

Decision No. 3621

BEFORE THE RAILROAD COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Investigation, on
the Commission's own motion, into the
operations, rates, charges, contracts,
and practices, or any thereof, of
VALLEY WHOLESALE DISTRIBUTORS, INC.,
FRED DEIL, G. R. BYNUM, G. A. CUPPRIDER,
J. J. ALLEGRETTI, C. R. WRIGHT, doing
business as Merchants Transfer Company,
R. R. LEISY, also known as R. R. Lacy,
doing business as Merchants Transport-
ation Company, KENNETH SACKETT, C. D.
McCLAREY, and J. R. ALLENBY.

ORIGINAL

Case No. 4240

In the Matter of the Investigation, on
the Commission's own motion, into the
operations, rates, charges, contracts,
and practices, or any thereof, of
C. K. HOLLAND, doing business as Holland
Motor Transport Co.

Case No. 4253

G. R. BYNUM, in propria persona,

C. D. McCLAREY, in propria persona,

JAMES J. BROZ, for Valley Express Co., Valley Motor
Lines, H. Frasher Truck Lines, and
Geo. Harm Truck Line, Intervenor,

WALLACE J. DOWNEY and CASEY THOMPSON, for Pacific
Freight Lines, Intervenor.

BY THE COMMISSION:

O P I N I O N

In Case No. 4240 the Commission instituted an investigation,
upon its own motion, into the operations, rates, charges, contracts,
and practices of Valley Wholesale Distributors, Inc., a corporation,
Fred Deil, G. R. Bynum, G. A. Cupprider, J. J. Allegretti, C. R.
Wright, doing business as Merchants Transfer Company, R. R. Leisy,
also known as R. R. Lacy, doing business as Merchants Transportation

Company, Kenneth Sackett, C. D. McClarey, and J. R. Allenby, all of whom were made respondents, to determine whether they or any of them had violated or were violating any rate order or orders prescribed by the Commission for radial highway common carriers or highway contract carriers, as defined in Chapter 223, Statutes of 1935, and to determine whether they or any of them had been or were owning, controlling, operating, or managing any auto truck used in the business of transporting property as a common carrier, for compensation, over any public highway in this State between fixed termini or over a regular route, without first having obtained a certificate of public convenience and necessity therefor.

In Case No. 4253 the Commission, upon its own motion, instituted an investigation into the operations, rates, charges, contracts, and practices of C. K. Holland, doing business as Holland Motor Transport Company, who was made a respondent, to determine whether he had been or was owning, controlling, operating, or managing any auto truck used in the transportation of property for compensation, as a common carrier, over any public highway in this State, between fixed termini or over a regular route, without first having obtained a certificate of public convenience and necessity therefor.

The two cases were consolidated for the purpose of hearing, and a public hearing was held before Examiner Austin on September 23rd and 24th, 1937, in Los Angeles, and September 30th, October 1st, and October 28th, 1937, in Fresno. The matter was then submitted and is now ready for decision.

In view of the fact that the operations of the various respondents, in so far as material here, are intimately connected

with the operations of respondent Valley Wholesale Distributors, Inc., we shall first direct our attention to the organization and function of that respondent.

The record shows that Valley Wholesale Distributors, Inc., was organized as a non-profit corporation on October 2, 1936, on which date its articles of incorporation, dated September 15, 1936, were filed in the office of the Secretary of State of the State of California. According to its articles, its purposes are, primarily, to accomplish the handling and distribution of freight for its members in an expeditious manner and at a minimum expense. The principal office is in Fresno, California, and the original directors were respondents Deil, Allegretti, and Cupprider, all of Fresno. The same persons also signed the articles of incorporation, as organizers of the corporation.

Respondent Bynum was the promoter of the corporation and has managed its affairs. Numerous shippers, who shipped property between Fresno and Los Angeles, were contacted, and their membership in Valley Wholesale Distributors solicited either by Bynum or by someone acting under his direction. The membership fee was Ten Dollars.

In order to obtain transportation at low rates, Valley Wholesale Distributors, Inc. instructed shippers both in Fresno and Los Angeles to consign their freight to Valley Wholesale Distributors, Inc., with the name of the ultimate consignee also written on the shipping documents. The local pickup and delivery in Los Angeles was performed by respondent Wright, doing business as Merchants Transfer Company. R. L. Stewart, doing business as Merchants Transfer Company, performed the local pickup and delivery in Fresno. The line-haul between Fresno and Los Angeles and inter-

mediate points was made, first by respondent Leisy, doing business as Merchants Transportation Company, and later by respondent Holland. Leisy and Holland did their hauling under contracts with Valley Wholesale Distributors, Inc. The bills of lading for the line-haul listed Valley Wholesale Distributors, Inc. as both consignor and consignee. The truck driver was given a sealed envelope on each trip, to be delivered with the shipment at the destination. This contained instructions for the local delivery to the ultimate consignees.

