EX-2

L/bh

ORIGINAL

Decision No. 93390

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 MPL, Inc., doing business as Universal Transportation, a California corporation, and Holland Oil Company, a California corporation, and Jack Holland and Son, Inc., a California corporation.	Case No. 10331 (Filed May 17, 1977; amended December 12, 1977)

ORDER GRANTING REHEARING OF DECISION NO. 92953

A petition for rehearing of Decision (D.) 92953 has been filed by Holland Oil Co. and Jack Holland & Son, Inc. (Holland). We have examined each and every allegation contained in the petition and are of the opinion that good cause for granting rehearing has been shown. Therefore,

IT IS HEREBY ORDERED that rehearing of D. 92953 is granted, limited to the right of Holland to call as a witness and take testimony from Mr. Steven Manning, president of Respondent MPL, Inc. In all other respects the petition for rehearing is denied.

IT IS FURTHER ORDERED that said rehearing be held at such time as may hereafter be set before such Commissioner or Administrative Law Judge as may be assigned.

The Executive Director is directed to cause notice of the rehearing to be mailed at least ten days prior to such rehearing.

This order is effective today.

Dated AUG 4 1981, at San Francisco, California.

President

Commissioners

ALJ/jn *

Decision No. 92953 April 21, 1981

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 MPL, Inc., doing business as Universal Transportation, a California corporation, and Holland Oil Company, a California corporation, and Jack Holland and Son, Inc., a California corporation.	Case No. 10331 (Filed May 17, 1977; amended December 12, 1977)

Chickering & Gregory, by C. Hayden Ames, Edward P. Nelsen, and Ronald L. Murov, Attorneys at Law, for Jack Holland and Son, Inc., and Jack Holland Oil Company; Bernard Petrie, Attorney at Law, associated with Chickering & Gregory, for Holland Oil Company; and Richard Carpeneti, Attorney at Law, for MPL, Inc.; respondents.

Jasper Williams, Attorney at Law, and E. H. Hjelt, for the Commission staff.

O P I N I O N

This is an investigation on the Commission's own motion into the operations, rates, charges, and practices of MPL, Inc. (MPL), doing business as Universal Transportation, a corporation, for the purpose of determining whether MPL charged and collected less than the applicable minimum rates and charges named in Minimum Rate Tariff 6-B (MRT 6-B) for transportation performed for Holland Oil Company (Holland), a corporation, and Jack Holland and Son, Inc.(JH&S). Holland and JH&S are related corporations and, for the purposes of this proceeding, one is considered the alter ego of the other.

A prehearing conference and nine days of public hearing wereheld before Administrative Law Judges Mattson and Mooney in San Francisco between October 1977 and March 1978. The matter was submitted upon the filing of concurrent briefs on July 14, 1978.

At the time of the staff investigation referred to hereinafter, MPL:

1. Operated pursuant to radial highway common carrier and petroleum contract carrier permits;
2. Had 21 employees, including 15 drivers;
3. Operated 9 tank trucks and pull trailers;
4. Had terminals at Long Beach and Bakersfield and a subterminal at Anaheim; and
5. Had been served with MRT 6-B and Distance Table 7, and all additions and supplements to each.

For the year 1976, MPL's gross operating revenue was $1,174,652, which included $708,492 and $345,808, for the third and fourth quarters.

Staff's Showing

A staff representative visited MPL's place of business in September 1976 and various days thereafter and reviewed its transportation records for the period June, July, and August 1976. The representative testified his investigation disclosed that during the review period:

1. MPL had transported 1,743 shipments for Holland and had assessed charges below the minimum rates for this transportation;
2. The commodity transported in each shipment was residual fuel oil, which is the remains of crude oil after all other usable products have been extracted by the refinery, and it is generally used for firing boilers;

3. The origins of these shipments were the West Coast Oil Refinery, Tosco Oil Refinery, and San Joaquin Oil Refinery, all located within the extended area of Bakersfield, and also the Beacon Oil Refinery at Hanford;
4. The destinations of the shipments were the Kaiser Steel Co. at Kaiser Mill (Fontana), Kaiser Cement and Gypsum Corp. at Cushenbury, and Golden Eagle Refining Co. at Carson;
5. With the exception of the Golden Eagle Refining Co., all origins and destinations were served by rail facilities; and
6. Over 75 percent of all transportation performed by MPL during this period was for Holland.

The representative stated that:

1. Although he had initially been furnished contrary information by Steven Manning of MPL, his investigation disclosed that Manning was the president and sole shareholder of MPL;
2. In later explaining this, the president informed him that the persons whom he had originally stated were the officers of MPL had expressed an intent to buy stock in the corporation and assume these positions but later declined to do so;
3. The president and an employee also initially informed him that none of the transportation in issue was subject to minimum rate regulation because the petroleum was handled by MPL under a buy and sell operation, and the president subsequently informed him that the transportation to Cushenbury was under a manpower agreement whereby MPL furnished drivers only;
4. According to the information he developed, this was not so, and all of the transportation in question was for-hire transportation subject to minimum rates; and
5. Later in his investigation. the president admitted to this and informed him that MPL was rebilling Holland for undercharges for all transportation performed for it, including that covered by the review period, on this basis.

With respect to the alleged buy and sell, the witness asserted that at no time did MPL have an ownership interest in the oil. In this connection, he explained that his investigation disclosed that:

1. MPL had no records of purchasing or selling the oil;
2. It did not store any of the oil;
3. It was responsible to Holland for the loss of any of the oil while it was in its possession; and
4. The only function MPL in fact performed was the transportation of the oil.

As to the alleged manpower agreement for the Cushenbury transportation, the representative testified that:

1. For the equipment used for this haul, MPL paid all fuel, oil, repair, insurance, and other expenses and stored the equipment on its premises;
2. According to MPL's records, none of these expenses were charged back to Holland; and
3. It is apparent, therefore, that the equipment used for this transportation was operated and controlled by MPL.

The witness pointed out that Holland and MPL executed a Memorandum of Understanding on June 25, 1976 setting forth the terms of a lease/purchase agreement to be executed at a later date whereby MPL would lease six units of equipment, each consisting of a tank truck and trailer, from Holland. A copy of the memorandum was received in evidence as Exhibit 1. It provided that:

1. The lease would be for two years;
2. The lessee shall maintain adequate liability insurance; and
3. Lessee agrees to hold the lessor harmless of any loss or other casualty occasioned by leakage, fire, or explosion in the equipment or from its use.

A copy of MPL's canceled check dated July 16, 1976 to Holland for $15,600 was received in evidence as Exhibit 2. The representative explained that MPL's president had informed him that the check was for the first two monthly payments for the 6 units of equipment MPL was purchasing from Holland under the lease/purchase agreement in the memorandum in Exhibit 1. He stated that he did not know whether this equipment was used for the Cushenbury or other hauls MPL performed for Holland.

