

ORIGINAL

Decision 88 02 047

FEB 24 1988

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Complaint by)
AIRPORT LIMOUSINE SERVICE OF SUNNYVALE)
INC. dba Airport Connection-PSC 899,)

Complainant,)

vs.)

Arturo Luna dba Bay Area Shuttle-PSC)
1420,)

Defendant.)

Case 86-12-003
(Filed December 1, 1986)

Clifford Orloff, for Airport Limousine
Service of Sunnyvale, Inc.,
complainant.

Jerry Haddock, for Arturo Luna, defendant.

OPINION

Airport Limousine Service of Sunnyvale, Inc., dba Airport Connection (complainant or Airport Connection) is a California corporation with its principal place of business at the San Francisco International Airport (SFO). Complainant currently provides on-call and scheduled airport transportation between points in Santa Clara, San Mateo, Alameda, Contra Costa, and San Francisco Counties and the San Francisco, San Jose, and Oakland Airports under a certificate of public convenience and necessity as a passenger stage corporation (PSC-899).

Arturo Luna, dba Bay Area Shuttle, currently provides scheduled airport transportation services between points in the cities of Berkeley, Emeryville, and Oakland and the San Francisco

and Oakland International Airports under a certificate of public convenience and necessity as a passenger stage corporation, (PSC-1420).

The Complaint

Complainant alleges that Luna and his employees actively solicit complainant's passengers on a regular basis as part of its business strategy. Complainant alleges that it has spent 10 years and considerable effort to develop its customer base, and defendant has instructed his drivers to solicit complainant's passengers rather than to develop his own customer base. In addition, complainant alleges that Luna often operates on complainant's schedule rather than his own schedule to solicit passengers, especially at the Durant Hotel in Berkeley and at SFO. The solicitations are alleged to occur on a regular and daily basis. Complainant also alleges that drivers for Luna have misrepresented themselves as working for Airport Connection to passengers waiting for Airport Connection buses to pick them up. Complainant requests that the Commission issue an order requiring defendant to cease and desist from such actions, and to operate only in accordance with its timetables and tariffs on file at the Commission.

The Answer

Although the complaint was filed December 1, 1986, no answer to the complaint was filed until April 16, 1987. Luna generally denies all of the allegations of the complaint. However, in his answer he does go into detail regarding one instance of alleged misrepresentation. He also states with regard to the allegation of over-lapping schedules as follows:

"In regards to the time scheduled matter, the defendant's timetable had been modified, at the request of the San Francisco Airport, in order to maintain at least a 20- to 30-minute separation between the complainant's and defendant's vehicles. The defendant's timetables are adhered to in the same manner as the complainant's affiliated owner-operators.

monitored and adhered to complainant's time schedules.

'The San Francisco Airport has commenced new procedures at SFO to insure that all authorized transit carriers comply with time schedules as filed with both the PUC and the Director of Airports at SFO.'" (Answer, page 2.)

Hearings

After due notice, a public hearing was held on May 28, 1987, before Administrative Law Judge Robert T. Baer. Both parties sponsored witnesses and documentary evidence, and following argument, the matter was submitted.

Complainant's Evidence

Complainant called as its first witness Ms. Sidney Morrell, one of its regular customers. Ms. Morrell testified that she uses the complainant's transportation service about three times yearly to travel between Berkeley and SFO. She identified a letter dated October 21, 1986, that she sent to complainant's president Clifford Orloff. The letter reads:

"Dear Cliff:

"Thought you would be interested to know that while I was waiting for the Airport Connection bus at the Durant Hotel on 10/9/86 at 3:00 p.m., I was approached by the driver of the Bay Area Shuttle. He offered to drive me to SFO for \$10 and handed me the enclosed schedule which indicates I could get another \$1 discount.

"Neither I nor the other three people waiting for the bus were interested, though he seemed to have a few passengers. As ever, Sid."

The witness was asked to describe the incident at the Durant Hotel in her own words. She said that she was waiting at the Durant Hotel for the bus, for which she had a reservation. The Bay Area Shuttle driver came up and said: "You're going to the San Francisco Airport"? The witness replied "yes". The Driver

replied, "I will take you there for \$10 and you will get an additional \$1 discount." However, Ms. Morrell had used Airport Connection and was very satisfied with the service. She had a reservation and told the driver that she was not interested.

