

Decision No. 74122

ORIGINAL

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of BOOTS LIVESTOCK
TRANSPORTATION, INC., OREN DITTNER,
doing business as Gerber Livestock
Transportation, GEORGE L. BARNES,
doing business as Barnes Livestock
Transportation, ALLAN MCPHEETERS
and DALE GOODWIN, a partnership,
doing business as Modoc Trucking;
HEMSTEAD LIVESTOCK TRANSPORTATION,
INC., a corporation, H & H TRUCKING
CO., a corporation,

Complainants,

vs.

MARION H. OWENS, doing business as
Owens Freight Lines,

Defendant.

Case No. 8711
(Filed October 19, 1967)

Hedlund and Goff, by Henry J. Goff, Jr.,
for complainants.
David R. Vandenberg, Jr., for defendant.

O P I N I O N

This matter was heard January 30 and 31, 1968, before
Examiner Thompson at Red Bluff and was submitted.

The radial highway common carrier permit of defendant
Marion H. Owens, doing business as Owens Freight Lines, was trans-
ferred to Owens Freight Lines, Inc., a corporation, on September 5,
1967. At the hearing the complaint was amended to include the cor-
poration as a defendant. Both entities will be referred to herein
as defendant.

Complainants are highway carriers of livestock with places
of business in northern California engaged in the transportation of
cattle throughout northern California as well as elsewhere.

Defendant is a radial highway common carrier of livestock with its principal place of business at Klamath Falls, Oregon, a terminal at Cottonwood, California, and is engaged in the transportation of cattle throughout northern California as well as elsewhere.

Complainants allege that defendant, by the device of providing airplane transportation, either free or at a charge less than the cost of such air transportation, to cattle buyers or sellers to and from various livestock auctions or other places where cattle may be bought or sold, has indirectly remitted or refunded a portion of the minimum rates established by the Commission for the transportation of livestock in violation of Section 3667 of the Public Utilities Code. They also allege that by maintaining a truck terminal on the property of one of its customers, Shasta Livestock Auction Yard at Cottonwood, defendant can thereby give secret rebates in the form of excessive land rental, free gas or free truck service. With respect to this latter allegation, complainants pray that the Commission investigate any such possible activity. Regarding the alleged violation of Section 3667, the complainants pray the Commission to revoke defendant's permit and to take whatever other action it deems appropriate.

Defendant denies said allegations. It entered into a stipulation with complainants that the charges assessed by defendant for the transportation of livestock are at the minimum rates prescribed by the Commission in Minimum Rate Tariff No. 3-A.

Before proceeding to the issues in this complaint, it should be stated that it is apparent that this proceeding was motivated by complainants interpreting certain actions of defendant, which is based in Oregon, as aggressive tactics to set up as a competitor in what they consider to be their own backyard, whereas the State of Oregon

will not permit complainants to actively compete therein. The indicated aggressive tactics include the installation of a truck terminal adjacent to the recently established Shasta Livestock Auction Yard at Cottonwood, the employment of a solicitor who formerly worked for other livestock carriers in the area, including one of the complainants, and the furnishing of air transportation to buyers and sellers of cattle, particularly to and from Shasta Livestock Auction Yard.

The evidence shows and we find as follows:

1. Until September 5, 1967, Marion H. Owens, doing business as Owens Freight Lines, held Radial Highway Common Carrier Permit No. 75172 and had been engaged in the transportation of livestock in California for a number of years.

2. Since September 5, 1967, and to the present date, Owens Freight Lines, Inc., a corporation, has held Radial Highway Common Carrier Permit No. 59829 and has been actively engaged in the transportation of livestock in California.

3. In September 1966, Ellington Peek, who formerly had some interest in the Valley Livestock Auction Yard at Red Bluff, established and opened for business the Shasta Livestock Auction Yard at Cottonwood, California, on 35 acres of land leased from Ellington Peek and John Trisdale, a partnership, which 35 acres is part of an 80-acre parcel owned by said partnership.