The representative testified that:

1. He made true and correct photostatic copies of all of MPL's invoices to Holland for the transportation in issue and some of the underlying freight bills and delivery receipts;
2. He did not photocopy all of the underlying documents for the 1,743 shipments because of the volume involved;
3. He did, however, extract all pertinent information from the underlying documents for each of the shipments and recorded this data together with information from the invoices on recap sheets he prepared; and
4. All of the photostatic copies and recap sheets are included in Exhibit 3.

He explained that:

1. Each MPL invoice covered transportation between a particular origin and destination;
2. He prepared a separate recap sheet for the shipments listed on each invoice;
3. In addition to showing the total charge assessed by MPL and the amount paid by Holland for all of the transportation covered thereby, he has shown the following information on the individual recap sheets for each shipment itemized thereon: the date of the shipment, delivery receipt and bill of lading numbers, number of barrels and gallons loaded, the charge assessed by MPL, and the correct billing weight;

4. All of this information except the weight was shown on MPL's documents; and

5. He developed the weight from the applicable rule in MRT 6-B. In this connection, Rule 30 of MRT 6-B provides that charges for residual fuel oil shipments shall be computed on the weight of the gross gallons loaded, and the weight shall be determined on the basis of 8.3 pounds per gallon.

The representative stated that the president of MPL informed him that:

1. Holland had furnished MPL with rates on a per barrel basis for each of the hauls;

2. MPL used these rates and based the charges for each of the shipments shown on its invoices on the gross barrels loaded at origin; and

3. However, Holland paid on the basis of the net gallons at destination which, in most instances, were less due to the cooling and settling of the residual fuel oil during transportation and this produced a lesser charge. The amount billed by MPL and the amount paid by Holland for the transportation covered by each invoice is shown on the recap sheets in Exhibit 1.

The representative further testified as follows:

1. He was informed by the president of MPL that payments under the lease/purchase agreement referred to in Exhibit 1 terminated on August 18, 1976;

2. Subsequent to this date, the agreed rate of $1.20 per barrel for the haul from Bakersfield to Cushenbury was reduced to $1.00 per barrel to compensate for this;

3. The total amount of the undercharges, based on the applicable minimum rates, for all transportation performed by MPL for Holland, including that covered by the review period, could be as high as $495,000, and those for the review period would approximate $250,000;

4. He informed the president that MPL would not be allowed to keep the undercharges that occurred during the review period and that, although he could not say for certain, it could be possible that MPL could retain undercharges collected for any transportation before or after this period;

5. Although he was aware that MPL was continuing to provide transportation for Holland while his investigation was in progress, he did not inform Holland of the potential undercharge liability that could result from this transportation;

6. At this point in time, he was not positive that undercharges did in fact exist and it is not usual procedure to contact the party responsible for the transportation charges while an investigation is in progress;

7. He is familiar with the volume tender provisions of MRT 6-B and volume tender agreements;

8. During his investigation, he was neither informed by the president or any other member of MPL nor was there any evidence in MPL's records that any of the transportation in issue was performed pursuant to a volume tender agreement; and

9. The president of MPL was cooperative during the investigation.

Additionally, the representative testified that:

1. When MPL ceased hauling for Holland, the six tank units referred to in the Exhibit 1 Memorandum were returned to Holland;

2. This left MPL with three units, and he does not know if MPL has subsequently added any additional units to its fleet;

3. A petroleum contract carrier permit was issued to Jack Holland, Sr. and Jack Holland, Jr., doing business as Jack Holland Oil Company on September 16, 1971, and the petroleum minimum rate tariff and the distance table and all reissues, supplements, and additions to each were served on the partnership;

4. JH&S is the successor to the partnership, and on July 20, 1977, the petroleum contract carrier permit was reissued and continued in its name; and

5. All reissues, supplements, and additions to the petroleum minimum rate tariff and distance table continued to be served on the corporation.

A staff rate expert testified that he took the set of documents in Exhibit 3, together with the supplemental information testified to by the representative, and formulated Exhibit 5 which shows for each of the invoices in Exhibit 3 the charge assessed by MPL and the actual amount paid by Holland for the shipments covered by the particular invoice, the minimum rate and charge computed by the staff for the transportation, and the amount of the resulting undercharge alleged by the staff. He pointed out that the total amount of the undercharges shown in Exhibit 5 is $265,541.07. The witness stated that pursuant to the alternative application of common carrier rates provisions of MRT 6-B, he had reviewed rail and petroleum common carrier tariffs and that none of these tariffs included rates that were lower than those set forth in MRT 6-B for the transportation in issue.

Both the representative and the rate expert were also called as adverse witnesses by Holland. Their testimony in response thereto will be summarized hereinafter along with Holland's evidence.

Staff counsel, in his closing brief, argued that the evidence clearly establishes that the undercharges asserted by the staff do in fact exist, and he recommended that MPL be directed to collect the undercharges and pay a fine in the amount thereof plus a punitive fine of $5,000.

Privilege Against Self-Incrimination

Before proceeding with a summation of the evidence presented by the respondent shippers, we will consider the due process issue raised by the shippers regarding the refusal by the president of MPL, Manning, when called as an adverse witness by the shippers pursuant to Section 776 of the Evidence Code, to testify on the grounds of the privilege against self-incrimination.

Manning did not voluntarily take the witness stand during the hearing and did not otherwise personally participate in the proceeding. As stated, he was called as an adverse witness by the shippers. His counsel immediately protested and stated that his client, pursuant to Section 1795 of the Public Utilities Code (Code), would not testify. The parties were then given an opportunity to brief this issue. Following the filing of briefs by the shippers and the staff only, the shippers renewed their request at a subsequent hearing, and Manning was directed to take the witness stand. Upon being sworn as a witness and stating his name, he immediately, in response to his attorney's request, read the following prepared statement:

> "On advice of counsel, I refuse to testify on the grounds of:
>
> "(1) The Fifth and Fourteenth Amendment of the United States Constitution;
>
> "(2) Article I, Section 13 of the California Constitution; and
>
> "Thirdly, Public Utilities Code Section 1795 and 3741." (RT 305, L.10-17.)

Other than testimony identifying MPL as a corporation and himself as the sole shareholder, president, manager, and person responsible for all activities of MPL during the review period, Manning refused to further testify on the grounds set forth in his prepared statement. The Administrative Law Judge thereupon ruled that based on the facts and circumstances of this proceeding and a review of the briefs on this issue, he would not require the witness to further testify and excused him as a witness. We concur with this ruling.

