rated under the deviation provisions required that Dolphin pay subhaulers 100 percent of the deviated rate; but Dolphin paid only 62 percent in many instances.

effective date of this decision.^{5/} Dolphin further acknowledged that it already had collected from Firestone the \$14,135.57 in undercharges as set forth elsewhere in the documentary exhibits, and agreed to pay a fine in that amount pursuant to Section 3800 of the Public Utilities Code. Dolphin also agreed to pay a punitive fine in the amount of \$5,000 for its misconduct pursuant to Section 3774 of the Public Utilities Code, and would assent to a Commission cease and desist order prohibiting any and all future unlawful operations and practices. Finally, by the stipulation Dolphin withdrew Application No. 59667.

The staff having offered no additional evidence pertaining to the other respondent, and that other respondent having failed to enter an appearance, and the introduction of the stipulation having obviated the need for further proceedings, the consolidated matters were submitted.

Discussion

By the mid-1970's, Dolphin had built up a valuable business relationship with Firestone and Mead. This relationship developed for it a substantial potential volume of intrastate transportation business. This business contained built-in economies in operation which made feasible lesser rates than the minimum established rates in MRT 2, and Dolphin accordingly sought authority from this Commission under provisions of Section 3666 of the Public Utilities Code to provide the transportation at deviation rates. But before

^{5/} It was also stipulated that any underpayments which Dolphin was unable to remit, in whole or in part, would be segregated into a special account to be disposed of as the Commission might order.

this Commission authorizes deviation rates under Section 3666, we first must ascertain that the requested deviation rates are reasonable. Used in that context, reasonableness contemplates something more than a mere showing that the carrier will recover more than his costs, or that he can operate at lower costs than his competition; rather it involves a consideration of those unusual circumstances and conditions in the transportation under consideration which lead to cost savings, as well as a showing that the proposed deviation rate is compensatory (William E. Daniel (1964) 63 CPUC 147 and 150). Furthermore, in our consideration of the compensability of the proposed rate, we are concerned not only with the compensability of the deviation rate to the applicant carrier, but also of that share of it which will devolve upon subhaulers used. Any deviation rate authorized where subhaulers are involved cannot be at the expense of the latter (See Trail's Trucking (1977) 61 CPUC 734; rehearing denied (1977) 82 CPUC 424).

Dolphin's Application No. 55607 for a deviation rate to apply to the Firestone transportation was processed ex parte by the Commission, and resulted on September 30, 1975 in issuance of Interim Decision No. SL943. By that decision the deviation requested was authorized for six months pending review of actual cost data to be obtained. Although this interim decision contained provisions pertaining to a tonnage balance,^{6/} no mention was made nor provision included pertaining to subhauler payments. Subsequently on March 3, 1976, despite a protest by the California Trucking Association (CTA),

^{6/} Appendix A to that order contained the following rule:
"The total annual tonnage northbound shall not exceed 1/3 of the total annual tonnage southbound. All northbound tonnage in excess of 1/3 of the southbound tonnage shall be charged at regular VRT 2 rates."

the interim authority was extended to June 30, 1976 without substantive change relating to these latter issues. In March 1976, Dolphin introduced an amendment to its application, not relevant here, and again CTA protested. Following a public hearing on the application, the Commission, on June 29, 1976 issued Decision No. 86031. At that - public hearing Dolphin's witness disclosed that subhaulers were being used on the Firestone transportation, but provided no cost evidence relating to the costs of the subhaulers involved. Consequently, in Decision No. 86031, the Commission, in accord with policy set forth in Trail's Trucking, supra, included a rule in Appendix A thereto which provided:

"In the event subhaulers are engaged, they shall be paid no less than the rate authorized herein."

Dolphin took no steps to file for reconsideration or rehearing of Decision No. 86031.

Shortly thereafter in 1976 Dolphin similarly filed Application No. 56752 to cover the proposed Mead deviation. In an Income Statement submitted with that application there was an allusion to Dolphin revenue and expense derived from subhauling. But again no subhauler costs were detailed. Consequently, when Decision No. 86908 was issued on February 1, 1977 granting the requested deviation for one year pending hearing on the application, in Appendix A to that decision was a rule providing that in the event subhaulers were used they must be paid no less than the deviated rate without any deduction for use of Dolphin's trailing equipment. When, on other grounds, CTA petitioned on February 25, 1977 for rehearing, reconsideration and suspension of that decision, Dolphin opposed the petition. But Dolphin itself did not file a petition seeking amendment. Nonetheless, rehearing was granted, and on July 13, 1978, the matter was reopened. Again Dolphin failed to detail subhaul costs. By Decision No. 89969 issued February 11, 1979, the Commission gave Dolphin authorization

for the requested deviation rate to apply to Mead shipments, but again included a requirement that, if issued, subhaulers must be paid the full deviation rate. Again Dolphin failed to seek an amendment or to request reconsideration.

