

Decision No. 77293

ORIGINAL

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Investigation on the Commission's
own motion into the operations,
rates, charges and practices of
GEORGE LANGE, an individual doing
business as GEORGE LANGE TRUCKING;
and PAUL MASSON, INC., a
California corporation.

Case No. 9027
(Filed March 3, 1970)

Fred W. Armstrong, for George Lange Trucking,
and Richard R. Zamar and Morris H. Katz, for
Paul Masson, Inc., respondents.
William J. McNertney, Counsel, 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 and practices of George Lange, an individual, doing business as George Lange Trucking (Lange), for the purpose of determining whether Lange violated Sections 3664, 3667, 3737 and 3548 of the Public Utilities Code by charging and collecting less than applicable minimum rates and charges in connection with transportation performed for Paul Masson, Inc., a California corporation (Masson), and by leasing a motor vehicle to Masson with a driver and without having executed a written lease.

Public hearing was held before Examiner Mooney in San Jose on April 14, 1970, on which date the matter was submitted.

Lange operates pursuant to Highway Contract Carrier Permit No. 41-2379. He has a terminal and office in San Jose. He and his wife are engaged in the business. He employs two full-time drivers, a part-time office girl and a part-time accountant. He has one truck, three tractors, four van trailers, one flat rack trailer and one set

of tanker trailers. He was served with all applicable tariffs and distance tables, together with all supplements and additions to each. His gross operating revenue for the year 1969 was \$183,678.

On various days during April, May and June, 1969, a representative of the Commission's Compliance Section visited Lange's place of business and examined his records relating to transportation performed for Masson during the period January through June 1969. He testified that he made true and correct photostatic copies of certain of the documents reviewed and that all of said copies are included in Exhibit 1. He explained that Section A of the exhibit includes 15 freight bills and supporting documents covering shipments of wine, sparkling wine, champagne, alcoholic liquors and advertising material from Masson's plant in Saratoga to various destinations in southern California and that Section B thereof includes five freight bills covering the lease of equipment with driver to Masson. He pointed out that each of the documents in Section B shows a charge of \$125 for the rental of a tractor and trailer with driver for one day and includes no additional information. The representative testified that he was informed by Lange that he had no additional documents relating to the leased equipment and that all of the equipment leases were oral. He stated that he contacted Masson and was informed by a vice president of said respondent that the leased equipment was used to transport wine in bottles in crates from the Saratoga plant to two warehouses in San Jose; that the vice president furnished him with copies of Masson's shipping orders which showed the commodity, weight, origin and destination of the shipments transported on the leased equipment; and that all of said copies are included in Section B of Exhibit 1. He stated that both respondents were cooperative during his investigation.

The representative testified that he had personally observed the premises of Paul Masson Vineyards at Champagne Fountain, 13150 Saratoga Avenue, Saratoga, the origin of all the transportation in Exhibit 1, and had determined that it is served by rail facilities of the Southern Pacific Transportation Company. He also testified regarding rail facilities at certain destinations. A second staff representative testified that he had personally observed the premises of the Vintage Wine Co. in the City of Commerce, the destination of all or part of 13 of the shipments in Part A of said exhibit, and had determined that it is served by rail facilities of The Atchison, Topeka and Santa Fe Railway Company.

A rate expert for the Commission staff testified that he took the set of documents in Exhibit 1, together with the supplemental information testified to by the two representatives and formulated Exhibit 3 which shows the rate and charge assessed by Lange, the rate and charge computed by the staff and the alleged undercharge for the transportation covered by each of the freight bills in Sections A and B of Exhibit 1. He explained that the first 15 parts of his exhibit relate to Section A of Exhibit 1 and that the alleged undercharges shown in said parts resulted from Lange's assessing incorrect alternative rail rates and failure to assess applicable alternative switching charges. He stated that the last five parts of the rate exhibit correspond with Section B of Exhibit 1. The rate expert testified that there are no provisions in the minimum rate tariffs which authorize the type of oral arrangement entered into by Lange and Masson for the transportation included in Section B. He pointed out that Section 3548 of the Public Utilities Code sets forth regulations governing the lease of equipment by a carrier to a shipper and that the lease arrangement herein does

not meet the requirements in said section.^{1/} He asserted that the alleged undercharges in Section B of the rate exhibit resulted from Lange's failure to assess applicable minimum rates for the transportation listed therein, and that the flat lease charge violated Item 257 of Minimum Rate Tariff No. 2 which requires that charges be based on the unit of measurement provided in the tariff. The amount of the alleged undercharges shown in Section A of Exhibit 3 is \$861.21 and in Section B thereof is \$1,735.21, and the total amount of said alleged undercharges is \$2,596.42.