As pointed out above, Manning made reference to both Sections 1795 and 3741 of the Public Utilities Code in his refusal-to-testify statement. In their brief, the shippers referred to Section 1795 only. Section 1795 relates to proceedings involving public utilities, and Section 3741 relates to proceedings involving

permit carriers. Both sections are substantially similar. As is pertinent here, each grants immunity to a person who has invoked the privilege against self-incrimination and is ordered to testify in a Commission hearing, from any penalty or forfeiture for any act or matter which he has testified to under oath. Since MPL holds permitted carrier authority only, Section 3741 is the applicable statute here and it provides in its entirety as follows:

> "No person shall be excused from attending and testifying or from producing any book, document, paper, or account in any investigation or inquiry by or hearing before the commission or any commissioner or examiner, or in obedience to the subpena of the commission, or in any cause or proceeding, criminal or otherwise, based upon or growing out of any alleged violation of any of the provisions of this chapter, when ordered to do so, upon the ground that the testimony or evidence, book, document, paper, or account required of him may tend to incriminate him or subject him to penalty or forfeiture, but no person shall be prosecuted, punished, or subjected to any penalty or forfeiture for or on account of any act, transaction, matter, or thing concerning which, under oath, he has testified or produced documentary evidence before the commission, or in obedience to its subpena, or in any such cause or proceeding. No person so testifying shall be exempt from prosecution or punishment for any perjury committed by him in his testimony."

The power conferred on the Commission by Section 3741 is discretionary. The statute commences with the statement "No person shall be excused from attending and testifying". The discretionary nature of the power is clearly evidenced by the inclusion of the phrase "when ordered to do so". Had the Legislature intended otherwise, it would have excluded this phrase. This discretion is consistent with decision by the courts. "The cases hold that the state is under no obligation to make a witness available

to testify for a defendant, or on behalf of the People for that matter, by granting him immunity from prosecution." (In re Marshall K. (1970) 14 CA 3d 94, 99, see also US v Allstate Mortgage Corp. (1974) 507 F 2d 492.)

We recognize, as pointed out in the shippers' brief, that it is a general rule of law that the privilege against self-incrimination is personal and does not extend to corporations. (See Campbell Printing Corporation v Reid (1967) 392 US 286.) However, we have before us a unique situation. As stated above, Manning, in identifying himself, testified that he alone owned, managed, controlled, and was responsible for MPL. For the purposes of this proceeding, Manning and MPL are one and the same. Any undercharge and punitive fines that might be imposed on MPL herein pursuant to Sections 3800 and 3774, respectively, of the Code would obviously affect Manning, the real party in interest.

It is to be noted that there are criminal and civil penalties for violations of the Highway Carriers' Act by an officer of a corporation, among others, set forth in Sections 3801 and 3803, respectively, of the Code. So, even if we were to hold otherwise regarding the relationship between Manning and MPL, he would have the right to assert the self-incrimination privilege because of the potential penalties that could be imposed on him pursuant to these two sections. There is, likewise, no abuse of discretion on our part, for the reasons stated above, in excusing him as a witness on this basis and not requiring his testimony under a grant of immunity. The very purpose of this proceeding is to determine whether violations of the Highway Carriers' Act do in fact exist, and if they do, what penalties, if any, should be imposed. While the Order Instituting Investigation herein refers to Section 3774 and 3800 penalties only, paragraph 9 thereof provides for the

entering of any other order or orders that may be appropriate. This would include any order or orders pursuant to Sections 3801 and 3803. It is apparent from the foregoing that had Manning been required to testify with a grant of immunity, it is possible that if violations were found to exist, the Commission could have been precluded from assessing appropriate penalties. Because of this possibility, it would not have been prudent to have ruled otherwise on this issue.

We have reviewed the several past Commission decisions cited by the shippers as supporting their position. Each involved a different factual situation than that involved here. In one decision, Hodge v Hall, et al. (1938) 41 CRC 483, two individuals, who were officers and directors of a corporation, were required to testify and were granted immunity though the corporation was punished. However, in this matter, the corporation, which continued to exist at the time of the proceeding, had a distinct existence apart from the two individuals, who had resigned prior thereto. In another decision, In re Ben Smits (1965) 64 CPUC 13, a motion for immunity by the respondent carrier because it had produced various shipping documents at a hearing in response to the Order Instituting Investigation in the matter was denied. The decision in that proceeding pointed out that the privilege does not apply to records which a statute or valid regulation require to be kept and that the Commission had promulgated rules pursuant to Sections 3701, et seq. of the Code requiring carriers to maintain and keep the records in question. The decision cited Davis, Administrative Law, Vol. I, pages 203-207. A third decision, A.K. Plotkin v P.T.&T. et al. (1969) 69 CPUC 500, involved the discontinuance of telephone service and held that such discontinuance is a matter of regulation and not a penalty or forfeiture of a vested right.

Here, one of the issues before us is whether fines pursuant to Sections 3774 and 3800 of the Code should be imposed on the respondent carrier. In the context used in these two sections, a fine is "[a] sum of money required as a penalty for an offense", Standard College Dictionary, Funk and Wagnall, 1968 Ed. The fourth decision cited by the shippers was referred to for other reasons.

Respondent Shippers' Showing

Evidence on behalf of the respondent shippers was presented by two witnessess, J. M. Holland, Jr. and D. W. Dalziel, who each are officers in the two companies, by the staff rate expert and representative, who, as stated above, were called as adverse witnesses, by a traffic consultant, and by the owner of Petrocal, Inc.

J. M. Holland stated that he is the secretary-treasurer of both Holland and JH&S and that he is on the board of directors and a shareholder of each company. He testified that JH&S is engaged in refining in Montana and the sale of residual oil and distillate to large industrial users in several States, including California, and holds a contract carrier permit, and that Holland is primarily engaged in the sale of gasoline, diesel fuel, lube oil, and grease generally within 25 miles of San Leandro. (Although reference is made to both Holland and JH&S as the shipper in the respondent shippers' evidence and brief, we will, because of the close relationship between the two, refer to Holland as the shipper).

With respect to the transportation from two refineries in Bakersfield to Kaiser Cement and Gypsum Corp. at Cushenbury (546 loads), the secretary-treasurer testified as follows:

1. He entered a product agreement on behalf of Holland with Kaiser to deliver residual fuel oil to it at a price of $8.27 per barrel, which included $1.18 for transportation;

2. Kaiser inserted a reference to volume tender rates in the agreement, but he did not know what they were;
3. He obtained the $1.18 from a transportation broker;
4. He had been using a trucker that charged $1.26 per barrel between these points but could get no one to handle the haul for $1.18;
5. He came to the Commission to find out how to obtain a rate at or near the rate in the agreement;
6. He was referred by a Commissioner to a senior rate expert who advised him to file for a rate deviation and gave him two sample applications;
7. After several additional meetings with the senior rate expert, at which he was accompanied by Dalziel, an application for a deviation for JH&S, based on cost data obtained from another carrier, was filed, and it was granted on an interim basis pending hearing by Decision No. 85870 dated May 25, 1976 in Application No. 56457;
8. The decision authorized JH&S to transport residual fuel oil between Bakersfield and Cushenbury at a rate of $1.20 per barrel with a minimum of 160 barrels per shipment;
9. He had informed the senior rate expert, who is now deceased, that he wanted to have the deviation for his own company so he would be free to select any carrier he wished rather than have a particular carrier obtain the deviation, and then be tied to it;
10. The senior rate expert agreed that this was a good idea; and
11. With the $1.20 rate, the profit per barrel was 20 cents.