It is against this factual backdrop that we must make our determinations in the instant matter. However, the submission of the staff-Dolphin stipulation at the outset of the July 8, 1980 public hearing in Los Angeles makes it unnecessary for us to analyze and weigh all the evidence presented. Whether or not Dolphin here admits or denies the truth or accuracy of the staff exhibits is not determinative. Stipulations as to a fact are the same as conclusive proof of that fact.^{7/} Here, by the terms of the stipulation, Dolphin accepts that the evidentiary material contained in the staff exhibits may be the basis for a decision, and agrees that this evidence shows that underpayments totaling \$61,435.51 are due subhaulers used to provide transportation for these shippers during the periods of time of the investigation. Dolphin agrees to pay this \$61,435.51. Dolphin further stipulates that undercharge violations totaling \$14,135.57 pertaining to the transportation it furnished Firestone during the period of the investigation are shown: undercharges since collected from Firestone.

Exhibit No. 2 in summary format shows transportation subject to the deviation rate carried by numerous subhaulers for Dolphin

^{7/} See California Jury Instructions, Civil No. 1.02; and Witkin, California Evidence, 2nd Ed. Section 505.

during the investigation periods for the Firestone and Mead accounts. The exhibit is in the form of a comparison, subhauler by subhauler, shipment by shipment, of the amount actually paid the subhauler for each shipment, to the 100 percent payment actually required to be paid the subhauler under the provisions of the respective deviation² authorities granted Dolphin. The exhibit shows that 93 subhaulers were underpaid a total of \$61,435.51.² Dolphin has agreed to and should be ordered to pay this \$61,435.51 in underpayments to the respective 93 subhaulers. However, it is asserted and would appear that the immediate payment of this \$61,435.51 in a lump sum would be beyond Dolphin's present financial ability. Instead, it is proposed that Dolphin be allowed to stage the payments at the rate of \$1,000 per month, so that the obligation could be paid off over a period of approximately five years. Rather than bankrupt Dolphin by ordering immediate repayment of the \$61,435.51, we will require that Dolphin pay the obligation at the rate of \$1,000 per month over an approximate five-year period.

The problem next at hand is how to spread the payments among the 93 subhaulers over the five-year period. Obviously, to order proportionate monthly payments to each of the 93 subhaulers would involve numerous very small payments drawn out over a prolonged period, and would require substantial extra costs in bookkeeping and postal expense in addition. Many of the smaller subhaulers would be out of business before they would be paid off. The small individual payments would lose any significance. Accordingly, we will not order proportionate payments. While we note that all 93 subhaulers at the time of their involvement accepted payment for their service at less than the deviation rate (at very substantially less than the applicable MRT 2 rate), we believe that those involved with the most

²/ A list of these 93 subhaulers, and the amount underpaid and therefore owed to each, is attached as Appendix A to this decision.

shipments necessarily had, or should have had, the best opportunity to appreciate what they were doing, and that these, therefore, were probably the most culpable in knowingly participating in the illegal subhaul payment scheme used by Dolphin. Consequently, we will order that those subhaulers owed the least should be those paid first, and that those owed the most (and involved with the most shipments) should be paid last. (The individual underpayment totals owed range from \$43.44 to well over \$5,000.) Appendix B sets forth the month-by-month repayment schedule which Dolphin will be ordered to follow.

In the event Dolphin is unable to locate a subhauler to send that subhauler's payment, that payment due will be placed in a separate trust account to be established by Dolphin in any bank of its choice, and the disposition of the funds accumulated therein will be determined by further Commission order at conclusion of the five-year period involved in the payment schedule. Dolphin will advise the Executive Director of this Commission of the status of this account, subhauler by subhauler, annually.^{9/}

Staff Exhibit No. 3 is a summary of shipping data pertaining to 109 individual shipments. These reflect the imbalance tonnage shipments on the Firestone traffic resulting from operations during the last four months of the first 12 months that the deviation authority was in effect under Decision No. 86031 issued June 29, 1976. These imbalance shipments should have been rated and charged at MRT 2 rates rather than at deviation rates. This \$14,135.57 has already been collected from Firestone. Pursuant to the provisions of

^{9/} Any interest earned by this account will be payable to Dolphin.

Section 3600 of the Public Utilities Code the Commission will order imposition of a \$14,135.57 fine upon Dolphin. Dolphin will be ordered to pay this fine within 30 days of the effective date of this decision.

