

Decision No. 85795**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 TRUCKING, INC., a California corporation; PAUL MASSON INC., a California corporation; DON W. SNYDER COMPANY, a California corporation; WESTERN LIQUOR DISTRIBUTORS, INC., a California corporation; BOHEMIAN DISTRIBUTING COMPANY, a California corporation; PARROTT & CO., a California corporation and: WHIRLPOOL CORPORATION, a Delaware corporation.

Case No. 10005
(Filed November 18, 1975)

George Lange and Ralph Johnson, Rate and Traffic Manager, for George Lange Trucking, Inc., respondent.
Mary Carlos, Attorney at Law, and
E. E. Cahoon, for the Commission staff.

O P I N I O NStatement of Facts

By its order dated November 18, 1975, the Commission instituted an investigation into the operations, rates, charges, and practices of George Lange Trucking, Inc. (Lange), Paul Masson, Inc. (Masson), Don W. Snyder Company (Snyder), Western Liquor Distributors, Inc. (Western), Bohemian Distributing Co. (Bohemian), Parrott & Co. (Parrott), and Whirlpool Corporation (Whirlpool). The purpose of the investigation was to determine whether Lange transported shipments of various alcoholic beverages and related materials, and appliances for respondents Masson, Snyder, Western, Bohemian, Parrott,

and Whirlpool at less than authorized minimum rates,^{1/} or failed to assess proper fuel surcharges^{2/} in violation of Sections 3664, 3667, and 3737 of the Public Utilities Code, and in the event violations occurred, whether Code Sections 3800 and 3774 should be invoked to order collection of the undercharges, impose fines, and/or order cancellation, revocation, or suspension of all or part of Lange's operating authority, and whether Lange should be ordered to cease and desist from any unlawful operations and practices.

Lange is engaged in the business of transporting property over the public highways of this State for compensation pursuant to authority granted in Highway Contract Carrier Permit T-96, 760 transferred and amended January 26, 1971 from George Lange, individual. Lange subscribes to Minimum Rate Tariffs 1-B, 2, 8, 9-B, 11-A, 14, 15, 19, Distance Table 7, and Exception Ratings Tariff 1. With an operations office and yard in San Jose, Lange employs 14 in operating 9 tractors and 42 trailers. Gross operating revenue for the four quarters ending September 1975 was \$989,369.

A public hearing was held February 19, 1976 before Examiner John B. Weiss in San Jose at which time the case was submitted subject to receipt of amended exhibit pages received February 23, 1976. At the hearing the staff asserted and presented evidence to the effect that during an investigation period covering approximately the first three months of 1974 Lange undercharged

^{1/} As set forth in Minimum Rate Tariffs 2 and 15 and Exception Ratings Tariff 1.

^{2/} Specifically, the 3 percent fuel surcharge required by Decision No. 82453 dated February 5, 1974 in Case No. 5432.

respondent shippers \$7,987.64,^{3/} and asked that Lange be directed to collect these undercharges from the respective shippers and pay \$7,987.64 as a fine, and that the Commission impose a punitive fine of \$750.00 upon Lange. Respondents Masson, Snyder, Western, Bohemian, Parrott, and Whirlpool did not answer or appear.

Discussion

The staff-sponsored evidence consisted of three bound volumes containing photocopies of freight bills and underlying documents relating to the asserted undercharges attributable to each respondent shipper during the approximate 3-month investigation period. In addition to the bound volumes, eight folders were submitted which contained summarized data derived from the bound volumes and respective respondent's records. These develop in comparative form the actual rates charged by Lange, and the legal minimum rates and charges which should have been charged for the transportation represented in the exhibits. The two major types of violations involved (1) repeated failure to apply an increased rail rate effective January 2, 1974 as ordered by Decision No. 82268 dated December 18, 1973 in Application No. 54269, and (2) a number of failures to correctly apply the excessive hours provisions of Minimum Rate Tariff 15. In addition there were three failures to charge for unloading per Items 240 or 241 of Minimum Rate Tariff 2, three failures to document split pickups or deliveries per Paragraphs 2 and 4, Item 162, Minimum Rate Tariff 2, several

