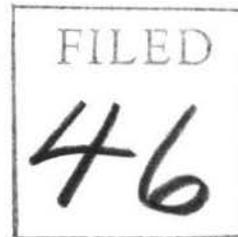


April 30, 1968

OPINION NO. 46  
250 (1967)  
Answered by Letter  
(Weber)

Honorable Carl D. Gum  
Prosecuting Attorney  
Cass County  
Harrisonville, Missouri



Dear Mr. Gum:

In your request for an opinion, you state the problem as follows:

"If a truck hauls from Kansas City, Missouri, to Paola, Kansas, and then hauls the load into Drexel, Missouri, is it necessary for the truck to have Missouri Public Service Commission authority?"

The following additional facts will aid in seeking a conclusion: The trucker in Kansas City, Missouri has no Missouri Public Service Commission authority whatsoever. That is, he has neither a certificate of public convenience and necessity to operate in intrastate commerce under Section 390.051, RSMo Supp. 1967, nor does he have a permit from the Missouri Public Service Commission to operate in interstate commerce under Section 390.071, RSMo 1959. The shipper contacts the truckline to haul a shipment from Kansas City, Missouri to Drexel, Missouri. The truckline does have authority from the Interstate Commerce Commission to haul shipments from Kansas City, Missouri to Paola, Kansas and to haul shipments from Paola, Kansas to Drexel, Missouri. The truckline prepares two bills of lading.

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The first bill of lading consigns the shipment from Kansas City, Missouri, to the trucklines dock in Paola, Kansas. The second billing of lading consigns the shipment from the truckline's dock at Paola, Kansas, to Drexel, Missouri.

The first observation to be made is that a motor carrier operating in Missouri must obtain either an intrastate commerce certificate of public convenience and necessity under Section 390.-051, RSMo Supp. 1967, or an interstate commerce permit under Section 390.071, RSMo 1959. Even if the trucker is legitimately operating in interstate commerce under authorization from the Interstate Commerce Commission, if he engages in interstate commerce on the highways of Missouri, he must have a permit from the Missouri Public Service Commission by virtue of Section 390.-071, RSMo 1959, which reads in part as follows:

"No person shall engage in the business of a motor carrier in interstate commerce on any public highway in this state unless there is in force with respect to such carrier a permit issued by the commission authorizing such operations. \* \* \* \*"

Furthermore, a motor carrier operating in Missouri must display an annual license issued by the Public Service Commission regardless of whether the carrier is an interstate or an intrastate motor carrier. Section 390.136, RSMo 1959 reads in part as follows:

"No motor carrier, except as provided in section 390.030, shall operate, under a certificate or permit, any motor vehicle unless such vehicle shall be accompanied by an annual license issued by the public service commission; provided, that when a motor carrier uses a truck-tractor for pulling trailers or semitrailers said motor carrier may elect to license either the truck-tractor, trailer or semitrailer. The fee for each such annual license shall be twenty-five dollars and shall be due and payable on or before January fifteenth of each calendar year. Such annual license shall be issued in such form and shall be used pursuant to such reasonable rules and regulations as the commission may, by general order or otherwise, prescribe. \* \* \* \*"

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The question arises as to the proper action to be taken in the present case. The motor carrier in your request does not possess either a certificate of public convenience and necessity to operate in intrastate commerce or a permit to operate in interstate commerce. If the carrier is cited by the highway patrol, the prosecutor may choose to take any of several courses of action.

Section 390.171, RSMo 1959 makes a violation of Section 390.-011 to Section 390.176 a misdemeanor:

"Every owner, officer, agent or employee of any motor carrier, and every other person, who violates or fails to comply with or who procures, aids or abets in the violation of any provision of sections 390.011 to 390.176, or who fails to obey, observe or comply with any order, decision, rule or regulation, direction, demand or requirement of the commission, or who procures, aids or abets any person in his failure to obey, observe or comply with any such order, decision, rule, direction, demand or regulation thereof shall be guilty of a misdemeanor."

If the prosecutor feels the motor carrier is legitimately operating in interstate commerce, he may institute an action against the motor carrier for an alleged violation of Section 390.136, RSMo 1959, for failure to display an annual license or for an alleged violation of Section 390.071, RSMo 1959 for failure to obtain an interstate commerce permit from the Public Service Commission.