Although respondent Firestone was shown to have received transportation services at less than the minimum rates applicable, no evidence was introduced which would indicate collusion between Firestone and Dolphin. Accordingly, we will conclude that staff failure to present any such evidence disposes of any Section 3669 aspect of the instant investigation, and we will terminate the order instituting investigation as to respondent Firestone.

We next turn to the stipulation segment that provides that, in view of Dolphin's misconduct in these violations, Dolphin would be required to pay a \$5,000 punitive fine pursuant to Section 3774 of the Public Utilities Code. As a punitive statute, Section 3774 provides that for a number of stated offenses, including (as relevant here) violations of any order, decision, rule, regulation or requirement established by the Commission, the Commission may cancel, revoke or suspend the operating permit or permits 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. But in public utility regulatory matters, protection of the public interest is a fundamental obligation and duty of this Commission, and the important determination whether or not an offense merits the ultimate penalty of cancellation, revocation or suspension of an operating authority, or the imposition of a lesser penalty such as a monetary fine, is a matter which must be reserved to the Commission. While a stipulation is an agreement legally binding upon the signatory parties, and, unless contrary to law or policy is also usually binding upon the court, the parties to a proceeding before us cannot arrogate

to themselves this fundamental function. The Commission cannot be ousted of the jurisdiction given exclusively to it by a stipulation of the parties (Los Angeles v Harper (1935) 8 CA 2d 552, 555).

While intent is not an element in determining whether noncompliance with Commission decisions or with tariff provisions - has resulted in a violation of the Code, in admeasuring the penalty to be imposed where there has been a violation, the Commission does consider the question of willfulness with respect to the stringency of the penalty to be assessed (Progressive Transportation Co. (1961) 58 CPUC 462). Unless culpability can be shown, a punitive penalty cannot be imposed.

In the instant proceeding, as we examine the evidence to determine if there has been culpable conduct, we are not bound, as we stated earlier, by Dolphin's stipulation that it neither admits nor denies the truth or accuracy of the staff's evidentiary exhibits. We are free to examine the record as it exists and to make our own determination of what Dolphin intended by its acts in underpaying subhaulers and in undercharging Firestone.

In the context applicable here, intent connotes an awareness of and a power to effect a deliberate choice or decision; in short, it is willfulness. Here the evidence of record shows that Dolphin made deliberate choices. First, it sought deviations for this traffic from the applicable minimum rate tariff usually involved for that class of carriage. And the decisions granting the requested deviations (Nos. 86031 and 86908) clearly provided that in the event subhaulers were used, they must be paid 100 percent of the deviation rate. Secondly, Dolphin did not seek reconsideration of these provisions.

Here the evidence does not reflect mere isolated instances of subhauling, instances which might be overlooked. Rather it reflects that Dolphin engaged in a regular and substantial subhaul practice to handle the Firestone and Mead traffic. The evidence is

that 93 individual subhaulers were used during the investigation period alone to make hundreds of shipments. In 21 instances a subhauler carried only a single shipment. In other instances a subhauler got to carry as many as 52 shipments. Under the circumstances, and noting who some of the subhaulers were, by no stretch of the imagination could the subhauler be classed as an employee of Dolphin. Nor was that defense raised at the hearing. In no instance represented by the exhibit entries was the subhauler involved paid 100 percent of the deviation rate. From this mass of evidence we must conclude that there could be nothing less involved than a clear intent on the part of Dolphin to disregard the clear requirement contained in the decisions authorizing the deviations that subhaulers be paid 100 percent of the deviation rate.

In addition, by the terms of the Firestone deviation authority, Dolphin was required to maintain a particular north-south tonnage balance on the Firestone shipments, or to charge VRT 2 rates for any overage. Dolphin must have been aware that as the year progressed there would be a strong probability that it would be out of balance. Nonetheless, although as the record shows its shipments were badly out of balance, it continued to rate all the involved shipments under the lower deviation rate. These undercharges to Firestone grew to \$14,135.57. By its failure to set up monitoring procedures, and by ignoring the growing out-of-balance volume, Dolphin was guilty of willful misconduct.