Valley Wholesale Distributors, Inc. paid all the transportation charges for pickup, line-haul, and delivery, and billed each shipper for the pickup and delivery charges on his shipment, plus a portion of the total line-haul charges based on the proportion, in weight, of the total line-haul shipment represented by his individual shipment.

The evidence is not clear as to the number of shippers who "joined" Valley Wholesale Distributors, Inc. When the shippers were first approached, they were asked to sign a subscription agreement which bound the subscriber to the payment of ten dollars, unless the association should not be formed within thirty days, and assured him of an equal voice with all other members in the management and control of the association. Some shippers paid ten dollars, others paid less, and a few paid a percentage of their savings from the use of the Valley Wholesale Distributors, Inc. service until a total of ten dollars had been paid. It is clear, however, that numerous shippers who had not paid any money or signed any membership papers made use of the service of Valley Wholesale Distributors, Inc. Bynum testified that shipments were accepted

if either the consignor or the consignee was a member, regardless of who paid the freight charges. Several witnesses testified that they had used the service at the request of consignees, even though they themselves had never had any contact with Valley Wholesale Distributors, Inc. Some witnesses also testified that nothing was ever said to them about joining the association, even though they had been solicited to use its service. It is apparent that Valley Wholesale Distributors, Inc. was willing to afford its service to all who cared to make use of it.

Before attempting to analyze the exact position occupied by Valley Wholesale Distributors, Inc. with relation to the transportation of property from the consignor to the ultimate consignee, we shall examine the relationship between some of the various respondents both before and after the formation of Valley Wholesale Distributors, Inc.

Respondent Bynum, manager of Valley Wholesale Distributors, Inc., has had considerable experience as an accountant with various trucking companies. He was formerly associated with respondent Leisy in the business of hauling between Los Angeles and Fresno. It was his idea to form an organization to consolidate shipments for San Joaquin Valley shippers. He first mentioned the subject to respondents Sackett and Leisy, suggesting a partnership with them. Sackett and Leisy were at that time engaged in hauling between Fresno and Los Angeles. At the request of some of the shippers solicited, Bynum decided to incorporate the organization, thereby limiting the liability of the participants.

The Los Angeles office of Valley Wholesale Distributors, Inc. is located at 1423 South Alameda Street. The same office is

used by respondent Wright, who performs the pickup and delivery service in Los Angeles, and by respondent Holland, who performs the line-haul between Fresno and Los Angeles. Respondent Leisy, during the time that he performed the line-haul, also made his Los Angeles office at the same place. The picture in Los Angeles is reflected in Fresno. An office at 2037 South Van Ness Avenue, in the latter city, has served as the headquarters for R. L. Stewart and respondents Valley Wholesale Distributors, Inc., Leisy and Holland. The latter performs the pickup and delivery service in Fresno. R. L. Stewart is the wife of respondent Sackett, using her maiden name in her business. She does business as Merchants Transfer Co. The company was formerly operated in Fresno by Leisy, with Sackett as manager.

Respondent Wright, who does business as Merchants Transfer Co. in Los Angeles, formerly was employed by that company when it was owned by Leisy.

Thus, with the formation of Valley Wholesale Distributors, Inc., the operations of Merchants Transfer Co. were seemingly broken up into three units, as follows: (1) the pickup and delivery in Los Angeles, performed by respondent Wright, doing business as Merchants Transfer Co.; (2) the pickup and delivery in Fresno, performed by Stewart, doing business as Merchants Transfer Co.; and (3) the line-haul between Los Angeles and Fresno, performed at first by respondent Leisy, doing business as Merchants Transportation Co., and subsequently by respondent Holland. But though the operations were apparently divided, the personnel remained much the same, and a close tie-up between the three units was maintained. Respondent Wright, for example, was formerly paid by Leisy on an hourly basis. After the formation of Valley Wholesale Distributors, Inc., he was paid by Bynum on a percentage basis. Later, Bynum paid him a flat weekly salary.