3/ At hearing staff requested and received permission to submit as a late-filed exhibit, Exhibit 10, which consisted of revised data summaries on two parts of Exhibit 2, with an attendant appendix of abbreviations and reference marks. Lange agreed to these revisions and the late-filed exhibit. The exhibit results in a net change of \$8.99 less in the Paul Masson undercharges. This amount has been taken into consideration elsewhere in this decision and order where amounts are stated.

violations of failure to treat as separate shipments rail rated shipments not picked up in one day per Paragraphs (a)4.b(z), and (b), Item 85, Minimum Rate Tariff 2, and numerous different violations involving judgmental classification and rate application errors.

Lange readily conceded that all the undercharge violations as alleged by the staff occurred, but asserted that he had no intention to charge lower than legal rates, and that no deception or misleading activities were involved. Rather, he contends, in the main the undercharges were the product of misunderstanding and simple oversight. Specifically he asserts that he overlooked a second rail rate increase applicable to highway for-hire carriers - which increase followed by one day another rail rate increase which was effective January 1, 1974,^{4/} and that he simply misinterpreted the excessive hours provisions of Minimum Rate Tariff 15.

In that Lange concedes the accuracy of the staff's undercharge computations as applicable to this proceeding, and no appearance having been made by any of the respondent shippers to make issue with the staff interpretation of the rates which should have been charged, we accept the staff computation of \$7,987.64 as being the total of the undercharges applicable to the shipments in issue, attributable as follows:

Masson	\$4,237.66
Snyder	1,367.96
Western	446.49
Bohemian	842.47
Parrott	186.25
Whirlpool	906.81
Total	<u>\$7,987.64</u>

^{4/} Decision No. 82016 dated October 16, 1973 in Application No. 54268 authorized Pacific Southcoast Freight Bureau to increase California intrastate rail rates 2.6 percent on January 1, 1974. Decision No. 82268 dated December 18, 1973 in Application No. 54269 authorized Pacific Southcoast Freight Bureau a further increase of 3 percent. This latter increase became effective January 2, 1974.

Accordingly we will direct Lange to collect these undercharges from the respective shippers in accordance with the mandatory collection provisions of Section 3800 of the Public Utilities Code.

Although Lange has provided a credible explanation of oversight and misinterpretation to account for the approximate \$3,375.00 involved in the two major types of violations, this explanation accounts for somewhat less than half of the total amount here involved. As to the remaining violations - the unloading, documentation, and failure to treat separate shipment violations, as well as the non-patterned but numerous violations involving judgmental classification and rate application errors - he presented no explanation other than that "all make mistakes" and that he can correct his mistakes and learn lessons from them. Taking into consideration Lange's prior violation record,^{5/} we see no reason in this case not to assess a fine of \$7,987.64, an amount equal to the undercharges, as provided under Section 3800 of the Public Utilities Code. Not to do so would result in an unequitable windfall to Lange.

However, we do not find that the violations committed dictate any cancellation, revocation, or suspension of Lange's operating authority, nor do we adopt the staff recommendation to assess a \$750.00 fine pursuant to Section 3774 as an alternative to cancellation, revocation, or suspension. In admeasuring a penalty to be imposed, the Commission will always consider the question of willfulness in the conduct being penalized (Progressive Transp. Co. (1961) 58 CPUC 462), and where there is no indication that the

5/ Commission records reveal the following violation history:

- (1) George Lange, an individual dba George Lange Trucking T-83, 724 (predecessor to George Lange Trucking, Inc.) was by Decision No. 77293 on June 3, 1970 in Case No. 9027 fined \$2,596.42.
- (2) On August 17, 1971 an undercharge letter in the amount of \$87.17 was issued to Lange.

