

ORIGINAL

Decision No. 67886

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Investigation on the Commission's
own motion into the operations,
rates and practices of SHIRLEY
ROBERTSON, an individual, doing
business as SHIRLEY ROBERTSON
TRUCKING.

Case No. 7882

George A. Schroeder and Truman F. Campbell,
for respondent.
Elmer Sjostrom and J. B. Hannigan, for the
Commission staff.

O P I N I O N

By its order dated April 28, 1964, the Commission instituted an investigation into the operations, rates, and practices of Shirley Robertson, doing business as Shirley Robertson Trucking.

A public hearing was held before Examiner Gravelle on May 21, 1964, at Fresno.

Respondent presently conducts operations pursuant to Radial Highway Common Carrier Permit No. 20-862 dated July 2, 1953. Respondent has a terminal in Chowchilla, California. He owns and operates fifty-two pieces of equipment and employs twenty persons. His gross transportation revenue for the year ending March 31, 1964 was \$435,037.00. Copies of appropriate tariffs and the distance table were served upon respondent.

On July 22 -- 26, 1963, a representative of the Commission's field section visited respondent's place of business and checked his records for the period from January through June of 1963, inclusive. The staff representative checked 267 movements

during said period. The underlying documents relating to 9 movements were taken from respondent's files and submitted to the License and Compliance Branch of the Commission's Transportation Division. They are included in Exhibit No. 1.

Based upon the data taken from said documents a rate study was prepared and introduced in evidence as Exhibit No. 2. Said exhibit reflects differences between the Commission's minimum rates and the sums received by respondent of \$839.09.

The theory of the staff case, as stated in the Order Instituting Investigation and by staff counsel at the hearing, is that respondent had engaged in unlawful "buy and sell" arrangements in violation of Minimum Rate Tariff No. 14 and Public Utilities Code Section 3668. The commodity which was the subject matter of the alleged "buy and sell" was hay. It must be conceded that if respondent were in fact lawfully engaged in the buying and selling of hay, then such activities were not for-hire transportation and hence not within the purview of this Commission's jurisdiction. Indeed, a rate expert testifying for the staff stated in effect that his exhibit (Exhibit No. 2) was based on the assumption that the transactions involved were for-hire transportation. Consequently the key issue which the Commission must decide is whether the activities in which respondent engaged were for-hire transportation or the lawful business of buying and selling hay.

This type of case has been before the Commission many times in the past and there are numerous decisions in which the Commission has indicated some of the criteria on which it has relied in making its determinations.

It has been held that such things as failure to stockpile material, to assume a risk of loss, to take a long or short position, to advertise as a dealer, to obtain a dealer's license, to assume title and responsibility for the commodity, to exercise independent judgment in the purchase or the sale of the commodity, to separate the transactions from for-hire transportation activities, to seek one's own suppliers, to seek one's own customers, to pay property taxes on the material purchased, or to perform any service other than transportation are some of the indicia of an unlawful "buy and sell" device.

In this case the evidence presented by the staff was to the effect that respondent had stated to the staff investigator that he had to buy and sell hay for competitive reasons, that he would have none of such business if the transactions were strictly for-hire transportation, that respondent had no contact with the ultimate purchasers and that he received payment from Niekirk Hay Co., before he paid the growers. The foregoing testimony plus the documents and the rate statement constituted the staff case. On cross-examination the staff investigator admitted that what respondent had actually told him was that he never "transported" hay but that he only bought and sold it.

The documents in Exhibit No. 2 consist generally of a shipping document, a weight certificate, a statement from respondent to a grower and a statement from Niekirk Hay Co., to respondent. The shipping document in each part of the exhibit bears the designation: "Shipping Order And Freight Bill -- Shirley Robertson Trucking." There is no designation on respondent's statements to the growers except "Shirley Robertson Trucking." It is obvious that respondent did not separate transportation

activities from his dealer activities at least as regards his billing practices. There was, however, no evidence offered to show how the funds paid to respondent by Niekirk Hay Co., were handled. Whether they went into a common bank account with respondent's for-hire transportation income or were treated separately is unknown to the Commission.