Rather than bringing the action himself, the prosecutor may choose to notify the Missouri Public Service Commission who may investigate the matter and bring an action against the motor carrier for lack of a permit under Section 390.156, RSMo 1959, which reads as follows:

"An action to recover a penalty or a forfeiture under sections 390.011 to 390.-176 or to enforce the powers of the commission under this or any other law may be brought in any circuit court in this state in the name of the state of Missouri and shall be commenced and prosecuted to final judgment by the general counsel to the commission. In any such action all

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penalties and forfeitures incurred up to the time of commencing the same may be sued for and recovered therein, and the commencement of an action to recover a penalty or forfeiture shall not be, or be held to be, a waiver of the right to recover any other penalty or forfeiture; if the defendant in such action shall prove that during any portion of the time for which it is sought to recover penalties or forfeitures for a violation of an order or decision of the commission, the defendant was actually and in good faith prosecuting a suit to review such order or decision in the manner as provided in sections 390.011 to 390.176, the court shall remit the penalties or forfeitures incurred during the pendency of such proceeding. All moneys recovered as a penalty or forfeiture shall be paid to the public school fund of the state. Any such action may be compromised or discontinued on application of the commission upon such terms as the court shall approve and order."

If the prosecutor is of the opinion that the federally certified motor carrier is illegally engaged in intrastate commerce, the action becomes more complicated. In Service Storage and Transfer Co., Inc. v. Virginia, 359 U.S. 171, 3 L.Ed 2d 717, 79 S.Ct. 714 (1959), the Supreme Court held that:

"Before a state may impose criminal sanctions upon a federally certified motor carrier for transporting, without a state certificate, shipments between points within the state via a point outside the state, the interpretation of the carrier's interstate commerce certificate should first be litigated before the Interstate Commerce Commission under § 204(c) of the Motor Carrier Act (49 USC § 304(c) ), authorizing the filing of a complaint to the commission by a state board that a carrier has abused its certificate."

In the Service Storage case, an interstate motor carrier certified by the Interstate Commerce Commission, transported shipments between points in Virginia, but routed them through its headquarters in West Virginia. The Virginia State Corporation Commission fined

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the carrier because of its failure to obtain a certificate for its intrastate operations. The court held that the state had no power to impose criminal sanctions upon an interstate motor carrier certified by the Interstate Commerce Commission for its failure to obtain state certification for its alleged intrastate operations since such sanctions would be tantamount to a partial suspension of the carrier's federally granted certificate. But, the court went on to say that a state which believes that the operation of a motor carrier certificated by the Interstate Commerce Commission is not bona fide interstate but merely a subterfuge to escape state jurisdiction, may avail itself of the remedy in Section 304(c) of the Motor Carrier Act (49 USC § 304(c)) authorizing the filing of a complaint to the Commission by a state board that the carrier has abused its certificate.

We have formerly stated that by virtue of Section 390.171, RSMo 1959, the prosecuting attorney may bring an action against the motor carrier for an alleged violation of any provision of sections 390.011 to 390.176. Therefore, theoretically speaking, the prosecutor could initiate the action against the motor carrier for failure to obtain intrastate authority under Section 390.051 RSMo Supp. 1967. But, according to the Service Storage case, supra, the interpretation of the certificate of public convenience and necessity issued by the Interstate Commerce Commission should be made in the first instance by the I.C.C. The prosecuting attorney may file a complaint to the I.C.C. alleging that the carrier has abused its certificate by virtue of the remedy provided in Section 304(c) of the Motor Carrier Act which reads as follows:

"(c) Upon complaint in writing to the Commission by any person, State board, organization, or body politic, or upon its own initiative without complaint, the Commission may investigate whether any motor carrier or broker has failed to comply with any provision of this chapter, or with any requirement established pursuant thereto, If the Commission, after notice and hearing, finds upon any such investigation that the motor carrier or broker has failed to comply with any such provision or requirement, the Commission shall issue an appropriate order to compel the carrier or broker to comply therewith. Whenever the Commission is of opinion that any complaint does not state reasonable grounds for investigation and action on its part, it may dismiss such complaint."

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It would be an expensive and complicated procedure for the prosecuting attorney to initiate the action against the motor carrier for lack of intrastate authority, and even if the prosecuting attorney was successful, the most severe penalty that could be invoked against the carrier would be a conviction of a misdemeanor under Section 390.171, RSMo 1959.

On the other hand, the Missouri Public Service Commission is equipped to prosecute these cases and would be an appropriate agency to file the complaint with the Interstate Commerce Commission. Also, the penalties available to the Public Service Commission are much more severe and range from \$100 per day per violation up to \$2000.