Mr. Lange testified that he has been in the trucking business approximately four and a half years; that he has been investigated numerous times in the past by the Commission staff; and that the past investigations have not disclosed any errors in his operation. He did not take exception to the staff ratings in the first 14 parts of Exhibit 3. He pointed out, however, that all or a portion of the alleged undercharges in most of the first 15 parts resulted from failure to assess an alternative Santa Fe Railway switching charge for deliveries to the Vintage Wine Co. in the City of Commerce; that he had been informed by said company that it was served by the Southern Pacific; and that based on this representation he did not assess said charge. As to Part 15 which covered a mixed shipment of champagne,

1/ Section 3548 provides in part as follows:

"The leasing of motor vehicles for the transportation of property to any person or corporation other than to a highway carrier, is prohibited as a device or arrangement which constitutes an evasion of this chapter, unless the parties to such lease conduct their operation according to the terms of the lease agreement, which shall be in writing, and shall provide that the vehicle shall be operated by the lessee or an employee thereof and the operation and use of such vehicle shall be subject to the lessee's supervision, direction, and control for the full period of the lease. The lessor or any employee of the lessor shall not qualify as an employee of the lessee for the purposes of this section."

wine, sparkling wine and alcoholic liquors to southern California on March 3, 1969, Mr. Lange asserted that the alternative rate of 50 cents per 100 pounds which he applied to the champagne, wine and sparkling wine was the applicable alternative rate in effect on the date of shipment rather than the 52-cent rate alleged by the staff rate expert. He stated that said 50-cent rate was published in Western Motor Tariff Bureau Tariff No. 11. A review of said tariff discloses that the 50-cent rate had been published in Item 1430 of the tariff but that it was canceled on February 24, 1969, which was prior to the transportation in question.

Several novel defenses to the staff allegation that the transportation represented by the documents in Section B of Exhibit 1 was subject to minimum rate regulation were presented by Mr. Lange, his attorney and the Assistant Secretary and General Finished Goods Manager of Masson. We are not persuaded by any of said defenses.

The first of the defenses was presented by the attorney for Lange. He asserted that the commodity transported was liquid in bottles from the crushing of fresh grapes and that said liquid was transported from Masson's location in Saratoga to two warehouses in San Jose for aging or fermentation. He referred to Minimum Rate Tariff No. 8 which excepts the transportation of fresh grapes to a winery from minimum rate regulation and raised the question as to whether said transportation would come within the purview of this exemption since the commodity transported could not as yet be marketed to the public as wine. Clearly it would not. The exemption specifically refers to fresh grapes only and does not include wine or any other liquid in bottles from crushed fresh grapes.

Another defense raised by Mr. Lange took exception to the assertion by the staff that the truck rentals in issue were in violation of the leasing provisions of Section 3548 of the Public Utilities Code. (See Footnote 1, above, for said provisions.) He argued that each of the oral agreements was for a one-day period and that because of the short duration this was a rental and not a lease subject to Section 3548. This is not so. Said section governs all such arrangements between a carrier and shipper irrespective of the length of the time period involved.

An additional defense was presented by the witness for Masson. He testified that the commodity covered by Parts 1, 2 and 3 of Section B was still wine in unlabeled bottles and the commodity covered by the remaining two parts thereof was "in process" sparkling wine in bottles. He stated that the still wine was transported to the San Jose warehouses for aging; that it is not ready for marketing until the aging process is completed; and that it would eventually be returned to Saratoga for labeling, capping, casing and sale to the public. He explained the processing of the "in process" sparkling wine as follows: Still wine is transported from Soledad to Saratoga in tank truck equipment; the still wine is put in a large tank where it is induced with a syrup consisting of a mixture of yeast and sugar; it is then bottled in fifths and capped; the bottles are transported to the San Jose warehouses for secondary fermentation which adds the effervescence to the sparkling wine; at this stage, it is not finished wine and is not marketable; the secondary fermentation requires many months; when this process has been completed, the sparkling wine is returned to Saratoga where it is transferred to another bottle, corked, wire hooded and cased; it is then finished sparkling wine ready for sale to the public. The witness