The business of the Merchants Transfer Co. in Fresno is managed by respondent Cupprider, who is also Secretary-Treasurer of Valley Wholesale Distributors, Inc. Prior to the formation of the latter, he was employed as a truck driver in Fresno by Leisy.

Whether or not Leisy retained actual control of the Merchants Transfer Co. in Los Angeles and in Fresno after the purported division of the hauling into the three units described above is not shown. The record leaves no doubt, however, that the supposedly separate operations were actually bound together by a common control exercised by Valley Wholesale Distributors, Inc. The latter gave the orders for pickup and delivery, directed the loading and unloading of the line-haul trucks, issued shipping directions to the consignors, and settled loss and damage claims presented by shippers.

An examination of the shipping documents used by various shippers fortifies the conclusion that the respondents were actually operating as one unit. Some bills of lading listed "Valley Wholesale Distributors" as the carrier from the consignor in Los Angeles to the consignee in Fresno; others listed "Merchants Transportation Co." as the carrier. Still others showed "Merchants Transfer Co." (the Los Angeles one, operated by respondent Wright) as the carrier. In some the carrier's name was given only as "Merchants."

As to the description of the consignees, the shipping documents again differ in some respects. The forms furnished by the carriers had the name "Valley Wholesale Distributors" printed on them as the consignee, with a blank line headed "Submarked" immediately below it. The name and address of the ultimate con-

signee were placed in that blank space. In some instances the consignor provided the bill of lading, naming "Valley Wholesale Distributors" as the consignee, and adding "c/o", followed by the name of the ultimate consignee. Other bills of lading provided by consignors gave the name of the ultimate consignee, but made no reference to Valley Wholesale Distributors, Inc. Yet, such shipments were handled in the same manner as the others.

Further evidence of the unity of management and control of the various operations is found in the internal government of Valley Wholesale Distributors, Inc. The Board of Directors consisted of Fred C. Deil, Joseph Allegretti, and G. A. Cupprider, the same men listed as organizers in the articles of incorporation. There are minutes of only two meetings held by these men, both on October 15, 1936. The first meeting, at 10:00 o'clock A.M., was denominated "First Meeting of Organizers and Subscribers." The only business transacted was the ratification of the filing of the articles of incorporation and the naming therein of the directors for the first year, and the adoption of the by-laws. At the second meeting, held at 11:00 o'clock A.M., Deil was elected President, Allegretti, Vice President, and Cupprider, Secretary-Treasurer. The place of the office was fixed, a corporate seal was adopted, and the following business was transacted: (1) A resolution empowered the Secretary to petition the State Corporation Commissioner for permission to issue membership certificates "upon receiving the sum of \$250.00 in payment thereof"; (2) A resolution directed the payment of \$5.00 to each director for each attendance at a directors' meeting; (3) A resolution empowered the President and Secretary to enter into a contract for ten years with G. R. Bynum, "in form as presented by the secretary"; (4) A resolution bound the corporation to enter into a contract with Merchants Transportation Co., of Los Angeles, for the carriage of

property from various points in California to Fresno, "in form as presented by the secretary."

No other minutes of meetings could be produced by the directors. The oral evidence is conflicting as to whether or not any other meetings were held. The greatest number of meetings testified to by any witness was five. None of the subscribers other than the directors was ever notified of any meeting or ever given any voice in the management of the affairs of the corporation, despite assurances to the contrary in the subscription agreement. The contracts with Bynum and Merchants Transportation Co. were entered into without any further action by the directors. No authority was ever given by the directors for entering into any arrangement for the pickup and delivery service in Fresno and Los Angeles, or for the contract with Holland for the line-haul.

In addition to the fact that no membership certificates were ever issued, and none of the subscribers was ever notified of any meetings, the directors themselves actually exercised no control over the affairs of the corporation. The contract with Bynum made him manager of the corporation, and he apparently never considered it necessary to submit anything to the directors for approval. The officers of the corporation apparently had little to do with its management. Respondent Allegretti, the Vice President, is in the winery business in Fresno. He testified that he attended only one meeting, at which time he signed the articles of incorporation. He received no notice of any other meetings, and confessed no interest in the corporation other than the lower rates he obtained in shipping the property of his winery. His hauling to Los Angeles had formerly been done by Leisy's Merchants Transfer Co. He testified that no change was apparent to him at the time the hauling was taken over by the Valley Wholesale

Distributors, Inc. Coming from the Vice President of the corporation, that statement is highly indicative of the purely fictitious character of Valley Wholesale Distributors, Inc.