The ultimate question in your request is whether the trucker must obtain Missouri Public Service Commission authority. Of course, we have determined that he must obtain a Missouri Public Service Commission permit under Section 390.071 RSMo 1959, if he is legitimately engaged in interstate commerce. The question of the requirement of a Missouri Public Service Commission certificate of public convenience and necessity under Section 390.051, RSMo Supp 1967 is more complicated and cannot be answered conclusively for several reasons. As a practical matter, the Public Service Commission is the appropriate agency to initiate the action since the Commission is equipped with the expertise and the machinery to litigate the case. Secondly, accordingly to the cases cited, where a federally certificated carrier is involved, the interpretation of such certificates of public convenience and necessity should be made in the first instance by the Interstate Commerce Commission. Finally, whether the system of circuitous routing employed by the carrier is a subterfuge for hauling freight in intrastate commerce depends upon many factors such as efficiency of routing, comparative interstate and intrastate rates and the intent of the trucker. Without a hearing, it would be impossible to reach a conclusion as a matter of law.

Although an action against the federally certified carrier for lack of a Missouri certificate of public convenience and necessity could best be initiated by the Missouri Public Service Commission, an analysis of the pertinent cases will assist you in deciding whether the routing employed by the carrier is a subterfuge to evade the state laws and action should be taken.

In Service Storage and Transfer Co. v. Virginia, supra, an interstate motor carrier was fined \$5,000.00 for carrying ten shipments alleged to have been of interstate character. The shipments originated at Virginia points and were destined to Virginia points, but were routed through Bluefield, West Virginia (the main terminal). They were transported in a vehicle with freight destined

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to points outside of Virginia. Upon arrival at Bluefield, the freight destined to Virginia was removed and consolidated with freight coming to the terminal from non-Virginia origin. It then moved back into Virginia to its destinations. The Corporation Commission found that the routes through Bluefield were a subterfuge to evade state law.

The U. S. Supreme Court held that the matter should first be litigated before the Interstate Commerce Commission, but went on to say that the shipments were, on their face interstate shipments. The court noted several factors: Though the routes were circuitous and often long, sometimes exceeding twice the shortest possible routes, the state offered no direct evidence of bad faith on the part of the carrier. The business had been carried on in a similar manner for many years under Interstate Commerce Commission authority. The court said the "operation is not only practical, efficient and profitable, but also the creation of this 'flow of traffic' is a timesaver to the shipper since there is less time lost waiting for the making up of a full truckload." The alleged intrastate shipments constituted only a small percentage of the carrier's operations.

In an older Missouri case, Eichholz v. Missouri Public Service Commission, (1939), 59 S.Ct. 532, 306 U. S. 268, 83 L.Ed. 641, a motor carrier hauled goods consigned to persons in Kansas City, Missouri, from St. Louis, Missouri, over the state line to Kansas City, Kansas, and then back to its intended destination in Kansas City, Missouri. The Public Service Commission found that the carrier had unlawfully engaged in intrastate commerce under the pretense of transacting interstate business. The following factors were relevant: The evidence showed an industrious solicitation of transportation business from St. Louis, Missouri to Kansas City, Missouri, at an interstate rate which was much lower than the intrastate rate. Further evidence disclosed that this was not the normal, regular or usual route; that the same routes were used in delivering merchandise after it had been hauled in the first instance to the terminal in Kansas City, Kansas, one-half mile across the state line. The evidence further showed that in most instances the carrier did not unload the goods, but merely changed drivers, sometimes with the same tractor and trailer and returned the goods to Kansas City, Missouri. The district court found that the method of operation employed was designed to afford shippers the benefit of a lower rate and was not in good faith.

In Jones Motor Co. v. U.S., 218 F. Supp. 133 (E.D. Pa.1963), a carrier operating without intrastate authority combined shipments between two points in Pennsylvania with interstate shipments, routing them through New Jersey. The court reversed the Interstate Commerce

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Commission and affirmed the examiner's position that: (1) The longer circuitous routes utilized by Jones in and of themselves were not proof of bad faith or subterfuge, and, (2) there existed logical, practical and feasible reasons from the standpoint of operating efficiency and economy for the questioned operations.