She further testified that she last used Airport Connection on May 17, about 10 days before the hearing. She was waiting at SFO for her Airport Connection bus to pick her up about 3:00 p.m. to return her to the Durant Hotel in Berkeley. About 5 minutes before her Airport Connection bus arrived the Bay Area Shuttle bus arrived and a man stuck his head out of the window and said "Are you going to Berkeley"? She ignored him because she was going to Berkeley but was not going with him. She identified the bus as a dark red bus with no writing on the side. She was waiting for the 3:06 p.m. schedule of Airport Connection.

Ms. Morrell identified Airport Connection's timetable, which shows a Schedule 8, departing SFO at 3:06 p.m. Ms. Morrell also identified the schedule and \$1 discount coupon of Bay Area Shuttle, which she had previously sent to Mr. Orloff with her note dated October 21, 1986. That timetable shows Bay Area Shuttle's Schedule 8 departing SFO at 2:35 p.m and Schedule 9 departing SFO at 3:35 p.m.

Complainant next called David Hayduk, a holder of charter party permit No. TCP-2257P. Hayduk sells transportation service to Airport Connection under contract. Under this contract Hayduk makes three round trips to SFO each day in regularly scheduled service. However, if he is driving in door-to-door or on-call service, he may make as many as 10 trips to the airport each day or as few as 2. In any event, he is present at SFO frequently each day. He has seen Bay Area Shuttle drivers solicit passengers at SFO and in Berkeley. Hayduk stated that on the morning of May 28, 1987, he was at the Durant Hotel in Berkeley at 5:30 a.m. Although the Bay Area Shuttle timetable calls for a 5:40 a.m. departure from

the Durant Hotel in Berkeley, that bus did not show up by 6:10 a.m., when Hayduk left.

Hayduk also testified that on May 27, 1986, he was at the Holiday Inn in Emeryville around 2:30 p.m. When he arrived at 2:25 p.m., there was a passenger standing there who asked him if he was Bay Area Shuttle. He replied that he was not, that he was Airport Connection. He asked what time Bay Area Shuttle was supposed to pick her up. The lady replied that 2:00 p.m. was the pickup time. At 2:30 p.m., Hayduk was ready to depart, so the lady asked him if she could ride with him. He then took her with the rest of his passengers to the airport.

Hayduk also testified that he has himself observed the Bay Area Shuttle going through SFO at non-scheduled times. On May 12, 1987, Luna himself was at SFO in his personal car, a 2-door Monte Carlo. He picked up a woman going to the Oakland Airport. Luna's vehicle did not have a TCP number, PSC number, or any form of commercial identification. It also had a personal license plate, rather than a commercial plate. Hayduk testified that other drivers for Airport Connection have had similar experiences with Bay Area Shuttle drivers going to the airport at non-scheduled times. The drivers show up at the Durant Hotel in Berkeley before Airport Connection vehicles are scheduled to be there, and pick up passengers who have made reservations with Airport Connection. According to Hayduk, less than 5% of the passengers carried by Airport Connection are walk-ons. This is because most of Airport Connection's passengers have read its signs or know of its service, since it has been in business for 12 years. In addition, Airport Connection provides free telephones at the various hotels, which a person can pick up and reach the reservation department of Airport Connection automatically.

Airport Connection next called Arturo Luna as an adverse witness. Mr. Luna testified that at the time the answer was filed around mid-April 1987, his business was a partnership with himself

and Joseph Villafuerte as partners. However, since that time, Mr. Villafuerte has withdrawn from the business and Mr. Luna is now president and sole owner and manager. He testified that his bus did not show up at the Durant Hotel the morning of the hearing because he did not have any reservations there. Luna was asked: "Is it your understanding that if you have no reservations, you don't have to make a stop at a scheduled point?" He replied that if the driver doesn't have any reservations on the scheduled point he may go directly to the next stop. Luna was also asked whether Bay Area Shuttle ever carried any of Airport Connection's passengers. Luna replied that sometimes when his drivers are on schedule, some of Airport Connection's passengers are early arriving at the point of departure. They then ask Luna's drivers whether they are going to the airport at San Francisco. Luna claims that these passengers ask his drivers how much the charges are, to which the drivers reply, "\$10 with a \$1 discount coupon."