4. In September 1967, the stockholders of defendant, as a partnership, leased one acre of the 80-acre parcel owned by Trisdale and Peek, adjacent to the 35 acres comprising the Shasta Livestock Auction Yard, and thereon constructed a truck terminal for defendant and a Key-lock truck station where diesel fuel is sold. The lease for the one acre of land is for \$200 per month plus taxes.

5. In May 1967, Marion H. Owens employed Mal Furtado as dispatcher and solicitor for defendant. The contract of employment provides that Furtado is paid a monthly salary, is furnished an automobile and is reimbursed for expenses incurred in the course of carrying out his duties. He is not paid a commission on any business he obtains for his employer.

6. Mal Furtado is a licensed private pilot and owns a 1960 Comanche, 180-horsepower, four-passenger airplane. He uses that airplane in connection with his employment and it is his understanding that the terms of his contract of employment call for him to charge defendant for the expense of operation, calculated at about \$10 per flight hour, whenever he, Furtado, flies alone in his airplane on business connected with his employment; however, no such charge for expense shall be made to defendant in connection with any trip in which Furtado has a passenger in the plane whether or not the trip is made in furtherance of the interests of defendant.

7. Furtado has not charged defendant for expenses of operating the airplane in connection with any trip when there has been a passenger in said airplane.

8. On or about August 19, 1967, Furtado transported in his airplane Herb Flournoy, a cattle buyer, from Cottonwood to Alturas and return. Flournoy purchased 73 head of cattle at a cattle auction at Alturas. The 73 head, amounting to two truckloads, were transported by defendant from Alturas to Red Bluff. Flournoy caused Furtado's airplane to be filled with fuel at a cost of \$18.83. No other payment was made by Flournoy for the airplane trip.

9. On or about September 19, 1967, Furtado transported Flournoy in said airplane from Cottonwood to Adin and return. At Adin Flournoy purchased 51 head of cattle at a private treaty sale.

Defendant transported the 51 head of cattle in one truckload from Adin to Red Bluff. Flournoy caused Furtado's airplane to be filled with fuel at a cost of \$15.15 at the Municipal Airport at Fall River Mills. No other payment was made by Flournoy for the airplane trip.

10. On or about August 18, 1967, Furtado transported in his airplane from Oakdale to Cottonwood, H. C. Jeffries, a cattle buyer, who at Shasta Livestock Auction Yard at Cottonwood purchased 19 head of cattle. Defendant transported the cattle from Cottonwood to Oakdale. Jeffries caused Furtado's airplane to be filled with fuel at Oakdale prior to the trip. Jeffries' recollection is that the cost of the fuel was between \$15 and \$17. No other payment was made by Jeffries for the airplane transportation.

11. On or about October 14, 1967, Furtado transported Jeffries and Dick Handy, also a cattle buyer, from Oakdale to Cottonwood and return. At Shasta Livestock Auction Yard Jeffries purchased 75 head of cattle. Defendant transported the cattle from Cottonwood to Oakdale. Jeffries caused Furtado's airplane to be filled with fuel at Oakdale. He did not recall the cost of the fuel. No other payment was made by Jeffries or Handy for the airplane transportation.

12. At other times H. C. Jeffries has obtained round-trip air transportation from companies engaged in the business of providing air-charter service. For round-trip transportation between Oakdale and Cottonwood he has paid said charter companies approximately \$75.

13. On or about August 1, 1967, Craig Owens (no relation to Marion H. Owens), a cattleman, and Norman Elston, a commission agent and cattle buyer for Shasta Livestock Auction Yard, engaged Redding Flying Service, an air-charter transportation company, for round-trip transportation from Redding to Turlock; the purpose of the trip was to look over some cattle in anticipation of a purchase. The charge