undercharges were willful or for the purposes of undercutting competition, there was no attempt at concealment, and the carrier cooperated in the investigation, a punitive fine need not be imposed (Jack Robertson (1969) 69 CPUC 563). In the instant case, accepting Lange's credible explanation of oversight and misunderstanding as to almost half of the violations, and noting that a fair portion of the remaining undercharge amounts results from recomputing surcharges and other incremental charges necessitated when the basic classification or rates were corrected, we fail to find evidence of willful intent to charge rates below those lawful. We find no evidence of collusion between Lange and the shippers involved. Overall there appears no scheme of patterned violations such as would tend to manifest a calculated purpose of undercutting competition. The most we can discern is an occasional negligent or lax approach to his classification and rating responsibilities as a for-hire carrier, a fault not exactly uncommon to smaller carriers. The prior 1969 violations^{6/} on record involve substantially different matters and do not vitiate these conclusions. Lange readily cooperated with the staff in making the investigation and has since on his own audited his billings and corrected some found in error. Lastly, Lange testified that he has since subscribed to the Pacific Southcoast Freight Bureau's Freight Tariff 300-A, California Commodity Tariff, so that an oversight as to rail rate increases applicable to him should not occur again. He further stated that he now understands the workings of the excessive hours provisions of Minimum Rate Tariff 15.

6/ The 1970 fine (see Footnote 5) primarily involved a truck leasing agreement held to be invalid under the Public Utilities Code, and use of improper rail rates.

Findings

1. Lange is engaged in transporting property for compensation under authority granted by this Commission.

2. Between January 2, 1974 and April 18, 1974 Lange assessed, charged, and received from the six respondent shippers less than authorized minimum rates and failed to assess proper fuel surcharges in violation of Sections 3664, 3667, and 3737 of the Public Utilities Code.

3. Lange's failure to assess, charge, and collect the prescribed minimum rates and to assess proper fuel surcharges resulted in undercharges in the total amount of \$7,987.64 ascribable to the six respondent shippers.

4. Lange acknowledged the above violations and undercharges during the February 19, 1976 public hearing in San Jose, and cooperated with the staff during its investigation.

5. The records of this Commission pertaining to Lange show one prior infraction with resultant fine and one undercharge letter.

6. Lange's explanation of oversight and misunderstanding as to the two major types of violations and undercharges involved is credible; however, the number and diverseness of the remaining violations and undercharges show occasional negligence and laxness in meeting his responsibilities as a for-hire carrier of property.

7. The Commission finds no evidence of willful intent to charge rates below those lawful, or of collusion between Lange and the respondent shippers.

8. By subscribing to the Pacific Southcoast Freight Bureau's tariff, Lange has taken appropriate steps to insure that the primary violations and undercharges should not occur again.

Conclusions

1. Lange violated Sections 3664, 3667, and 3737 of the Public Utilities Code by charging less than authorized minimum rates and failing to assess proper fuel surcharges.

2. Lange should be required to pay a fine of \$7,987.64 pursuant to Section 3800 of the Public Utilities Code.

3. The Commission expects that Lange will proceed promptly, diligently, and in good faith to pursue all reasonable measures to collect the \$7,987.64 in undercharges. The staff of the Commission will make a subsequent field investigation into such measures. If there is reason to believe that Lange, 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 the proceeding for the purpose of determining whether further sanctions should be imposed.

4. Lange should be ordered to cease and desist from any and all unlawful operations and practices in the future.

O R D E R

IT IS ORDERED that:

1. George Lange Trucking, Inc. shall pay to this Commission a fine of \$7,987.64 pursuant to Public Utilities Code Section 3800 on or before the fortieth day after the effective date of this order.

2. George Lange Trucking, Inc. shall take such action, including legal action, as may be necessary to collect the \$7,987.64 undercharges as found by this Commission, and shall notify the Commission in writing upon collection and payment.

3. George Lange Trucking, Inc. shall proceed promptly, diligently, and in good faith to pursue all reasonable measures to collect the undercharges. 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, George Lange Trucking, Inc. shall file with this 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.

4. George Lange Trucking, Inc. shall cease and desist from any and all unlawful operations and practices.

The Executive Director of the Commission is directed to cause personal service of this order to be made upon respondent George Lange Trucking, Inc., and to 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 twenty days after completion of service on that respondent.

Dated at San Francisco, California, this 11th day of MAY, 1976.

I dissent
Leonard Ross

[Signature]

President
William J. [Signature]
James L. [Signature]

[Signature]

Commissioners

*I concur, however if we
are to enforce then
the rules must apply
to all parties Robert Bateman*