stated that the bottles of unlabeled still wine and "in process" sparkling wine are transported from Saratoga to the San Jose warehouses in large wooden bins approximately four feet square and that a bin holds 364 fifth bottles. He stated that Minimum Rate Tariff No. 2 excepts the transportation of liquids in bulk in tank truck equipment from the minimum rates named in said tariff and that an informal ruling issued by the Commission staff provides that the container for the bulk liquid need not be a steel tank. He asserted that in his opinion the wooden bins and bottles were bulk containers and the transportation to the warehouse was, therefore, exempt from the rates in Minimum Rate Tariff No. 2. We do not agree. The tariff exemption referred to is in Item 41 of Minimum Rate Tariff No. 2 and covers the transportation of liquids in tank truck equipment or collapsible tanks or bags 20 feet or more in length, 2,000 gallons or more in capacity and 20,000 pounds or more carrying capacity. Liquids in fifth bottles in four-foot bin certainly does not come within the purview of the exemption. Said tariff item also exempts the transportation of milk, cream and liquid buttermilk in shipping cans, in bottles, in cases or crates, or in bulk in tanks. This exception is specifically limited to the transportation of milk, cream and liquid buttermilk only. The staff informal ruling referred to is No. 60-A. Said ruling refers to the tariff exemption for milk, cream and buttermilk and states that the bottles and tanks referred to therein may be made from any material. It in no way expands the tariff exemption to include commodities other than the dairy commodities named therein.

As to the classification of the unlabeled wine and the "in process" sparkling wine, we concur with the staff that, for the purpose of applying minimum rates, said commodities are properly ratable as wine.

Based on a review of the entire record, we are of the opinion that Lange should be directed to collect the undercharges shown in Exhibit 3 and that a fine in the amount of said undercharges should be imposed on him.

The Commission finds that:

1. Lange operates pursuant to Highway Contract Carrier Permit No. 41-2379.
2. Lange was served with all applicable minimum rate tariffs and distance tables, together with all supplements and additions to each.
3. The rate of 50 cents from Saratoga to southern California assessed by Lange for the transportation of the wine included in the shipment covered by Part 15 of Exhibit 3 was canceled from Item 1430 of Western Motor Tariff Bureau Tariff No. 11 on February 24, 1969. The shipment moved on March 3, 1969. The lowest alternative rate on wine in effect on the date of shipment was the 52-cent rate shown in the staff rating of said part.
4. The bottles of unlabeled wine and "in process" sparkling wine in the shipments covered by Part B of Exhibits 1 and 3 were, for the purposes of this proceeding, ratable as wine.
5. The transportation of wine in fifth bottles in wooden cases approximately four feet square is not exempt from minimum rate regulation.
6. Lange did not comply with the unit of measurement provisions of Item 257 of Minimum Rate Tariff No. 2 in connection with the transportation covered by Part B of Exhibits 1 and 3.
7. The staff ratings in Exhibit 3 are correct.
8. Lange charged less than the lawfully prescribed minimum rates in the instances set forth in Exhibit 3, resulting in undercharges in the total amount of \$2,596.42.

The Commission concludes that:

1. The provisions of Section 3548 of the Public Utilities Code governing equipment leases between a carrier and a shipper apply to all such arrangements irrespective of the length of the time period involved.

2. Lange violated Sections 3664, 3667, 3737 and 3548 of the Public Utilities Code and should pay a fine pursuant to Section 3800 of said code in the amount of \$2,596.42.

The Commission expects that Lange will proceed promptly, diligently and in good faith to pursue all reasonable measures to collect the undercharges. The staff of the Commission will make a subsequent field investigation into the measures taken by said respondent and the results thereof. If there is reason to believe that either said respondent or his 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 formally inquiring into the circumstances and for the purpose of determining whether further sanctions should be imposed.

O R D E R

IT IS ORDERED that:

1. George Lange, an individual doing business as George Lange Trucking, shall pay a fine of \$2,596.42 to this Commission on or before the fortieth day after the effective date of this order.

2. Said respondent shall take such action, including legal action, as may be necessary to collect the amounts of undercharges set forth herein, and shall notify the Commission in writing upon the consummation of such collections.

3. Said respondent shall proceed promptly, diligently and in good faith to pursue all reasonable measures to collect the undercharges, and in the event undercharges ordered to be collected by paragraph 2 of this order, or any part of such undercharges, remain uncollected sixty days after the effective date of this order, said respondent shall file with the Commission, on the first Monday of each month after the end of said 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.

4. Said respondent shall cease and desist from violating Section 3548 of the Public Utilities Code and applicable tariff rules and 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 Secretary of the Commission is directed to cause personal service of this order to be made upon respondents. The effective date of this order, as to each respondent, shall be twenty days after the completion of such service on such respondent.

Dated at San Francisco, California, this 3rd day of JUNE, 1970.

William J. ...
President

Augusta

[Signature]

Vernon L. Sturgeon
Commissioners