made by Redding Flying Service of approximately \$33 per hour was paid by Shasta Livestock Auction Yard. Subsequent to August 1, but prior to August 7, 1967, Craig Owens purchased 559 head of cattle at Turlock, comprising 13 truckloads. Following the sale, but also prior to August 7, 1967, Norman Elston engaged carriers for the transportation of the cattle. Six truckloads were transported by defendant; two truckloads were transported by Barnes Livestock Transportation, a complainant; two truckloads were transported by Gerber Livestock Transportation, a complainant; and one truckload each was transported by carriers identified only as Ten Bar, Minch Brothers, and Dye Creek. On August 7, 1967, Furtado transported Craig Owens and Norman Elston from Red Bluff to Turlock in his airplane, the purpose of the trip by Owens and Elston being to supervise and facilitate the loading of the 13 truckloads. Furtado returned Owens and Elston to Red Bluff in his airplane on August 8, 1967. For the transportation of Owens and Elston, Shasta Livestock Auction Yard paid Furtado \$30. The charge was computed by Furtado as being the amount of expense incurred by him, for the round-trip which involved approximately three hours flight time.

14. At various other times during the last six months of 1967, including July 21, 26 and 27; August 7, 9, 13, 19, 21, 22, 23, 26, 28 and 29; September 2, 11, 16, 20, 22, 26, 27, 28 and 29; October 6, 12, 16, 21 and 22; November 2, 10, 25 and 27; and December 6, 1967, Mal Furtado transported in his airplane various persons identified as engaged in the business of buying or selling livestock, including Ed Kloss, Aaron Stockton, Norman Elston, Ellington Peek, Vic Wooley and Dick Handy and various other persons not specifically identified as engaged in the business of buying or selling livestock, including Dow Cole, Windy Vitaley and Larry Rowe, between various points in California, Oregon, Nevada and Idaho, the purpose of the trips by the

passengers being, in the main, in furtherance of their occupations of buyers or sellers of livestock, for which said Mal Furtado charged said passengers his estimate of the cost of operating the airplane for the trip, which estimates approximate \$10 per flight hour. In some instances, cattle were bought or sold by the passenger at destination and in a few instances the said cattle bought or sold were thereafter transported by defendant. In the majority of the instances set forth herein defendant did not obtain any transportation resulting from the business transacted by the passenger on the particular trip.

15. The purposes of Mal Furtado in transporting said passengers were two-fold; he enjoys flying his airplane and payment of his expenses by the passengers makes it possible for him to follow that pursuit; the accommodation of passengers in providing transportation at cost provides him with an opportunity to be with potential users of livestock transportation service thereby enabling him to be more effective as a solicitor for such business.

16. Fourteen checks issued during the last six months of 1967 by Shasta Livestock Auction Yard payable to Mal Furtado for remuneration of expenses for airplane trips involving transportation of Norman Elston, Ellington Peek and Vic Wooley totaled \$699.20.

17. Marion H. Owens is president of defendant and owns a Cessna 210, 285-horsepower, six-passenger airplane. He holds a private pilot's license. During the last six months of 1967 he provided airplane transportation to Ed Kloss, Norman Elston, Ellington Peek, Oakley Kerber and James Quinlan. He made no charge of any kind for such transportation. Defendant has never transported any livestock for Ed Kloss. He transported Norman Elston from Klamath Falls to the latter's home in Red Bluff on an occasion when Norman Elston was without automobile transportation at Klamath Falls. Two of the three

occasions when Marion Owens transported Oakley Kerber in his airplane involved trips to and from Prineville, Oregon, where Kerber purchased some cattle. The cattle were shipped via Boots Livestock Transportation and by Minch Bros. and were in interstate commerce. The third occasion did not involve any business activity. The three occasions when Ellington Peek traveled in Owens' airplane did not involve any business activity. Owens transported James Quinlan a number of times, mainly between points in Oregon. Virtually all of the livestock shipped by Quinlan to or from California points is in interstate commerce.

The Public Utilities Code does not nor does any order of the Commission prohibit a radial highway common carrier from soliciting traffic. Activities of a livestock carrier which are unlawful are devices whereby a carrier refunds or remits any portion of the minimum rates (Section 3667 of the Public Utilities Code) or by which a carrier, or an officer or agent thereof, assists, suffers or permits any corporation or person to obtain transportation of any property at rates less than the minimum rates (Section 3668 of the Public Utilities Code). The term device, as used in Sections 3667 and 3668 of the Public Utilities Code, contemplates an understanding or agreement, either expressed or implied, by the carrier and the shipper that in exchange for the business of transporting the shipper's property, the carrier, its officer or agent will, by a particular means or method such as providing another service free or at less than cost, furnish the shipper with some compensation which, when the transaction is considered as a whole, results in the shipper receiving transportation of property at less than the minimum rates. Whether or not a transaction between the carrier and the shipper is a device within the meaning of Sections 3667 and 3668 is a question of fact,

the resolving of which requires a consideration of all of the circumstances including usages in the trade.