Luna was asked about the instance reported by Ms. Morrell where a Bay Area Shuttle van went through the airport midway between its scheduled departure times. Although Luna did not appear to know anything specific about the incident, he stated that "sometimes you are late because of the traffic." He also stated: "If you are supposed to be at the airport at 2:35, you will be late about 10 or 15 minutes. So you have to go on inside the airport to get passengers, so maybe that's what they're talking about." Luna also testified that when he was first certificated he attempted to obtain the airport's permission to operate a timetable with stops approximately 10 minutes before each of Airport Connection's scheduled departures from SFO. However, the airport insisted on a schedule of approximately hour intervals on the half hour to spread the service evenly with Airport Connection's timetable which called for departures approximately on the hour. At that point Bay Area Shuttle filed a timetable with departures from SFO on the half hour. Luna was asked if his drivers were sometimes stopping 10

minutes before Airport Connection's schedule even though Bay Area Shuttle's timetable required departures on the half hour. Luna denied that his drivers were doing that.

Defendant's Evidence

Luna called Clifford Orloff, the president of Airport Limousine Service of Sunnyvale, Inc., as an adverse witness under Section 776 of the Evidence Code. Orloff testified that Airport Connection operates about 25 vans under contract and about 5 vans with employed drivers. An owner/operator, who operates under contract with Airport Connection and has his own charter party authority issued by the Commission, is paid 50¢ per mile for any transportation he provides to Airport Connection. In addition, if the revenue collected by the owner/operators exceeds 50¢ per mile, the owner/operator gets 55% of the difference as a bonus. The bonus serves as an incentive to find passengers or not have them stolen by competitors. Airport Connection has an understanding with its owner/operators that the company is responsible for marketing and managing the transportation and developing customers. The driver is responsible for keeping them, once Airport Connection has obtained them, by giving good service, that is, by providing reliable, on time service, and by being courteous.

The scheduling of Airport Connection's vehicles is done by the dispatcher. If there are three or four people to be picked up on a particular schedule, then one eleven-passenger van will be assigned to make all of those pickups. The schedule is designed so that the vehicle stops and immediately departs, because there is not time in the schedule to wait at each stop. Airport Connection's schedules are designed to have the passengers waiting for the bus for a minute or two. On the other hand, if there are 20 passengers with reservations on a particular schedule, Airport Connection runs two vans, each with 11 seats. One van will begin the route and the other van will be sent directly to the Durant Hotel in Berkeley, because that is where most of the reserved

passengers are found, and also because that is where passengers are most likely to be stolen by competitors. The dispatcher will send the second vehicle to the Durant Hotel as early as possible, based on the fact that the vehicles are doing other work. It cannot go too early because it will consume too much unproductive time, but if it arrives too late passengers will be stolen by Bay Area Shuttle.

It is not the daily practice at Airport Connection for a driver to arrive at the Durant Hotel approximately 40 minutes before the normal departure time. Orloff testified that the only reason he could think of for Mr. Hayduk being at the Durant Hotel early is that that was the first trip in the morning and Hayduk was not under dispatch. He was not under the dispatcher's scheduling until 20 minutes before his first pickup. So, according to Orloff, he obviously elected to go there himself to protect the fares that he felt would be stolen. The drivers do not have the ability to go early to any given stop unless it is their first pickup in the morning. Hayduk in the instance to which he testified was operating the backup van and the Durant Hotel was his first pickup.

Orloff testified that Airport Connection has very little walkup business except at two locations. At the Durant Hotel, Airport Connection's busiest stop, many people in Berkeley just assume that the vehicle always stop there. And, from a practical point of view, it does always stop there because Airport Connection always has at least one passenger there. It is therefore possible at the Durant Hotel for a person to walk up without a reservation. After doing that the first time, he could do it again and again and would think that a reservation was not necessary. Because of that phenomenon, Airport Connection has put a direct telephone line from the Durant Hotel to the dispatcher. Persons waiting at the Durant Hotel can pick up the phone and tell the dispatcher to pick them up. They also have that same capability at SFO. Airport Connection always leaves from SFO whether it has a passenger or

not. A person could walk up at the airport and not know that reservations are required. Airport Connection also has a direct phone line to its dispatcher from SFO so that a person could make an instant reservation.