Respondent did not testify in his own behalf. His case was presented through the testimony of a District Supervisor of the Department of Agriculture, various growers, and of Simon Niekirk to whom respondent sells his hay.

Harry Kachadorian is a District Supervisor from the Department of Agriculture of the State of California, Bureau of Market Enforcement. He testified as to the license status of respondent and through him Exhibit No. 4 was received in evidence. Said exhibit is a certification of respondent's license status and shows that respondent has been a dealer in hay for most of the period from June 16, 1954 to the present time. Kachadorian testified that to obtain a license as a dealer from the Department of Agriculture required a showing of financial ability, payment of a fee of \$80 per year and the securing of a surety bond in the amount of \$2,000.00.

Simon Niekirk testified that he is the person to whom respondent sells hay, that he dealt only with respondent and knew none of the persons from whom respondent purchased hay, that all hay deliveries come to his place of business and are then directed to the ultimate purchasers who are customers of Niekirk Hay Co. Niekirk paid respondent, but did not know how much respondent had paid the growers for the hay.

Tony Teixeira, Irby Abercrombie, and Dudley Drake all testified that they were growers of hay or a representative of a corporate grower of hay; that they sold hay to respondent among others; that they did not know Simon Niekirk or Niekirk Hay Co., and had never sold hay to either entity; that when hay was sold to respondent or his employees they did not further control its movement or destination; and that respondent sometimes purchased hay as much as two months in advance of his receipt of said commodity.

An analysis of Exhibit No. 1 shows that during the period from June 1, 1963 through June 28, 1963, respondent bought hay at prices that varied from \$22.50 per ton to \$24.00 per ton; his selling price to Niekirk Hay Co., ranged from \$27.50 per ton to \$32.50 per ton, and his profit per ton was as low as \$5.00 and as high as \$8.50. On a move of 359.4 constructive miles he made a profit of \$7.50 per ton on June 1, 1963. On a move of 356.6 constructive miles he made a profit of \$8.50 per ton on June 4, 1963. On a move of 359.4 constructive miles he made a profit of \$5.50 per ton on June 28, 1963. Each of these three examples was a purchase by respondent from the same grower and each was ultimately delivered to the Chino area, two of them to the same dairy.

Staff counsel conceded in his closing argument that the buying end of these transactions was valid, but contended that the final sale was not because it was determined by Niekirk Hay Co.

Counsel for respondent argued that this was simply a case of a person engaging in two lawfully licensed businesses against which there is no legal sanction.

In the final analysis the evidence here discloses that respondent does legitimately buy hay from various sources which he alone determines, that he sells such hay to Niekirk Hay Co., a

commission buyer or broker in hay who directs respondent to a specific place for delivery. Niekirk Hay Co. could conceivably receive and store all hay sold by respondent at its place of business and then subsequently deliver said hay to its customers. If such were the case then the move from Niekirk Hay Co. to the dairy would be for-hire transportation if performed by respondent. Such is not the case, Niekirk Hay Co. merely specifies to its seller, in this case respondent, where it will accept delivery. As far as respondent is concerned his buyer is not the dairy where the hay is unloaded, but Niekirk Hay Co. from whom he receives payment.

This case is similar on its facts to the activity of Alvin Kuiper in Case No. 7242, 60 Cal. P.U.C. 244, in which this Commission discontinued its investigation as to the said Alvin Kuiper.

After consideration the Commission finds that the evidence fails to establish that respondent has violated Section 3668 of the Public Utilities Code.

Based on the foregoing finding of fact the Commission concludes that this investigation should be discontinued.

O R D E R

IT IS ORDERED that this investigation is discontinued.

Dated at San Francisco, California, this 22nd
day of SEPTEMBER, 1964.

Frederick B. Hallock
President
W. E. Vint
George A. Hoover
William W. Russell
Commissioners