Having found from the record in this proceeding the requisite willfulness we conclude that a Section 3774 penalty is in order. As noted earlier, choice of an appropriate penalty is within the discretion of the Commission. The Commission does not usually favor revocation of operating authority unless there is present some voluntary act in defiance of our statutes, Commission orders, etc. (Kinzel (1967) 66 CPUC 216). However, even though the violations

evidenced from the record in the instant proceeding are indicative of a defiant and contemptuous disregard of Commission orders, and would therefore support either revocation or suspension of respondent's operating permit, imposition of either such penalty would cause abrupt discontinuance or interruption of respondent's operations. This would seriously inconvenience those shippers otherwise regularly served by the respondent, about which service there have been no complaints. It would also mean the loss of a number of jobs during a recession period, and would almost certainly doom or impair the chances of the subhaulers listed in Appendix A to collect the \$61,000 in underpayments due them from Dolphin. Furthermore, it is not the Commission's desire to deprive this permit holder of its livelihood unless repetition of the offenses shows that revocation or suspension of its permit becomes the only means of bringing about compliance with our order. Accordingly, we will in the alternative adopt the staff's recommendation as contained in the stipulation, and impose the maximum \$5,000 fine provided for under Section 3774 of the Code on Dolphin. This fine will be payable on or before the thirtieth day after the effective date of this decision.

In accordance with the provisions of the stipulation filed on July 8, 1980 in this proceeding, Dolphin withdrew Application No. 59667. No further proceedings on the application were therefore required.

Findings of Fact

1. During the period relevant herein, 1976 and 1977, Dolphin operated pursuant to radial highway carrier and highway contract carrier permit authorities issued earlier by this Commission.

2. In 1975 and 1976 respectively, Dolphin was approached by two of its regular shippers, Firestone and Mead, and, because of special circumstances allegedly applicable, was asked to obtain authorization for deviations providing rates lower than those of MRT 2 to be applicable to their traffic.

3. By Decisions Nos. 86031 and 86186 and Order SDD-613, and Decision No. 86908, Dolphin was granted authority by the Commission under provisions of Section 3666 of the Public Utilities Code to deviate from the minimum rate provisions of MRT 2 with respect to transportation furnished Firestone and Mead.

4. The deviation authorities granted to Dolphin, at the times relevant to this OII, contained requirements that Dolphin must pay any subhaulers used 100 percent of the deviation rate for all transportation they provided, and that Dolphin's application of the deviation rate was subject to certain north-south tonnage balance limitations, with all out-of-balance transportation to be subject to MRT 2 rates.

5. On various dates in 1978 the Commission staff conducted an investigation into the operations, rates, and practices of Dolphin relative to transportation services Dolphin furnished Firestone during the period June 29, 1976 through December 31, 1977, and Mead during the period February 1, 1977 through December 31, 1977.

6. The staff investigation disclosed that Dolphin had assessed Firestone rates and charges less than the applicable MRT 2 rates and charges for transportation provided Firestone which exceeded the tonnage balance limitations applicable to that transportation, and that Dolphin had failed to pay subhaulers the required 100 percent of the authorized deviation rate for transportation provided by Dolphin using subhaulers to both Firestone and Mead.

7. The Dolphin undercharges to Firestone totaled \$14,135.57. Dolphin has since collected this amount from Firestone.

8. The Dolphin underpayments to the 93 subhaulers used during the periods of the investigation for the Firestone and Mead shipments totaled \$61,435.51.

9. As a consequence of the staff investigation the Commission on its own motion on March 13, 1979 instituted the instant formal proceeding, OII 38, naming Dolphin and Firestone as respondents.

10. In an attempt to blunt or otherwise mitigate the thrust of the Commission's OII, Dolphin on May 18, 1980 filed Application No. 59667, seeking, inter alia, retroactive elimination of the 100 percent subhauler payment requirements contained in Decisions Nos. 86031 and 89969.

11. At the outset of the public hearing in the instant matters, Dolphin elected to proceed no further with a defense and stipulated to admission of staff exhibits which pertained to the undercharges and underpayments, and, while neither admitting nor denying the truth or accuracy of these exhibits, agreed that the evidentiary material contained therein might be used as the basis for a decision and order disposing of the OII.

12. By its stipulation Dolphin further agreed to the imposition of and to pay a fine in the amount of \$14,135.57 pursuant to the provisions of Section 3800 of the Public Utilities Code. Dolphin further agreed to make payment of the \$61,435.51 owed to the 93 subhaulers on a uniform monthly schedule over a five-year period. Finally, Dolphin also agreed that, pursuant to the provisions of Section 3774 of the Public Utilities Code, it should be ordered to pay and would pay a \$5,000 punitive fine for its misconduct.

13. The staff exhibits introduced set forth details which show undercharges to Firestone in the amount of \$14,135.57, and underpayments to 93 subhaulers in the amount of \$61,435.51 for the Firestone and Mead transportation subject to the deviation rates.

14. Dolphin withdrew Application No. 59667.

15. The evidence before the Commission provides no basis for any finding of culpability on the part of respondent Firestone in the issue of the undercharges.