Orloff admitted that sometimes vans are late arriving at the airport because of traffic on the San Francisco-Oakland Bridge. Because this is a frequent occurrence, the witness testified, Airport Connection has a 10-minute buffer built into its schedule, so that if all goes well the buses will arrive at the airport 10 minutes before the scheduled arrival time. Airport Connection has done a statistical analysis of travel times. It is not Airport Connection's policy to use average travel time so that the buses are early half the time and late half the time. Rather, the schedules are designed so that 99% of the time the buses arrive early at the airport or on time.

Orloff admitted that both Airport Connection and Bay Area Shuttle are subject to the same general traffic conditions. However, he pointed out that since the schedules are offset in time, a given traffic jam might affect Bay Area Shuttle more or less than the earlier or later Airport Connection bus or vice versa. Orloff also pointed out that his complaint does not focus on isolated cases involving delays due to traffic but on repeated instances of soliciting customers of Airport Connection. Orloff testified that while Joseph Villafuerte was managing Bay Area Shuttle, Orloff spoke at least three times with him about the problems of soliciting. Orloff also instructed his operation's manager to speak to Mr. Villafuerte on at least two other occasions. These five phone conversations, involving informal complaints by Airport Connection to Bay Area Shuttle, encompassed literally 60 or 70 individual complaints coming through its drivers or passengers. Since December 1, 1986, Orloff has not submitted any additional informal complaints to Bay Area Shuttle because he knew that this case would come to hearing. He could, however,

remember two conversations that he had with Mr. Villafuerte since January 1, 1987, one of which specifically involved a complaint. There have also been at least five written complaints, including that of Ms. Morrell, which are attached to the complaint. Including verbal complaints, Orloff testified that the frequency of complaints is at least one per week; he has not forwarded to Bay Area Shuttle each and every individual complaint. It became clear to Orloff that Bay Area Shuttle did not intend to do anything about Airport Connection's complaints, so he caused a formal complaint to be lodged with this Commission in order to seek a final resolution of the problem of solicitation.

Since Bay Area Shuttle has been in operation, Orloff has noticed an increase in the volume of passengers. However, he attributes that increase to the increase in air travel. While Airport Connection's existence as a passenger stage corporation is not jeopardized by the business practices of Bay Area Shuttle, Orloff estimates that Airport Connection is losing \$10,000 a month of revenue because of Bay Area Shuttle solicitating its passengers. Orloff further testified that \$10,000 per month out of total revenue of \$180,000 for Airport Connection does not jeopardize its operations. On the other hand, \$10,000, he estimates, represents approximately 50% of Luna's revenues. Orloff believes that Luna would not be able to survive if it were not for the subsidy created by his soliciting and taking reserved passengers from Airport Connection. In effect, Luna is stealing the passengers that Airport Connection generates through extensive advertising. Luna does no advertising. Orloff had seen none in the Berkeley area.

In response to a question by the ALJ, Orloff described the regulations imposed on van service at the airport. The airport will allow only vans with an airport contract to pick up passengers. Vans that have airport contracts are identified by stickers on their back passenger side windows. Under the terms of the contract with the airport, each time a vehicle passes the

central terminal, either the upper level roadway or the lower level roadway, counts as one trip. At the end of the month each passenger stage corporation must report all trips by its vehicles and pay the airport 35¢ for each one of the passes made through the airport. The airport enforces its regulations by video taping the daily traffic through the central terminal. Airport auditors may cross check the video tapes against the reports on a sample basis to determine if the reports of the various passenger stage corporations are accurate. The airport also regulates where passenger buses may stop. All services of the type provided by Luna and Airport Connection stop at the blue-striped pillars.

Beyond the testimony of Luna and of Orloff the defendant offered no other evidence on its behalf.