None of the buyers or sellers that Owens or Furtado transported uses defendant's livestock transportation services exclusively. Very few of them tender the majority of their shipments to defendant. Except in a very few instances, illustrated in Findings Nos. 8 through 11, the airplane trip did not directly result in traffic being obtained by defendant. In those instances each of the buyers testified that if he desired he could have had the cattle transported by any carrier. At best they felt a moral obligation to engage defendant's service, or as one buyer put it, "If you was going to buy a pair of shoes and somebody hauls you twenty miles to their shoe store, you would naturally buy from him if you are barefooted." There is no evidence that any of the buyers had an understanding that if they tendered shipments to defendant they would be entitled to free or reduced cost airplane transportation.

The manner in which the air trips were provided indicates a lack of obligation to use defendant's livestock carrier service and hence appears not to constitute a device. Furtado did not seek out the buyer to offer him an airplane trip. Apparently it is well known among the buyers, however, that Furtado will provide transportation in his airplane at a cost of about \$10 per hour or the price of a full fuel tank. Ordinarily the airplane trips are initiated by a buyer telephoning Furtado and asking him if he could fly him to a particular place. If Furtado is not otherwise engaged he ordinarily is willing to make the flight.

The following "gratuities" have been given by complainants to their customers and are considered by them, and apparently by all of the persons involved herein, as legitimate methods of solicitation, expressions of appreciation or common courtesy: the furnishing of

\$20-gift merchandise orders, Western hats and bottles of whiskey, buying of drinks and dinners, and providing rides in private automobiles. Defendant asserts that the providing of transportation in the carrier's own private airplane is no different than providing customers with transportation in one's own private automobile. Complainants respond that they agree that there is no distinction between providing customers with automobile transportation and airplane transportation but that the crux of the matter is not an occasional accommodation of persons but the consistent and continuing offer of free or reduced cost transportation as a means to obtain business. In that connection Mal Furtado admits that he uses his airplane as a means to further his employment as a solicitor and the number of trips on which he has flown buyers of livestock shows a consistent and continuing pattern rather than an occasional accommodation. With respect to the operation by Marion H. Owens of his private airplane, the evidence does not disclose such consistent or continuing pattern. The trips provided by Marion H. Owens appear to have been for the purpose of accommodating a friend or acquaintance and in most instances were made for the purpose of assisting the buyer in the loading of cattle onto trucks or railroad cars not owned or operated by defendant.

With respect to the consistent and continuing offer of reduced cost airplane transportation by Furtado, its effect upon complainants and its effect upon the transportation of livestock generally are not material to the main issue in this case which is whether the providing of such airplane transportation is a device prohibited by Sections 3667 and 3668 of the Public Utilities Code. Although the offer by Furtado to cattle buyers provides an inference that it may be such a device, there is insufficient corroborating

evidence to support it. The evidence that there was no understanding between Furtado and the buyers that in return for airplane travel, the cattle transportation service of defendant would be used and that at most they may have felt a moral obligation to use defendant's services, the evidence showing that Furtado merely had "hopes" that the buyers might follow the business maxim of "you scratch my back and I'll scratch yours" and that most of the buyers did not follow such maxim for reasons they considered to be more important than reduced cost air transportation, and the testimony of Furtado, supported by other evidence in the record, that the principal reason he transported persons in his aircraft at \$10 per hour is so that he can fly more often as he could not afford to make such flights unless the passenger paid for the direct costs, including fuel and tie-down charges, are sufficient to overcome any such claimed inference.