16. The evidence introduced by the staff and the fact of the stipulation and its contents lead the Commission to infer that Dolphin in this instance deliberately disregarded the 100 percent payment requirement pertaining to subhauler usage and payment as contained in Dolphin's deviation authorities.

17. Dolphin knew or should have known that it was exceeding the north-south tonnage balance limitations contained in its Firestone deviation authority.

18. Dolphin's willful or otherwise culpable conduct provides the requisite basis for imposition of punitive measures as provided for under Section 3774 of the Public Utilities Code.

19. The purposes of regulatory justice would best be served in this instance by requiring that Dolphin make payment first to those subhaulers who transported the fewest number of subhauls.

Conclusions of Law

1. Dolphin violated Sections 3664, 3667, and 3737 of the Public Utilities Code by reason of its failure to comply with the provisions of Decisions Nos. 86031, 86186, 86908, and Order No. SDD-613, resulting in undercharges to Firestone in the amount of \$14,135.57, and underpayments to subhaulers in the amount of \$61,435.51.

2. Dolphin should be required to pay the 93 subhaulers the \$61,435.51 amount they were underpaid for their subhaul services.

3. Dolphin should be required to pay a fine pursuant to the provisions of Section 3800 of the Public Utilities Code in the amount of \$14,135.57.

4. Dolphin should be required to pay a punitive fine pursuant to the provisions of Section 3774 of the Public Utilities Code in the amount of \$5,000 as an alternative to the cancellation, revocation or suspension of its operating permits.

5. Dolphin should be ordered to cease and desist from future violations.

6. Application No. 59667 should be dismissed.

O R D E R

IT IS ORDERED that:

1. Dolphin Transportation, Inc., starting within thirty days of the effective date of this order, shall, over a period of sixty-two consecutive months, pay a total of \$61,435.51 in approximately equal monthly payments to the subhaulers listed in Appendix A to this order, as provided for and set forth in a schedule of payments listed as Appendix B to this order. Dolphin Transportation, Inc. shall on the fifteenth day of each month advise the Executive Director of this Commission in writing of the payments made the preceding month.

2. Should Dolphin Transportation, Inc. be unable to locate a designated subhauler to make payment, Dolphin Transportation, Inc. shall establish and open a trust account with a bank of its choice, and each month shall promptly deposit therein such scheduled payments.

3. Dolphin Transportation, Inc., within thirty days of the effective date of this order, shall pay the Commission a fine in the amount of \$14,135.57 pursuant to the provisions of Public Utilities Code Section 3800.

4. Dolphin Transportation, Inc., within thirty days of the effective date of this order, shall pay to the Commission a punitive fine in the amount of \$5,000 pursuant to the provisions of Public Utilities Code Section 3774.

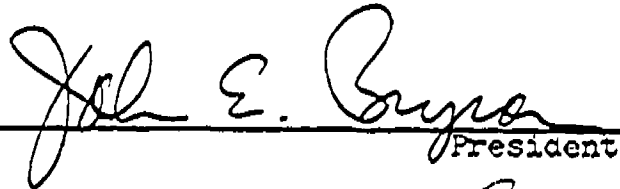
5. Dolphin Transportation, Inc. shall cease and desist from charging and collecting rates and charges for the transportation of property or for any service in connection therewith in a lesser amount than the minimum rates and charges prescribed or authorized by this Commission, and shall cease paying subhaulers less than the amounts established by this Commission.

6. The order instituting investigation as to respondent Firestone Tire and Rubber Company is terminated.

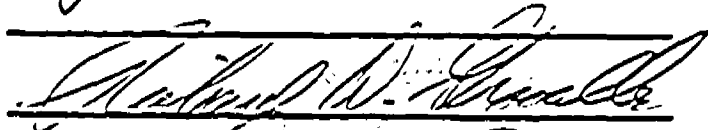
7. Application No. 59667 is dismissed.

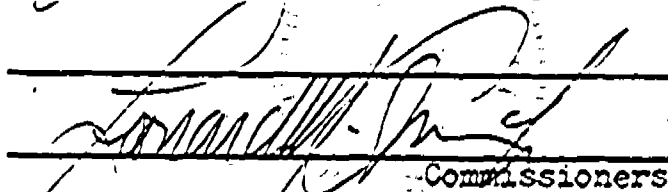
The Executive Director of the Commission shall cause personal service of this order to be made upon Dolphin Transportation, Inc., and shall cause service by mail to be made upon Firestone Tire and Rubber Company. The effective date of this order shall be thirty days after completion of service on that respondent.

Dated OCT 22 1980, at San Francisco, California.