Discussion

On February 10, 1986, Arturo Luna filed Application 86-02-016 seeking authority to operate as a passenger stage corporation to transport passengers between Oakland International and SFO on the one hand and the cities of Oakland, Emeryville, and Berkeley on the other. Luna alleged in its application that:

"Public convenience and necessity require the granting of this application for the following reasons:"

* * *

- " . . . Currently there is only one (1) regulated carrier operating this type of service from this area, however they do not serve the Oakland Airport on a regularly scheduled service. The applicant is also aware of numerous complaints concerning their service and numerous suspensions of their certificate for lack of proof of insurance on file with the Commission.
- "3. Applicant's time schedule and service points will not conflict with any other regularly scheduled service and will allow

travelers a lower cost of transportation than is currently available."

"For the foregoing reasons, applicant is of the opinion that the service herein proposed is non-controversial in nature and should not be in conflict with any existing public or Commission certificated service."

Luna did not name in his application Airport Connection as the existing carrier competing on the Berkeley to SFO route, despite having been an employee of Airport Connection.¹ Our rules of procedure do not require applicants for passenger stage certificates to name other regulated businesses with whom they will be competing nor do they require such applicants to serve copies of their applications or notices of the filing of an application upon potential or existing competitors. Rule 15.1 states that publication in the Daily Transportation Calendar of a notice of the filing of an application is constructive notice of the application and its contents to all competitors and other interested parties. Under Rule 21(1) applicants are required to send a copy of their application to anyone requesting a copy.

There were no protests to Luna's application and, accordingly, the Commission granted the application by ex parte order in Decision 86-06-024, dated June 4, 1986.

The thrust of the complaint seems to revolve around the question of defendant's timetable and whether he is observing his timetable. Section 11.01 of General Order 98-A requires:

"(a) Except as provided in Section 11.04, every passenger stage corporation shall publish and file with this Commission

¹ Both Joseph Villafuerte, the erstwhile partner of Luna, and Jerry Haddock, Luna's representative in the hearings in this complaint proceeding, are former employees of Airport Connection.

three (3) copies of each timetable as provided in this part."

"(b) Every passenger stage corporation publishing a public timetable or timetables for distribution shall file with this Commission three (3) copies of each such public timetable as soon as it is prepared and made available for distribution."

We have searched Luna's tariff filings in File PSC-1420 and have discovered no evidence that Luna has ever filed with this Commission the copies of his timetables required by GO 98-A (§ 11.01). Luna has, however, published and made available to the public and his passengers a timetable, a copy of which is Exhibit 3 in this proceeding.

Section 11.07 of G.O. 98-A requires:

"Except as otherwise permitted by this part, timetables shall be substantially adhered to at all times."

Moreover Civil Code Section 2172 requires: "A common carrier must start at such time and place as he announces to the public, unless detained by accident or the elements, or in order to connect with carriers on other lines of travel."²

The evidence of the complainant shows that Luna is operating his buses, especially at the Durant Hotel and SFO, at times other than his scheduled departure times as set forth in his

² According to Section 2168 of the Civil Code, which defines "common carrier", Luna is a common carrier for purposes of Section 2172. Section 2168 provides in part: "Every one who offers to the public to carry persons...is a common carrier of whatever he thus offers to carry."

published timetable. Luna and his employees are doing this to solicit traffic that is not otherwise reserved to his passenger stage service. We do not find in our statutes or regulations any provision that would require Luna to cease and desist from soliciting passengers reserved to other carriers. However, the above-quoted provisions of the Civil Code and of General Order 98-A require adherence to the published timetable of a given carrier. We believe that an order requiring Luna to observe his timetable will tend to discourage him and his drivers from skimming the reserved passengers of other passenger stage corporations.

We have studied and considered the evidence sponsored by the defendant and find it neither clear, cogent, consistent, nor persuasive. In Appendix A, we have compared the departure times from the Durant Hotel in Berkeley for complainant and defendants buses going to SFO. The four morning schedules of Bay Area Shuttle are 30 minutes earlier than the first four of Airport Connection's schedules. If Bay Area Shuttle arrived consistently 15 minutes late for each of its first four schedules, it could place itself in a favorable position to solicit the passengers of Airport Connection waiting for their buses to arrive. We find that there is evidence of specific instances of solicitation as well as evidence, sponsored through Orloff, who was called as an adverse witness by Luna, that there has been a consistent pattern of solicitation involving 60 or 70 instances. This evidence is unrebutted. We therefore conclude that Luna should be ordered to cease and desist from violating his published timetables and should be ordered to comply with Part 11 of General Order 98-A.