J. M. Holland testified as follows regarding the relationship between Holland and MPL:

1. A Jack Quarles contacted him for a job prior to the transportation in issue, but he would not hire him;

2. His company did not want to transport shipments from the Bakersfield area with its own equipment because it would require hiring additional personnel there;

3. Quarles did tell him that MPL had trucks available if he should need them;

4. In June 1976, Quarles came back to his office with Manning and Crowe, all of whom were represented to him as shareholders or partners of MPL;

5. It was agreed at this meeting that MPL would lease six units of equipment from Holland and would haul materials to Cushenbury at $1.20 per barrel, and the Memorandum of Understanding in Exhibit 1 was drawn up;

6. A lease-purchase agreement was to have been drawn up, and it was to provide that after lease payments had been made for two years, the equipment would belong to MPL;

7. However, on approximately August 18, 1976 or very shortly thereafter, the parties verbally agreed to terminate the Memorandum of Understanding, and the lease-purchase agreement was never drawn up;

8. Thereafter, the Cushenbury transportation was handled on a manpower agreement;

9. The reason for this change was because Holland had been receiving calls from creditors of MPL who were complaining that MPL was not paying its bills and some of the deliveries were becoming erratic;

10. MPL was happy with the changeover because it no longer had to make the high monthly lease payments, and because of this the rate for the Bakersfield-Cushenbury haul was reduced from $1.20 to $1.00;

11. Under the Memorandum of Understanding, MPL paid the drivers and all expenses for the equipment, including gas, oil, repairs, and tires, and this same arrangement continued under the manpower agreement;

12. Holland never had a subhaul agreement with MPL;

13. The witness was of the opinion that MPL could transport residual oil for Holland to Cushenbury under Holland's deviation;

14. The rate deviation was canceled at Holland's request by Decision No. 86518 dated October 12, 1976 after a petition for rehearing by the California Trucking Association had been granted; and

15. Another carrier now has a similar deviation.

J. M. Holland stated that it was his understanding that all of the hauling by MPL for his company to the two other destinations, Kaiser Steel Co. at Kaiser Mill, Fontana (766 loads) and Golden Eagle Refining Co. at Carson (431 loads), were being handled at the lowest minimum rates. He explained that although he made all transportation decisions during the time covered by the staff investigation, he wasnot familiar with Commission rates and regulations and no one else at Holland or JH&S were familiar with them either during this period. He asserted that they now have someone who is knowledgeable of such matters. He stated that it was never his intent or the intent of anyone else at Holland or JH&S to violate any Commission rates or regulations.

The witness testified that the hauling here was the greatest amount ever done for it by a for-hire carrier. He stated that JH&S uses its own equipment primarily for hauling its own freight and only occasionally hauls for others. The witness asserted that he was always told by Manning that he was happy with the hauls and making money and that everything was fine. He stated that when the relationship between Holland and MPL finally terminated, only three of the leased trucks were operational, and Holland had to pay the repair bill for the other three that were in a shop.

According to J. M. Holland, if Holland had to pay the rates alleged by the staff to be applicable for the transportation in issue, it would have lost considerable money, and its financial position would have been considerably jeopardized. He stated this

was particularly true with respect to the Cushenbury transportation. He pointed out that the haul from Bakersfield to Carson was to move out an oversupply of stock Holland had at a refinery, and at the rates assessed by MPL, Holland made no profit on this stock.

Dalziel, the other officer of Holland and JH&S to testify, stated that he is the president of JH&S and is on its board of directors and that he is a vice president of Holland. Much of his testimony was similar to and corroborated the testimony of J. M. Holland and will not be recited. He also testified that:

1. He arranged for most of the transportation for the two companies during the staff review period;
2. He has had no rate training and was not familiar with volume tender rates at that time;
3. Quarles informed him that the $1.20 deviation rate for Cushenbury was within cents of the volume tender rate;
4. Another carrier had quoted $1.20 for this haul;
5. When he asked MPL for rate quotes, he asked for volume tender rates;
6. At this point in time, it was his understanding of volume tender rates that all the shipper need do was to call the carrier and request these rates, tell the carrier the length of time involved for the haul (day, month, or year), sign a blank volume tender form, and send it to the carrier, and that the carrier would insert all necessary information on the form and bill the shipper accordingly;
7. In June or July he signed 20 blank volume tender forms for MPL and later signed approximately 40 more blank forms for it, and these blank forms were picked up by or sent to MPL;
8. He asked MPL at various times if all necessary information was inserted on the volume tender forms by it, and each time the carrier informed him that it was and that all paper work was correct;

9. He also asked MPL for copies of the completed volume tender agreements but was never furnished with any;
10. The blank volume tender forms he signed were for the Kaiser Steel, Fontana and Golden Eagle, Carson hauls and for any other hauls for which they might be needed;
11. He does not recall any reference to volume tender with MPL's billings or any volume tender mileage, excess mileage, per hour driver charges, or other volume tender charges on the billings; and
12. MPL based all its charges on a per barrel basis, and he does not know how they were determined.

Dalziel presented copies of 12 separate documents each entitled Volume Tender Service Agreement, and they were received in evidence as Exhibits 9-A through 9-L. He stated that:

1. He had requested Quarles in August or September 1977 to furnish him with any volume tender agreements he might be able to obtain for the transportation handled by MPL for Holland (Quarles had not been with MPL since November 1976 and was now an employee of Holland);
2. Quarles brought the 12 copies in the Exhibit 9-series to the witness' office and they were forwarded to Holland's attorney;
3. He was informed by Quarles that they were from his personal file and he did not know where the originals were; and
4. He did not again ask Manning for the copies of the many other agreements he had signed in blank and returned to MPL.

The 12 Volume Tender Service Agreements have blanks to fill in the following information:

1. The name of the carrier;
2. Period of service;
3. Equipment unit number and capacity;
4. First point of origin;
5. Date of agreement;
6. Shipper tender number;

7. Carrier address;
8. Signature of representatives of carrier and shipper;
9. Time and date the engagement is to commence and terminate; and
10. Volume tender rate information, including the basic per unit charge for the equipment for the service period, per hour and per mile charges, excess per hour and per mile charges, and charges for additional service, all of which are stated in MRT 6-B.

Six of the agreements (Exhibits 9-A to 9-F) do have handwritten information on them and each shows an agreement date of June 20, 1976, it is for a one-year period, the carrier's name and address, the vehicle identification number and capacity, the signatures of Dalziel and Quarles, and except for one, the engagement is to commence at 6:00 p.m. on June 18, 1976. None of the six had any information thereon regarding the applicable volume tender charges for the unit of equipment, hours, miles, and additional services. However, each had the following handwritten notice at the bottom of the sheet: "Per rate deviation 1.20 per bbl. to Kaiser, Cushenbury." The remaining six agreements (Exhibits 9-G through 9-L) were essentially blank, and of these, all were signed by Dalziel and five were signed by Quarles and included a vehicle identification number.