With respect to the lease of the one acre by the stockholders of defendant from a partnership of which one partner is a shipper of livestock utilizing the services of defendant, such leases are suspect in that excessive compensation paid by a carrier for services or property furnished by a shipper is a clear indication of a device to remit or refund a portion of the charges for transportation services performed by the carrier. In this case, however, it has not been shown that \$200 per month plus taxes is excessive compensation for the use of the property. We do not find that it is reasonable compensation but merely that complainants have the burden of proving that said amount is excessive and they have not made such showing; nor have complainants shown that the Key-lock truck terminal has furnished fuel or truck service as a device to refund or remit any portion of the minimum rates.

Complainants assert that the activities of defendant described herein are detrimental and injurious to them and to livestock

transportation generally. They ask the Commission to undertake to do something, presumably by the establishment of rules, which would prohibit the solicitation methods described herein which they deem to be unfair and not available to all carriers without great expense or large capital outlay. Without making any determination or comment on whether defendant's methods of obtaining business are unfair or injurious to the transportation of livestock generally, we can perceive that unbridled methods of solicitation might result in carriers believing themselves obliged, in order to obtain or retain business, to engage solicitors with airplanes or to provide facilities and services for the comfort, enjoyment or benefit of customers, and that such undertaking might so increase the costs of carriers generally as to make compensatory rates so high as to restrict the freedom of movement of livestock. The evidence herein does not show whether or not such threat is real. In any event, if complainants or any other persons believe that rules governing solicitation are necessary to the application and enforcement of such minimum rates to promote the freedom of movement by carriers of livestock, as contemplated by Section 3661 of the Public Utilities Code, such proposed rules may be presented to the Commission for consideration in an appropriate petition in Case No. 5433. The establishment of rules applicable to carriers generally is not within the scope of this complaint proceeding.

We find further that:

18. Complainants, who are highway carriers of livestock, filed a complaint on October 19, 1967 alleging that defendant, a highway permit carrier, violated Section 3667 of the Public Utilities Code by directly or indirectly refunding or remitting a portion of the minimum rates.

19. Defendant is a highway permit carrier of livestock subject to the rates and rules established by the Commission in Minimum Rate Tariff No. 3-A and which in the transportation of livestock between points in California has ordinarily assessed charges no higher and no lower than the rates named in said Minimum Rate Tariff No. 3-A.

20. Marion H. Owens, an officer of defendant, owns and flies his own airplane and has flown various persons who are customers or potential customers of defendant between various places in California, Oregon and Nevada without charge.

21. Mal Furtado, an employee and agent of defendant, owns and flies his own airplane and has flown various persons who are customers or potential customers of defendant between various places in California, Oregon, Nevada and Idaho for a charge equivalent or closely equivalent to the cost of fuel and tie-down charges.

22. A partnership of the stockholders of defendant has established a truck terminal adjacent to Shasta Livestock Yard at Cottonwood and for that purpose has leased one acre of land from a partnership of which one partner is the owner and operator of Shasta Livestock Auction Yard, a customer of defendant.

23. It has not been shown by complainants that the transportation of defendant's customers by Marion H. Owens and by Mal Furtado in their respective airplanes free of charge or at a charge equivalent to the cost of fuel and tie-downs is a device whereby defendant has remitted or refunded a portion of the minimum rates established by the Commission and charged by defendant to said customers for the transportation of property.

24. It has not been shown by complainants that defendant, through the establishment and maintenance of the truck terminal by its stockholders, has paid excessive land rental, provided free fuel

or free truck service as a device to refund or remit a portion of the freight charges assessed to Shasta Livestock Auction Yard or any other customer.

25. It has not been shown by complainants that defendant has directly or indirectly paid any commission, made any refund, remitted in any manner or by any device any portion of the rates or charges specified by the Commission as the minimum rates and charges applicable to the transportation of livestock.

We conclude that the relief sought by the complaint should be denied and that the case should be dismissed.

O R D E R

IT IS ORDERED that the relief sought by this complaint is denied and that Case No. 8711 is dismissed.

The effective date of this order shall be twenty days after the date hereof.

Dated at San Francisco, California, this 21st
day of MAY, 1968.

[Signature]
President
[Signature]
[Signature]
[Signature]
Commissioners

Commissioner A. W. CATOV

Present but not participating.