Cupprider, the Secretary-Treasurer, has, as already stated, been directing the pickup and delivery by the Merchants Transfer Co. in Fresno. He formerly was employed by Leisy, and never has been a shipper. That he was an organizer, director, and officer of Valley Wholesale Distributors, Inc., is further evidence that the latter, though supposedly an association of shippers, is in reality an artifice designed to enable the respondent carriers to haul property without first obtaining a certificate of public convenience and necessity and to haul property at less than the minimum rates established by the Commission.

The occupation of Deil, President of the corporation, is not shown in the record. He apparently was not much concerned with the business of the corporation, in view of the paucity of meetings called and of his acquiescence in the management of the corporation by Bynum.

The status of some of the respondents has been shown in describing the organization and operation of Valley Wholesale Distributors, Inc. We shall now refer to each respondent separately.

1. Valley Wholesale Distributors, Inc.

It is already clear from the foregoing portion of the opinion that Valley Wholesale Distributors, Inc., was promoted, organized, and operated, not as a bona fide association of shippers, but rather as a part of a scheme on the part of carriers to evade the regulatory statutes governing highway carriers. This was to be accomplished through the device of representing the "association" as a sole shipper, in an attempt to take advantage of the lower rates applicable to consolidated shipments, and as a cooperative association, in an attempt to avoid the requirement of a certificate of public convenience and necessity authorizing its operations.

2. Fred Deil.

Though an organizer, director, and the President of Valley Wholesale Distributors, Inc., Deil was not shown to have actively participated in the affairs of the corporation after the designation of Bynum as manager.

3. G. R. Bynum.

Bynum was the instigator of the scheme to charge less than the minimum lawful rates, the chief promoter of the corporation, and the manager of its operations.

4. G. A. Cupprider.

Cupprider was an organizer, director, and officer of the corporation, and has actively managed the pickup service in Fresno.

5. J. J. Allegretti.

Allegretti, though an organizer, director, and officer of the corporation, has not actively participated in the management of the corporation. His role, like Deil's, seems to have been that of what is commonly referred to as a "dummy director."

6. C. R. Wright.

From the beginning, Wright was informed of the plan to charge less than the minimum rates, has been closely connected with the operations described above through his handling of the pickup and delivery service in Los Angeles, and has actively participated in the scheme.

7. R. R. Leisy.

Like Wright, Leisy was one of the first to hear about the plan. He actively participated in its furtherance until about August 1, 1937, at which time his place as line-hauler was taken over by Holland.

8. Kenneth Sackett.

Sackett was formerly associated with Leisy in hauling property between Fresno and Los Angeles. At the time Valley Wholesale Distributors, Inc. was formed, Bynum asked him to take charge of the pickup and delivery service in Fresno. He did not do so, however. That service was operated by his wife under her maiden name, with Cupprider as manager. So far as the record shows, Sackett did not participate in the plan at all.

9. C. D. McClarey.

McClarey formerly hauled for Leisy between Los Angeles and Fresno. Upon the formation of Valley Wholesale Distributors, Inc., Leisy asked him to take charge of the pickup and delivery service in Visalia. The Visalia office was later abandoned because of insufficient business, and McClarey has, since about February 1, 1937, been hauling property between Los Angeles and Fresno, in his own truck, for Leisy and Holland, respectively.

10. J. R. Allenby.

Valley Wholesale Distributors, Inc. maintains a dock at Bakersfield, receiving and discharging property on and from the line-haul trucks there. Allenby performs the pickup and delivery service in Bakersfield.

11. C. K. Holland.

Just what part, if any, was played by Holland in the organization of Valley Wholesale Distributors, Inc. is not shown. From what appears in the record, he first entered the picture on or about August 1, 1937, at which time he took over from Leisy the line-haul between Los Angeles and Fresno. Since that time, however, he has been performing one of the key operations for Valley Wholesale Distributors, Inc.

From the evidence already discussed, it is clear that the respondents have been attempting to divide the transportation of property between Fresno and Los Angeles into apparently separate operations, with the purpose of making lower rates applicable thereto. There has not, however, been any actual bona fide separation of the operations. The entire transportation, from the time the property is received from the consignor to the time it is delivered to the ultimate consignee, is managed and controlled from a central authority, and the relations with the shipper are those of a single carrier. Any division is seeming, not real, and is merely an effort to manipulate regulatory provisions out of existence.