Dalziel stated that it was always Holland's intent to pay correct rates and that it was his understanding that correct rates were paid.

The staff rate expert was called as an adverse witness by the respondent shippers and questioned regarding the application of the volume tender provisions of MRT 6-B. These provisions provide that a carrier and shipper may enter into an agreement whereby the transportation charges are based on a volume tender basis rather

than a per shipment basis. Volume tender rates may be on a daily, monthly, or yearly basis and the applicable rates and rules for each are set forth in Items 500, 510, and 520, respectively, of the tariff. The rules governing the agreement and the form of the freight bill are set forth in Items 530 and 610, respectively, of the tariff. Copies of the five items were received in evidence as Exhibit 11.

The shipper's intent in calling the the staff rate expert was to establish that the volume tender provisions in MRT 6-B are ambiguous and that the volume tender agreement can be oral. The witness did not agree. In this connection, paragraph 2 is identical in the daily (Item 500), monthly (Item 510), and yearly (Item 520) vehicle unit volume tender provisions and provides as follows:

> "The provisions of this item apply only when, prior to the transportation of the property, the shipper has requested verbally or in writing that the transportation be performed under the provisions of this item and charges are prepaid; provided, that if requested verbally, the shipper shall place a confirming written request in the United States mail the same day as verbally requested. (For form of agreement, see Item 530.)"

The first paragraph of Item 530 provides as follows:

> "Prior to the transportation of any commodities as described in Item 30 under the provisions of Items 500, 510, 520, 523 or 525, the shipper must enter into a written or verbal agreement with the carrier."

In answers to questions regarding the above-quoted provisions, the rate expert concluded that the agreement referred to in the first sentence of Item 530 if oral must be reduced to writing within a short time.

He explained that:

1. A shipper may request volume tender service orally, but as provided in paragraph 2 of the volume tender items, a written confirmation must be placed in the mail the same day;
2. The shipper's written request can be in any form;
3. As soon as the carrier receives the oral request, he can then start the hauling, and once he does, there is an oral agreement in effect between the parties;
4. Item 530 sets forth the information that must be contained in the agreement and the form of the agreement which is to include the date of agreement, the period it is to cover, the capacity and identification of the equipment, the charge for the unit of equipment, additional and excess hour and mile charges, charges for additional service, name and address of the shipper and carrier; and signatures of representatives of the shipper and carrier;
5. It is apparent that since the agreement requires all of this information, including signatures, it must be in writing;
6. The carrier must as soon as possible, within a day or so, complete and sign the agreement and send it to the shipper for signature at which time it becomes a completed written agreement and contract between the parties; and
7. The shipper then returns the written agreement to the carrier. It is noted that the title of Item 530 is Written Agreement.

The rate expert also testified that he did not agree with the respondent shippers that there was a conflict between Notes 10 and 21 of the yearly volume tender provisions in Item 520 of MRT 6-B. Note 10 states that a freight bill in the form for vehicle unit rates in Item 610 shall be prepared for each engagement. Note 21 states that all charges under the yearly

tender shall be assessed on a calendar-month basis. The witness explained that Note 10 merely means that a freight bill shall be prepared for the year's engagement and that according to Note 21, the carrier shall issue a monthly invoice for payment to the shipper for accrued charges which could vary from month to month depending on the additional and excess miles and hours and other additional services provided.

When called as an adverse witness by the respondent shippers, the staff representative testified as follows:

1. While investigating other carriers, he has seen over 100 volume tender agreements;
2. Substantially all of those he has seen have not included all of the information listed in Item 530 of MRT 6-B, but the majority of these have included most of this information; and
3. He has in other investigations recommended that the carrier be required to collect undercharges in instances where volume tender agreements have not been completed correctly.

A traffic consultant who had previously been a senior member with the Commission's Transportation Division staff for many years and had prior experience in the transportation industry appeared as an expert witness for Holland. He testified that when the volume tender provisions were first added to MRT 6-B in 1961, he was with the Commission and both he and his staff members had reservations about the rules and were not satisfied that their provisions were clear and free of ambiguities. He is of the opinion that since the first sentence of Item 530 provides that the agreement can be either written or verbal, the only reasonable interpretation of this provision is that an oral agreement between a shipper and carrier for volume tender service is valid and need not be memorialized in writing. The consultant stated that

for this reason, the volume tender agreements in Exhibits 9-A through 9-L did not have to be in writing. He testified that since they were signed by Dalziel for Holland, it was MPL's responsibility to fill them out, and that the blank volume tender documents signed by Dalziel did satisfy the requirement in paragraph 2 of the daily, monthly, and yearly volume tender provisions of MRT 6-B that the request for volume tender service be written or confirmed in writing. The witness explained that it is not necessary to have a written volume tender agreement to show the rates agreed upon by the parties because these are shown on the freight bill. He was of the opinion that there was no inconsistency in having the notation that deviation rates were to apply on the bottom of the volume tender agreements in Exhibit 9-A through 9-F since it obviously meant that the deviation rates would apply if they were lower than the volume tender charges. He stated that a number of petroleum carriers have their shippers sign volume tender agreements in blank.

The consultant did not agree with the staff that the Note 10 provision that a freight bill shall be issued for each engagement and the Note 21 provision that charges shall be assessed monthly in yearly volume tender rule in Item 520 of MRT 6-B are consistent. He testified that one implies that charges are to be collected on a yearly basis and the other merely states that charges are to be assessed on a monthly basis but says nothing as to how this is to be accomplished. He is of the opinion that this inconsistency casts doubt on the volume tender rules. He also stated that the reference in paragraph 2 of the volume tender rules to Item 530 for the form of agreement causes confusion. He pointed out that a request and agreement are not the same. In this connection, he stated that while paragraph 2 requires that

the request be in writing or confirmed in writing if oral, Item 530 provides that the agreement can be verbal. He asserted that he has observed that other shippers and carriers have found the volume tender provisions to be ambiguous and have had problems with them.

The consultant testified that based on a review of the records of another carrier that had hauled at volume tender rates for Holland between the same points involved here, he developed the charges that would accrue for sample shipments under the daily (Exhibit 13) and monthly (Exhibit 14) volume tender rates and the distance rates advocated by the staff for the transportation of residual fuel oil between these points. He pointed out that the charges in his examples under the volume tender rates were substantially less, ranging from 27 to 90 percent less under the daily volume tender rates and from 61 to 93 percent less under the monthly vehicle unit rates. The witness admitted, however, that he had made a number of assumptions in his calculations, had not verified any of the data he obtained from the other carrier's records, and did not know if any of the additional volume tender charges for excess hours and mileage and for accessorial and other services should have been applied. He explained that Holland did not have sufficient information in its records for him to reconstruct charges for the transportation in issue on a volume tender basis and that MPL was most likely a much less efficient carrier than the one he obtained the records from and would therefore have higher volume tender charges.