We will also direct the staff to compare the route description set forth in D.86-06-024 with the timetables found in Exhibit 3, since it appears to us that Luna is not serving points authorized to be served and is serving other points for which no authorization has been obtained.

We will also ask our staff to inquire into Luna's promotional fares. According to his tariff, the adult fare is \$10. The tariff on file with the Commission also provides:

"Promotional fares may be offered to the general public for various reasons (service startup, routes, stops, schedule changes, etc.) Any and all promotional fares will be offered on a non-discriminatory basis to any passenger, subject to conditions and restrictions printed on such tickets, coupons, newspaper advertisements, etc. Such promotional fares will be for specified periods of time not to exceed 60 (sixty) days."

Exhibit 3 is a copy of Luna's timetable. Attached thereto is a \$1 discount coupon for trips to and from SFO. The coupon is not restricted in any manner, such as an expiration date, as required by the tariff on file with the Commission. It appears that Luna has, in effect, reduced his fare from \$10 to \$9 by the unrestricted use of promotional discount coupons of \$1 value.

Luna should be placed on notice that failure to comply with the statutes, general orders, orders of the Commission and his tariffs may result in suspension or revocation of his operating authority.

Findings of Fact

1. Luna is operating his passenger bus schedules at other than the times specified in his published timetable.
2. The deviations from the timetable are particularly prominent at Durant Hotel, Berkeley, and SFO.
3. Because Luna's schedules operate between the same points and in some cases at only one-half hour intervals from Airport Connection's schedules, deviations from the timetable by Luna place the drivers of his buses in a position to solicit passengers reserved on complainant's buses.
4. Luna has not filed his timetable with the Commission.

5. Luna is making use of unrestricted \$1 discount coupons, in violation of his tariff filed with the Commission.

6. Luna may be serving points for which he has no authority and he may be failing to serve points for which authority has been granted.

Conclusions of Law

1. Luna has violated Part 11 of General Order 98-A, in that he has failed to file timetables with the Commission and is not adhering to his published timetable.

2. Luna should be ordered to file his timetable with the Commission.

3. Luna should be ordered to cease and desist from serving his routes at other than the times specified in his timetable.

4. The staff should be directed to take appropriate steps to insure that the operations of Luna are consistent with his tariff filings, or that the tariff filings are amended.

ORDER

IT IS ORDERED that:

1. Arturo Luna shall cease and desist from operating his schedules at other than the times specified in his published timetable.

2. Arturo Luna is ordered to file his timetables with the Commission in accordance with Sections 11.01 and 11.02 of General Order 98-A.

3. The staff is directed to inquire into the status of Arturo Luna's tariffs and operations to determine whether they are consistent, in particular whether the discount coupon is in fact a rate decrease without authorization.

This order is effective today.

Dated FEB 24 1988, at San Francisco, California.

STANLEY W. HULETT

President

DONALD VIAL


JOHN B. OHANIAN

Commissioners

Commissioner Frederick R. Duda,
being necessarily absent, did
not participate.

Commissioner G. Mitchell Wilk,
being necessarily absent, did
not participate.

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


Victor Weiss, Executive Director

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APPENDIX A

Departure Times From Durant Hotel,
Berkeley, En Route SFO

<u>Bay Area, Shuttle</u> ¹	<u>Airport Connection</u> ²	<u>Difference (Minutes)</u>
5:40 a.m.	6:10 a.m.	30
6:50 a.m.	7:20 a.m.	30
7:45 a.m.	8:15 a.m.	30
8:45 a.m.	9:15 a.m.	30
9:45 a.m.	10:25 a.m.	40
10:40 a.m. (10:55) ³	11:15 a.m.	35 (20)
11:40 a.m. (12:00) ³	1:10 p.m.	90 (70)
1:40 p.m.	2:15 p.m.	35
2:40 p.m.	3:10 p.m.	30
3:40 p.m.	4:25 p.m.	45
4:45 p.m.	5:30 p.m.	45
6:20 p.m.	7:35 p.m.	75
8:05 p.m.	9:05 p.m.	60
9:35 p.m.	-	-

1 Exhibit 3.

2 Exhibit 2.

3 Timetable from A.86-02-016, Exhibit B.

(End of Appendix A)