It is also apparent that the services of the respondent have been made available to the public generally. Not only were a large number of shippers solicited to become members of Valley Wholesale Distributors, Inc., but, in addition, shippers were solicited to use the service without any mention being made of their becoming members. According to Bynum, approximately 70 shippers paid the \$10.00 membership fee. Although the exact number of shippers who used the service does not appear, there is no doubt that a large number who did not pay any membership fee took advantage of the arrangement. Forty shippers who had used the service testified at the hearing; sixteen of them stated they had never paid any membership fee. In many cases the shippers whose participation was solicited were not even told of any necessity for the payment of a membership fee or the signing of a membership application. Furthermore, the solicitations of Bynum and his associates were not confined to any select group of shippers but, on the contrary, showed a disposition to serve any shipper willing to participate in the scheme.

The service between Fresno and Los Angeles was maintained on a daily schedule. The route followed was the same each day. The operations were thus conducted over a regular route between fixed termini. Such operations, having been made available to the general public or a substantial portion thereof, were those of a highway common carrier. The respondents have not obtained a certificate of public convenience and necessity authorizing such operations, as required by Section 2-3/4 of the Public Utilities Act.

Respondent Sackett was not shown to have any connection with the operations discussed herein. The Order Instituting Investigation will therefore be dismissed as to him. The other respondents will be ordered to cease and desist from the operations and practices herein found to be unlawful.

FINDINGS OF FACT

Upon full consideration of the evidence, the Commission hereby finds the facts to be as follows:

Respondents Valley Wholesale Distributors, Inc., a corporation, Fred Deil, G. R. Bynum, G. A. Cupprider, J. J. Allegretti, C. R. Wright, doing business as Merchants Transfer Company, R. R. Leisy, also known as R. R. Lacy, doing business as Merchants Trans-

portation Company, C. D. McClarey, J. R. Allenby, and C. K. Holland, doing business as Holland Motor Transport Company, have, and each of them has, been transporting property for compensation over the public highways of this State between fixed termini, to-wit, between Los Angeles, on the one hand, and Fresno, on the other hand, and between said termini, respectively, and points intermediate thereto, as highway common carriers, as defined in Section 2-3/4 of the Public Utilities Act, without first having secured from this Commission a certificate of public convenience and necessity authorizing such operations, as required by Section 50-3/4 of the Public Utilities Act.

O R D E R

A public hearing having been had in the above entitled proceeding, evidence having been received, the matter having been duly submitted, and the Commission being now fully advised:

IT IS HEREBY ORDERED that respondents Valley Wholesale Distributors, Inc., a corporation, Fred Deil, G. R. Bynum, G. A. Cupprider, J. J. Allegretti, C. R. Wright, doing business as Merchants Transfer Company, R. R. Leisy, also known as R. R. Lacy, doing business as Merchants Transportation Company, C. D. McClarey, J. R. Allenby, and C. K. Holland, doing business as Holland Motor Transport Company, be and they are, and each of them is, hereby required and directed to cease and desist, directly or indirectly, or by any subterfuge or device, from conducting any and all operations for the transportation of property for compensation as a highway common carrier, as defined in Section 2-3/4 of the Public Utilities Act of the State of California, by any motor vehicle or motor vehicles, over the public highways, between Fresno, on the one hand, and Los Angeles, on the other hand, and between said

termini, respectively, and points intermediate thereto, unless and until they and each of them shall first have secured from the Railroad Commission a proper certificate of public convenience and necessity therefor.

IT IS HEREBY FURTHER ORDERED that this proceeding be and it is hereby dismissed, and that the Order Instituting Investigation herein be, and it is hereby, discharged as to respondent Kenneth J. Sackett.

IT IS HEREBY FURTHER ORDERED that the Secretary of this Commission shall cause a certified copy of this decision to be personally served upon respondents Valley Wholesale Distributors, Inc., a corporation, Fred Deil, G. R. Bynum, G. A. Cupprider, J. J. Allegretti, C. R. Wright, doing business as Merchants Transfer Company, R. R. Leisy, also known as R. R. Lacy, doing business as Merchants Transportation Company, C. D. McClarey, J. R. Allenby, and C. K. Holland, doing business as Holland Motor Transport Company, and each of them, and cause service thereof to be made upon respondent Kenneth J. Sackett.

IT IS HEREBY FURTHER ORDERED that this order shall become effective as to each respondent twenty (20) days from and after service thereof upon such respondent.

Dated at ^{Los Angeles} ~~San Francisco~~, California, this 15th day of

August, 1938.

Ray B. W. [Signature]
Leon [Signature]
Frank [Signature]

Ray L. Riley
Commissioners.