The final witness for Holland was the owner of a company that is engaged in buying and selling petroleum products. He testified that:

1. The business he was previously employed by owned a subsidiary petroleum tank carrier company;

2. Manning was employed by the subsidiary during part of this time, and because he would not completely fill out volume tender agreements, it was necessary to hire a girl to do this;

3. Manning has called him recently and has offered to transport residual fuel oil for his company from Bakersfield to Los Angeles at $1.20 per barrel; and

4. Manning's reputation in the petroleum industry is not good.

The attorneys for the shippers in their brief urged that the Commission find that:

1. Their clients acted in good faith at all times to secure the lowest lawful rates;

2. The shippers and carrier in good faith intended to and did in fact enter into valid volume tender agreements for the Fontana and Carson hauls;

3. The shipments to Cushenbury were pursuant to the rate deviation;

4. The intent of the minimum rate structure has been fully satisfied; and

5. The shippers are not liable for any undercharges.

They argued that should the Commission adopt the staff ratings, with which they do not agree, requiring the shippers to pay the enormous resulting undercharges would serve neither justice nor the minimum rate structure. In this connection, they asserted that the facts and special circumstances herein constitute mitigating circumstances and warrant an order by the Commission under Section 3667 of the Public Utilities Code that the shippers should not be required to pay any undercharges.

It is pointed out in the brief that Manning and MPL have filed an action in the Alameda Superior Court, Action No. H-44617-2 entitled <u>MPL, Inc., et al. v Jack Holland & Son, Inc., et al.</u> seeking recovery of $625,000 for the period June through November 1976. (This matter has not yet come to trial and may not for a while, but in any event, the filing of the complaint tolls the statue of limitation on the alleged violations.)

It is asserted that a decision here favorable to the staff position, which it is alleged the evidence does not support, would not only result in an excessive penalty to shippers who acted in good faith but would have a significant bearing on the civil action and could enhance the possibility of Manning, the sole shareholder of MPL, personally realizing over $360,000 in undercharges allegedly incurred during September through November 1976.

MPL'S Position

While MPL did not present any evidence, it did file a brief. In summary, the brief stated that:

1. The shipper set the rates that were assessed and informed the carrier that they were legal;
2. The carrier accepted this in good faith;
3. While undercharges do exist, there was never any intent on the part of the carrier to undercharge or undercut any other potential competitor for the traffic; and
4. The carrier cooperated fully with the staff during the investigation and did not attempt to conceal anything.

For these reasons, it is requested in the brief that no punitive fine be imposed on MPL and that no action be taken against its operating authority.

Discussion

We are of the opinion that the staff ratings in Exhibit 5 and the resulting $265,541.07 in undercharges are correct. The evidence establishes that the undercharges were the result of a negotiated, per barrel rate.

MPL presented no evidence and took no exception to the staff ratings in its brief. It has rebilled Holland for the undercharges for the transportation it performed for MPL during

the review period and also for undercharges for all other transportation it performed for the shipper. It has also filed a civil action to recover these undercharges. As to any transportation not included in the review period, we do not have sufficient evidence before us to determine what the applicable rates might have been and take no position whether undercharges do in fact exist in connection with such transportation.

Holland took exception to all of the staff ratings which were based on the distance rates published in Item 400 of MRT 6-B and urged that no order be issued by the Commission that would result in Holland's having to pay any undercharges. Basically, its position is that:

1. The transportation to Kaiser Cement and Gypsum Corp. at Cushenbury was subject to the deviation rate prior to approximately August 18, 1976, and thereafter it was subject to a manpower agreement and exempt from rate regulation, and
2. All transportation to Kaiser Steel Co. at Kaiser Hill, Fontana and to Golden Eagle Refining Co. at Carson was subject to the volume tender provisions of MRT 6-B.

The evidence does not support these contentions. There is no basis for rating any of the Cushenbury transportation under the deviation to transport residual fuel oil at $1.20 a barrel for Kaiser Cement and Gypsum Corp. between Bakersfield and Cushenbury granted to JH&S by Decision No. 85870 dated May 25, 1976. This decision was rescinded and the application was dismissed with prejudice by Decision No. 86518 dated October 13, 1976. A deviation rate can be used only

by the carrier to whom it was granted and no other carrier. Here MPL is the actual carrier. Therefore, it cannot use the deviation granted to JH&S. A deviation might be applicable if the prime hauler has a deviation and contracts with a subhauler to actually perform the transportation at the deviation rate. This is not the situation here. Shipper witnesses J. M. Holland and Dalziel each testified that JH&S never entered into a subhaul agreement with MPL. It is evident that MPL is the prime hauler because it is the entity that billed for the transportation.

The transportation also cannot be rated pursuant to the deviation rate because this would allow a shipper to transport his property pursuant to a deviation. Section 3666 of the Public Utilities Code permits the Commission to grant deviations to highway permit carriers only. The shipper entities had title to the oil until it was delivered in Cushenbury. If they transported the oil then it would probably be exempt proprietary transportation and there would be no need for a deviation. But it is not permissible for a shipper to obtain a deviation and pass it on to carriers. Furthermore, although JH&S does have a carrier permit it is also the shipper irrespective of which of the two entities, Holland or JH&S, MPL actually provided the transportation for. As stated above, because of the close relationship between the two shipper entities, for the purposes of this proceeding one is considered the alter ego of the other. In such circumstances, a carrier engaged as an ostensible subhauler to transport the property of an alleged prime carrier is in fact the prime carrier and must be paid the applicable minimum rate for this service unless it in its own name has authority from the Commission to charge otherwise. (See Investigation of Doudell Trucking Co., et al. (1976) 81 CPUC 26.)

As to the assertion by Holland that a former senior staff rate expert had advised him that the Cushenbury haul could be handled under the JH&S deviation rate by any carriers, it is not clear on the record whether Holland had explained all of the facts and circumstances surrounding this haul to this staff member. Even assuming he did, which the record does not confirm, it is a general rule of law that statements made by a staff member are not binding on a governmental agency, and we have consistently so held.