President





Commissioners

Commissioner Vernon L. Sturgeon, being necessarily absent, did not participate in the disposition of this proceeding.

Commissioner Claire T. Dedrick, being necessarily absent, did not participate in the disposition of this proceeding.

APPENDIX A
Page 1 of 2Dolphin Transportation, Inc.
OII 38 - Subhauler Underpayments

A & D Trucking	\$ 242.59	Z & M Enterprises	\$ 457.44
Action Transport	140.74	Don Ellis Trucking	45.44
Action Transportation	166.44	T & J Trucking	69.16
Aladdin Transportation	70.37	Farnsworth Trucking	284.69
Atlantic Trailways	82.82	Fox Trucking	70.37
B & B Trucking	173.22	Frontier Transportation	70.37
Baja Transportation	448.49	Frost Transportation	134.60
Bell Trucking	284.23	Bill Gaffett Trucking	55.41
Bellamy Equipment Co.	513.57	Glide Bros.	457.60
Brazil Trucking	129.61	A. Gonzales Trucking	2,611.86
Buckmaster Trucking	1,532.07	Frank Griffith	144.27
C & T Trucking	138.63	Groskoff Heidas Trucking	236.38
Cademartori Trucking	69.16	Gullien & Son	780.12
Lloyd Cannon Trucking	73.90	Jim Hlebakes Trucking	222.95
Cargo Carriers	506.99	I M L Freight - Eagle Div.	348.12
Cargo Truckloads	122.36	Intra Cal Transport	70.37
Dave Castro Trucking	321.07	J&K Trucking (Fred Jordan)(DT-11)	4,836.20
Ply Champ Truck Lines	352.77	J&K Trucking (Fred Jordan)(DT-11)	4,771.86
Commercial Transport	48.32	J.S.I.	288.15
Mike Conrotto Trucking	1,493.15	Rodney James Trucking	3,342.49
Contractors Transport	994.77	Jensen Trucking Service	1,301.72
T. G. Cooper	495.25	K. C. Industries	146.99
C. Q. Trucking	278.19	Florence Keast	538.09
Cornwell Transportation	82.21	Earl Keel & Sons Trucking	165.70
Double R Ranch	69.16	Kincade Transportation	70.37

APPENDIX A
Page 2 of 2Dolphin Transportation, Inc.
OII 38 - Subhauler Underpayments

Bill Kelm	\$2,429.38	Rausser Trucking Company	\$- 124.23
Bill Kelm (W.E.K. Trans.)	3,911.85	Redfern Trucking	170.68
Pete Kooyman Trucking	156.64	Lee Rose Trucking	150.49
Jim Kusely Transportation	870.12	Ruxton Trucking	70.37
L & V Trucking	147.15	S & H Truck Lines, Inc.	147.15
George Lange Trucking	1,104.93	S & M Marketing	156.20
Lucky Product Transport	196.82	S & Z Trucking	203.04
W. D. Martin	85.54	Sacramento-Los Angeles Motor Express	148.48
Ron McNeil	4,027.29	Seitz Trucking	682.39
Meikalf Trucking Co.	1,029.80	Shane Ind.	70.37
Flood Morss	140.09	Sierra Packers	210.50
Mike Moustakas	69.16	Taylor Enterprises	127.55
Robert Neal Trucking	452.52	Ronald R. Toel	1,347.75
Newfield Trucking	219.45	Trans. State Inc.	257.49
C N C Trucking	174.58	Trans. West Service	242.82
Paffile Trucking	154.96	Watkins Refrigerated	170.71
PAMS Trucking	171.88	Westside Transport	552.95
Parker & Sons Trucking	761.43	Weybridge Trucking	69.16
J. L. Phipps Trucking	111.40	William Truck Leasing	69.16
Henry Pimentel	5,389.87	Kenneth Wilson	3,848.12
Pocato Transport	325.30	W. Wise Trucking	<u>464.90</u>
Quality Brokerage	159.05	Total Underpayments	<u>\$61,435.51</u>

APPENDIX B

DOLPHIN TRANSPORTATION, INC.