In three consolidated cases, Service Trucking Co. Inc. v. United States, 239 F. Supp. 519 (D. Md. 1965) affirmed 382 U.S. 43, 86 S.Ct. 183, 15 L.Ed. 2d 36 (1965); Hudson Transportation Co. v. U. S. and Arrow Carrier Corp. v. U. S., reported jointly at 219 F. Supp. 43 (D.N.J. 1963), affirmed 375 U.S. 452, 84 S.Ct. 524, 11 L.Ed. 2d 477 (1964), the carriers were held to have operated in bad faith and in a manner to avoid the state law by subterfuge. Hudson and Arrow admitted in substance that were it not for their lack of authority to operate intrastate, they would have used the more direct routes. In addition, neither company performed terminal service at out-of-state points while moving the traffic between state points. Service Trucking used the more direct routes for nonregulated intrastate traffic and for multistate shipments. However, circuitous routes were used where intrastate authority was lacking. In these cases circuitous routes were used for the sole purpose of evading regulations. The court stated that the routes were not logical or normal operations; that this was a deliberate calculated method employed by the carriers to avoid the unfavorable consequences to them of their intrastate Pennsylvania traffic coming within the rightful jurisdiction of the Utility Commission. The evidence overwhelmingly pointed to the routes as artificial contrived arrangements to obtain intrastate business not otherwise available.

In Rock Island Motor Transit Co. v. United States, 256 F. Supp. 812 (1966), the evidence sustained the finding of the Interstate Commerce Commission that the interstate motor carrier's practice of circuitous routing and backhauling of shipments from points in Iowa to Nebraska and back to points in Iowa and from points in Iowa to Illinois and back to points in Iowa did not constitute a subterfuge to escape the jurisdiction of the state of Iowa by converting to interstate commerce what would be, but for circuitous routing and backhauling, intrastate commerce. The court held that the motor carrier's routings were generally efficient and not intended to attract intrastate traffic or evade the laws by subterfuge. The court found the following factors to be decisive; the routes were designed for efficient consolidation and carrier convenience; other carriers found it convenient to use the same routing techniques; only a small percent of the motor carrier's operations were questioned (3 percent). The method of

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operation was normal, logical and efficient and the carrier had acted in good faith. The difference in the direct route and the circuitous route was not great. Here, the court felt that the question of lawfulness should not be decided on the basis of comparative efficiency alone.

Missouri Public Service Commission v. Red Arrow Transit Co., No. MCC-4197, CCH Federal Carriers Cases, Interstate Commerce Commission, No. 469, Section 43,232 (Commission decision), involved shipments from Kansas City, Missouri, through Kansas to Joplin, Missouri, and Springfield, Missouri. The commission stated that the complainant had established no facts from which they could infer bad faith. Nor did he establish anything at all untoward or unreasonable about the carrier's use of its Kansas City, Kansas terminal and the Kansas route to handle the considered traffic moving between points in the Kansas City, Missouri area on the one hand and on the other, Joplin, Springfield and the other disputed Missouri points. Important factors in the commission's decision were the carrier's good faith and the reasonableness of the routing and operational method of handling the involved traffic.

The Commission stated:

"less than truckload traffic, as a matter of economic and practical necessity, generally must be handled from origin to a nearby terminal for assembly and consolidation into line-haul vehicles for movement to the terminal most convenient to the ultimate destination where the traffic must then be broken down for delivery in local equipment. This often results in other than the straight-line routes being used between origin and destination."

The above cases should be helpful in analysing the method of operation employed by the trucker in your opinion request. Note that he possesses no Missouri Public Service Commission authority or permit whatsoever. Furthermore, the fact that the two bills of lading are prepared and the goods are accepted for consignment to Drexel, Missouri, looks somewhat suspicious. At the same time, the method of operation may be legitimate in that the truckline is performing a terminal service at the out-of-state point and the shipments involved are in less-than-truckload amounts.

It is the opinion of this office that a motor carrier operating in Missouri must obtain either an interstate commerce certificate of public convenience and necessity under Section 390.051, RSMo Supp. 1967, or an interstate commerce permit under Section 390.071, RSMo 1959.

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Section 390.171, RSMo 1959 makes a violation of any provision of Sections 390.011 to Section 390.176 a misdemeanor. Therefore, it is within the authority of the prosecuting attorney to bring actions for such violations. However, before a state may impose criminal sanctions upon a federally certified motor carrier, for transporting shipments without intrastate authority, the interpretation of the carrier's interstate commerce certificate must first be litigated before the Interstate Commerce Commission.

By virtue of Section 304(c) of the Motor Carrier Act (49 U.S.C.A. § 304(c)), the prosecuting attorney or the Public Service Commission may file a complaint with the Interstate Commerce Commission to determine whether the carrier is, in fact, an interstate carrier. Due to the fact that the Public Service Commission is equipped with the machinery required to efficiently litigate cases involving unauthorized intrastate hauls and due to the fact that stiffer penalties are available under Public Service Commission proceedings, it is recommended that the Public Service Commission handle cases where a federally certified motor carrier is allegedly operating in intrastate commerce without authorization.

Yours very truly,

NORMAN H. ANDERSON  
Attorney General

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