The purported manpower agreement is not a basis for exempting the Cushenbury transportation after August 18, 1976 from minimum rate regulation. As explained by J. M. Holland a lease-purchase agreement was to have been drawn up to replace the Memorandum of Understanding executed by the shipper and carrier respondents on June 25, 1976 (Exhibit 1). Under this, MPL leased six units of equipment from Holland at a stated monthly charge, and MPL was to own the equipment after two years. While this was in effect, MPL paid all fuel, oil, repairs, and other expenses, furnished the driver, and stored the equipment on its premises. Under the alleged manpower agreement which purportedly replaced the lease-purchase arrangement after August 18, 1976, except for the monthly lease payment by MPL and the understanding that it was to own the equipment after two years, the duties and obligations of the parties insofar as the operation of the six units of equipment is concerned did not change. MPL continued to be responsible for payments for all fuel, oil, repairs, and other vehicle expenses, furnishing drivers, and storing the equipment. Also, after this date the transportation rate of $1.20 per barrel was reduced to $1.00 to compensate Holland

for the cancellation of the monthly lease payment. In effect, the 20 cent reduction was a lease charge and a substitution for the prior monthly basis for the lease charge. Taking all this into account, it is obvious that there was no valid manpower agreement. For such an agreement to have been valid, MPL would have furnished only a driver, and Holland would have been completely responsible for the equipment, including its operation, storage, and all expenses in connection therewith.

There is no basis for rating the Fontana and Carson transportation under the volume tender provisions of MRT 6-B as urged by the respondent shippers in their brief. There is likewise no basis for rating any of the Cushenbury transportation in this manner. As stated above, all of the transportation was rated by applying negotiated per barrel rates. Holland alleged that some of the rates that were assessed were quoted to it by other carriers. It further alleged that although JH&S did hold permit authority, no one in either shipper company had any knowledge of minimum rates or regulation. These and other similar statements offered in mitigation are irrelevent. The law is well-settled that correct rates must be assessed and collected for all transportation. Here, the correct applicable rates for all transportation are those calculated by the staff and shown in its Exhibit 5.

Volume tender rates also were inapplicable because the transportation was not performed in accordance with the provisions of the volume tender items as required by paragraph 1 of MRT 6-B Items 500 (daily), 510 (monthly), and 520 (yearly). Paragraph 1 of the items makes compliance with its provisions a mandatory precondition for the application of volume tender rates. Since this precondition was not met, there is no legal basis for applying volume tender rates.

The documentation requirements were not met. The many volume tender service agreement forms signed by the shippers and given or sent to MPL in two batches do not satisfy the written request or confirmation requirement in paragraph 2 of the three rules in MRT 6-B for daily, monthly, and yearly service. While, as explained by the staff rate expert, the written confirmation may be in any form, it is obvious that the service requested must be identified in some reasonable manner by including information as to the type of volume tender service requested (daily, monthly, or yearly), when the service is to commence, how many and type of vehicles needed, and the like. It is noted that the Exhibit 9-series type of agreement forms signed by Dalziel in blank and sent to MPL refer to Items 500 (daily), 510 (monthly), and 520 (yearly) of MRT 6-B. It is apparent that such a blank form without the time period filled in does not specify the type of volume tender service requested.

We agree with the staff rate expert that the agreement for volume tender service set forth in Item 530 of MRT 6-B must be in writing. As pointed out by the respondent shippers' traffic consultant the first paragraph of the item does state that "[p]rior to the transportation of any commodities..., the shipper must enter into a written or verbal agreement with the carrier." This statement means what it says. No transportation can be performed until there is an agreement, written or verbal. It is plain that the purpose of this statement is to authorize the commencement of service in accordance with the intent of the parties before they execute a written agreement which may take several days because of the time required to mail or otherwise take the written document from one party to the other for signature. Generally, the oral agreement occurs

when the carrier accepts the shipper's request. The balance of Item 530 sets forth the information the agreement shall contain and the form of the agreement which includes space for the signatures of representatives of both the shipper and carrier. It is clear that if signatures are required, a written document is necessary. Also, since the item sets forth the information the agreement shall contain, it is obvious that this information is to be placed on a written agreement. Furthermore, as heretofore pointed out, the item is titled "Written Agreement". An interpretation based solely on the first sentence that only an oral agreement is required and a written agreement is optional, as advocated by the respondent shippers, is untenable. The item must be read in its entirety and so interpreted. Although no time is specified in the item as to when the written agreement must be completed, it is reasonable to conclude that it must be executed promptly by the parties.

The assertion by the shippers' traffic consultant that Note 10 of Item 520 (yearly volume tender), which requires the issuance of a freight bill for each engagement, and Note 21 of the item, which requires the monthly assessment of charges, are inconsistent is without merit. The staff rate expert, as pointed out above, correctly explained the freight bill for the engagement and the monthly assessment. Furthermore Note 10 requires that the freight bill for the engagement be in the form set forth in Item 610 of the tariff for vehicle unit rates and that a copy be retained by the carrier for three years. No such freight bills were issued or retained by MPL.

While the shippers did assert that the volume tender agreement could be oral (with which we do not agree), apparently one of the reasons they presented the 12 documents in Exhibits 9-A through 9-L was an attempt to establish that there

were written agreements. A review of these documents clearly shows their insufficiency to qualify as volume tender agreements. Some of the documents purporting to be yearly volume tenders commence in mid-month. This is contrary to Item 520, paragraph 2 which requires that yearly tenders commence with the first day of the calendar month. Neither the rates nor charges are shown. In this connection, paragraph 3 of each of the volume tender rules sets forth specific rates, subject to the items' notes, for equipment, labor, mileage, hours, and other services and purposes. According to the form of agreement in Item 530 (Written Agreement rule), this rate information is to be shown on the agreement. Some of the agreements have the notation "per rate deviation 1.20 per bbl to Kaiser Cushenbury". It cannot be ascertained from these documents if the parties were agreeing to volume tender or deviation rating. Furthermore, the actual billing by the carrier to the shippers was, as noted, on a per barrel basis. The six documents that had information inserted on them were incomplete, and the other six had only Dalziel's signature on them.

We have consistently held that documentation requirements must be strictly enforced to ensure the integrity of the minimum rate structure. (See Investigation of Elmo v La Marr (1966) 66 CPUC 337, Investigation of Gem Freight Lines (1963) 61 CPUC 411.) If proper documentation were not required, parties could defend undercharge cases by simply saying that they intended to ship in a certain way. Based on the record before us, the waiver of these requirements in this proceeding is not warranted.

There is insufficient information in the record to rate the transportation in issue under the volume tender provisions. The volume tender ratings developed by the shippers' traffic consultant in Exhibits 13 and 14 were based on records of another carrier and

many assumptions by him. They are certainly not a valid basis for determining volume tender charges for the transportation in issue. However, having concluded that none of this transportation could be rated under the volume tender tariff provisions, to rerate it on this basis would be an idle act.

We are mindful of the assertions by various witnesses for the shippers regarding Manning that:

1. His reputation in the petroleum field is not good;
2. He did not complete volume tender agreements while working for another carrier in the past; and
3. He has a bias in favor of the staff position because if it is adopted by the Commission, the possibility of success in the civil action he has filed and thereby personally realizing over $360,000 for undercharges on shipments subsequent to the review period is enhanced.