PAGE NO. 1

PAYMENT SCHEDULE

011-38

1ST YEAR REPAYMENTS

1ST MONTH 2ND MONTH 3RD MONTH 4TH MONTH 5TH MONTH 6TH MONTH

Aladin Transportation	70.37					
Atlantic Trailways	82.82					--
Cadernastice Trucking	69.16					
Lloyd Cannon Trucking	73.90					
Commercial Transport	48.32					
Cornwell Transportation	82.21					
Double R. Ranch	69.16					
E & M Enterprises	45.44					
Don Ellis Trucking	45.44					
F & J Trucking	69.16					
Joe Trucking	70.37					
Frontier Transportation	70.37					
Bill Gaffett Trucking	55.41					
Delta Cal Transport	70.37					
Lincoln Transportation	70.37					
W. D. Martin		85.54				
Mike Moustakas		69.16				
Ruston Trucking		70.37				
Shane Ind.		70.37				
Weybridge Trucking		69.16				
William Truck Leasing		69.16				
Action Transport		140.74				
Action Transportation		166.44				
B & B Trucking		173.22				
Brazil Trucking			129.61			
C & T Trucking			138.63			
Cargo Truckloads			122.36			
Frost Transportation			134.60			
Frank Griffith			144.27			
K.C. Industries			146.99			
Earl Kiel & Sons Trucking			165.70			
Pete Kooyman Trucking				156.64		
L & V Trucking				147.15		

(CONTINUED ON PAGE 2)

1ST YEAR REPAYMENTS (CONTINUED)

	1ST MONTH	2ND MONTH	3RD MONTH	4TH MONTH	5TH MONTH	6TH MONTH
Lucky Product Transport				196.82		
Wood Horse				140.09		
CNO Trucking				174.58		-
Paffile Trucking				154.96		
Pams Trucking					171.88	
J. L. Phipps Trucking					112.40	
Quality Brokerage					159.05	
Rabbsen Trucking Company					124.23	
Redfern Trucking					170.68	
Lee Rose Trucking					150.49	
S & H Truck Lines, Inc.					147.15	
S & H Marketing						156.20
Sacramento - Los Angeles Motor Express						148.58
Taylor Enterprises						127.55
Watkins Refrigerated						170.71
A & D Trucking						242.59
Bell Trucking						284.23
MONTHLY TOTAL:	992.87	914.16	982.16	970.24	1034.88	1124.75

1ST YEAR REPAYMENTS (CONTINUED)

	7TH MONTH	8TH MONTH	9TH MONTH	10TH MONTH	11TH MONTH	12TH MONTH
C. G. Trucking	278.19					
Farnsworth Trucking	284.69					
Grookoff Haidap Trucking	236.38					
Jim Hlebaker Trucking	222.95					
J. S. I.		288.15				
Newfield Trucking		219.45				
S & Z Trucking		203.04				
Sessa Packers		210.50				
Trans State Inc			267.49			
Dave Castro Trucking			334.07			
Ply Champ Truck Lines			352.77			
J. M. L. Freight - Eagle Div.				348.12		
Potato Transport				325.30		
Trans West Service				342.82		
MONTHLY TOTAL:	1022.21	921.14	954.33	1016.24		

1ST YEAR (2ND YEAR PAYMENTS

	11TH MONTH	12TH MONTH	13TH MONTH	14TH MONTH	15TH MONTH	16TH MONTH
<i>Beja Transportation</i>	200.00	200.00	48.49			
<i>T.G. Cooper</i>	200.00	200.00	95.25			--
<i>Glide Bros.</i>	200.00	200.00	57.60			
<i>Robert Neal Trucking</i>	200.00	200.00	52.52			
<i>W. Wise Trucking</i>	200.00	200.00	68.90			
<i>Bellamy Expt. Co.</i>			150.00	200.00	163.57	
<i>Cargo Carriers</i>			150.00	200.00	156.49	
<i>Florence Keast</i>			150.00	200.00	288.09	
<i>Westside Transport</i>			150.00	200.00	202.95	
<i>Seitz Trucking</i>			82.39	200.00	300.00	100.00
<i>Gullien & Son</i>						225.00
<i>Parker & Sons Trucking</i>						225.00
<i>Jim Kusely Transportation</i>						225.00
<i>Contractors Transport</i>						225.00
MONTHLY TOTAL:	<u>1,000.00</u>	<u>1,000.00</u>	<u>1,001.15</u>	<u>1,000.00</u>	<u>1,014.60</u>	<u>1,000.00</u>

2ND YEAR PAYMENTS

	17TH MONTH	18TH MONTH	19TH MONTH	20TH MONTH	21 MONTH	22 MONTH
<i>Gullien & Son</i>	250.00	250.00	55.12			
<i>Parker & Sons Trucking</i>	250.00	250.00	35.48			
<i>Jim Kusely Transportation</i>	250.00	250.00	145.12			
<i>Contractors Transport</i>	250.00	250.00	269.77			
<i>Nelkely Trucking Co</i>			85.00	175.00	175.00	175.00
<i>George Lange Trucking</i>			85.00	165.00	165.00	165.00
<i>Erson Trucking Service</i>			85.00	165.00	165.00	165.00
<i>Ronald R. Toel</i>			85.00	165.00	165.00	165.00
<i>Mike Conrotto Trucking</i>			85.00	165.00	165.00	165.00
<i>Buchmaster Trucking</i>			85.00	165.00	165.00	165.00
MONTHLY TOTAL:	<u>1,000.00</u>	<u>1,000.00</u>	<u>1,015.44</u>	<u>1,000.00</u>	<u>1,000.00</u>	<u>1,000.00</u>