They are irrelevant to this proceeding. Should the shippers be of the opinion that the undercharges herein were due to their reliance on inaccurate or incorrect statements or action by MPL, the proper forum to seek damages therefor is a court of competent jurisdiction.

Based on a review of all the facts and circumstances, we are of the opinion that there are not sufficient mitigating circumstances to warrant a waiver of a directive to the carrier requiring it to collect the undercharges herein. We will, therefore, direct the carrier to collect the undercharges and to pay a fine in that amount plus a $5,000 punitive fine.

In arriving at the amount of the punitive fine, we have given consideration to the arguments set forth in MPL's brief but are not persuaded by them. Manning, the sole owner, president, and manager

of MPL, has had considerable experience in the petroleum transportation field. A carrier is responsible for observing and abiding by an applicable tariff. Lack of knowledge of tariff provisions or reliance on anyone else for tariff information does not exonerate him from this duty.

We recognize that the payment of the undercharges may be a substantial financial burden for the respondent shippers. Should this be so, a properly supported petition to modify this decision may be filed requesting that the undercharges be collected on a reasonable installment basis.

Findings of Fact

1. MPL operates pursuant to a petroleum contract carrier permit and other permitted authority.

2. Respondent shipper JH&S holds a petroleum contract carrier permit that was issued to its predecessor entity and transferred to it.

3. MPL and JH&S were each served with all applicable minimum rate tariffs and distance tables, together with all amendments and additions thereto.

4. Holland and JH&S are related corporations and, for the purposes of this proceeding, one is considered the alter ego of the other.

5. JH&S was granted a rate deviation by Decision No. 85870 dated May 25, 1976 in Application No. 56457 to transport residual fuel oil for Kaiser Cement and Gypsum Corp. between Bakersfield and Cushenbury. Although the deviation authority was later canceled, it was in effect during the entire period covered by the staff investigation.

6. A carrier with a rate deviation cannot engage another carrier to transport its property at the deviation rate it has been authorized to charge. In such circumstances, the other carrier is a prime carrier and not a subhauler.

7. For the reason stated in Finding 6, MPL could not use the deviation rate granted to JH&S for the Cushenbury transportation performed by it for the respondent shippers during the staff review period.

8. The alleged manpower agreement between the shippers and MPL for transportation to Cushenbury after approximately August 18, 1976 was in effect an equipment lease arrangement. The rate that was being assessed for this transportation was reduced 20 cents per barrel to compensate the respondent shippers for the use of the equipment by MPL. Also MPL furnished the driver and paid for fuel, oil, repairs, and most other vehicle expenses.

9. For the reason stated in Finding 8, the Cushenbury transportation, after approximately August 18, 1976, performed by MPL for the respondent shippers during the staff review period was not exempt from rate regulation and was subject to minimum rates.

10. The form of volume tender agreement in Item 530 of MRT 6-B requires signatures by representatives of the shipper and carrier. The provision in the first paragraph for an oral agreement is to cover the temporary period between the commencement of service and the execution of the written agreement. Although the rule is silent as to when the written agreement should be executed, the reasonable interpretation is that it should be done as soon as possible after the oral agreement is reached.

11. Except for the initial commencement of service period, the volume tender provisions of MRT 6-B cannot be applied to transportation unless a written agreement containing the information required by Item 530 has been executed by the parties.

12. There are no ambiguities in the volume tender provisions of MRT 6-B.

13. None of the documents in Exhibits 9-A through 9-L contain all of the information required to be shown on the written agreement for volume tender service by Item 530 of MRT 6-B.

14. Based on the evidence before us, there were no valid written agreements for any of the transportation performed by MPL for the respondent shippers during the staff review period, and for this reason, none of the transportation could be rated under the volume tender provisions of MRT 6-B during this period.

15. The rates and charges computed by the staff and the undercharges alleged by it in Exhibit 5 are correct.

16. MPL charged less than the lawfully prescribed minimum rates for transportation performed for the respondent shippers in the instances set forth in Exhibit 5 in the total amount of $265,541.07.

17. There is no basis in the evidence in this proceeding on which to make a determination whether undercharges existed in connection with transportation performed by MPL for the respondent shippers before or after the staff review period.

Conclusions of Law

1. MPL violated Sections 3664, 3667, 3668, and 3737 of of the Public Utilities Code.

2. MPL should pay a fine pursuant to Section 3800 of the Public Utilities Code in the amount of $265,541.07 and, in addition thereto, should pay a fine pursuant to Section 3774 in the amount of $5,000.

3. MPL should be directed to cease and desist from violating the minimum rates and rules of the Commission.

4. There was not an abuse of the discretion granted in Section 3741 of the Public Utilities Code or constitutional due process by the Administrative Law Judge in excusing Manning from testifying after he had invoked the privilege against self-incrimination.

The Commission expects that MPL will proceed promptly, diligently, and in good faith to pursue all reasonable measures to collect the undercharges including, if necessary, the timely filing of complaints pursuant to Section 3671 of the Public Utilities Code. The staff of the Commission will make a subsequent field investigation into such measures. If there is reason to believe that MPL or its attorney has not been diligent, or has not

taken all reasonable measures to collect all undercharges, or has not acted in good faith, the Commission will reopen this proceeding for the purpose of determining whether further sanctions should be imposed.

ORDER

IT IS ORDERED that:

1. MPL, Inc., doing business as Universal Transportation, a corporation, shall pay a fine of $5,000 to this Commission pursuant to Public Utilities Code Section 3774 on or before the fortieth day after the effective date of this order. MPL, Inc. shall pay interest at the rate of seven percent per annum on the fine; such interest is to commence upon the day the payment of the fine is delinquent.

2. MPL, Inc. shall pay a fine to this Commission pursuant to Public Utilities Code Section 3800 of $265,541.07 on or before the eightieth day after the effective date of this order.

3. MPL, Inc. shall take such action, including legal action instituted within the time prescribed by Section 3671 of the Public Utilities Code, as may be necessary to collect the undercharges set forth in Finding 16 and shall notify the Commission in writing upon collection.

4. MPL, Inc. shall proceed promptly, diligently, and in good faith to pursue all reasonable measures to collect the undercharges. In the event the undercharges ordered to be collected by paragraph 3 of this order, or any part of such undercharges, remain uncollected sixty days after the effective date of this order, respondent shall file with the Commission, on the first Monday of each month after the end of the sixty days, a report of the undercharges remaining to be collected, specifying the action taken to

collect such undercharges and the result of such action, until such undercharges have been collected in full or until further order of the Commission. Failure to file any such monthly report within fifteen days after the due date shall result in the automatic suspension of MPL, Inc.'s operating authority until the report is filed.

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

The Executive Director of the Commission shall cause personal service of this order to be made upon respondent MPL, Inc. and cause service by mail of this order to be made upon all other respondents. The effective date of this order as to each respondent shall be thirty days after completion of service on that respondent.

Dated April 21, 1981, at San Francisco, California.

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