3RD YEAR

4TH YEAR PAYMENTS

	35TH MONTH	36TH MONTH	37TH MONTH	38TH MONTH	39TH MONTH	40TH MONTH
Rodney James Trucking	400.00	377.49				
Kenneth Ineson	330.00	330.00	330.00	348.11		
Bill Kelom	50.00	50.00	110.00	110.00	166.00	166.00
Bill Kelom (N.E.K. Trans)	50.00	50.00	110.00	110.00	166.00	166.00
J&K Trucking (F. JORDAN DT-11)	50.00	50.00	110.00	110.00	166.00	166.00
J&K Trucking (P. JORDAN DT-12)	50.00	50.00	110.00	110.00	166.00	166.00
Ron McNeil	50.00	50.00	110.00	110.00	166.00	166.00
Henry Pimentel	50.00	50.00	110.00	110.00	166.00	166.00
MONTHLY TOTAL:	1030.00	1007.49	990.00	1008.11	996.00	996.00

MONTHLY

4TH YEAR PAYMENTS

	41ST MONTH	42ND MONTH	43RD MONTH	44TH MONTH	45TH MONTH	46TH MONTH
Bill Kelom	166.00	166.00	166.00	166.00	166.00	166.00
Bill Kelom (N.E.K. Trans)	166.00	166.00	166.00	166.00	166.00	166.00
J&K Trucking (F. JORDAN DT-11)	166.00	166.00	166.00	166.00	166.00	166.00
J&K Trucking (P. JORDAN DT-12)	166.00	166.00	166.00	166.00	166.00	166.00
Ron McNeil	166.00	166.00	166.00	166.00	166.00	166.00
Henry Pimentel	166.00	166.00	166.00	166.00	166.00	166.00
MONTHLY TOTAL:	996.00	996.00	996.00	996.00	996.00	996.00

4TH YEAR

5TH YEAR PAYMENTS

	47TH MONTH	48TH MONTH	49TH MONTH	50TH MONTH	51 MONTH	52ND MONTH
Bill Kelom	166.00	166.00	166.00	166.00	117.38	
Bill Kelom (N.E.K. Trans)	166.00	166.00	166.00	166.00	180.00	200.00
J&K Trucking (F. Jordan DT-11)	166.00	166.00	166.00	166.00	180.00	200.00
J&K Trucking (F. Jordan DT-12)	166.00	166.00	166.00	166.00	180.00	200.00
Ron McNeil	166.00	166.00	166.00	166.00	180.00	200.00
Henry Pimentel	166.00	166.00	166.00	166.00	180.00	200.00
MONTHLY TOTAL:	996.00	996.00	996.00	996.00	1077.38	1000.00

5TH YEAR PAYMENTS

	53RD MONTH	54TH MONTH	55TH MONTH	56TH MONTH	57TH MONTH	58TH MONTH
Bill Kalm (W.E.K. Trans)	200.00	200.00	200.00	200.00	200.00	200.00
J&K Trucking (F. Jordan DT-11)	200.00	200.00	200.00	200.00	200.00	200.00
J&K Trucking (F. Jordan DT-12)	200.00	200.00	200.00	200.00	200.00	200.00
Ron McNeil	200.00	200.00	200.00	200.00	200.00	200.00
Hensy Pimentel	200.00	200.00	200.00	200.00	200.00	200.00
MONTHLY TOTAL:	<u>1000.00</u>	<u>1000.00</u>	<u>1000.00</u>	<u>1000.00</u>	<u>1000.00</u>	<u>1000.00</u>

5TH YEAR

6TH YEAR PAYMENTS

	59TH MONTH	60TH MONTH	61TH MONTH	62ND MONTH	63RD MONTH	64TH MONTH
J&K Trucking (F. Jordan DT-11)	290.00	335.00	319.20			
J&K Trucking (F. Jordan DT-12)	290.00	335.00	254.86			
Ron McNeil	135.29					
Hensy Pimentel	290.00	330.00	425.00	452.87		
MONTHLY TOTAL:	<u>1005.29</u>	<u>1000.00</u>	<u>799.06</u>	<u>452.87</u>		