MOTOR VEHICLES;
PUBLIC SERVICE COMMISSION: Employee of Fort Leonard Wood transporting other certain employees to the Fort is not a "motor carrier" or "contract hauler."

May 11, 1942

5-16

FILE 20

Honorable Edward Cusick
Prosecuting Attorney
Pulaski County
Waynesville, Missouri

Dear Sir:

We are in receipt of your letter dated May 7, 1942, requesting an official opinion from this department, as follows:

"I would like to have your special opinion upon the following matters, to-wit:

"Richland, Missouri, in this County, is approximately 25 miles from Fort Leonard Wood. Quite a number of the inhabitants of Richland and the adjacent territory are employed by the Government in civilian work at Fort Leonard Wood. These employees have been commuting under an arrangement whereby some four or five employees would ride in the automobile of another employee and each pay a per diem to the driver of 50¢ for the transportation. Until recently no public service vehicle operated between Richland and Fort Leonard Wood. Recently the Public Service Commission issued a certificate of convenience and necessity to an individual resident of Richland and on April 27, 1942, this individual began operating a bus be-

tween Richland and Fort Leonard Wood and intermediate points, pursuant to the Public Service Commission authority aforesaid, and is making four round trips each day between Richland and Fort Leonard Wood.

"A great many of the employees are continuing to commute in private conveyances in the manner above described and are operating along the line now traveled by the Public Service vehicle. A few of the owners of the private vehicles purpose to lease their vehicles to the persons who would otherwise be their passengers.

"My first question is: Are the owners of these private vehicles who are transporting employees on a per diem basis in violation of the criminal law and thus subject to criminal prosecution?

"My second question is: If such owner of a private vehicle executes a lease to certain of the civilian employees, these lessees pay the agreed rental in the lease and use the vehicle for transportation to and from their place of employment, said travel being along the line serviced by the Public Service vehicle above mentioned, is such owner, and are the purported lessees, violating the criminal law and as such subject to criminal prosecution?"

The Public Service Commission has no power over property for private use, it was so held in the case of State ex rel Buchanan County Power & Transmission Co., v. Baker, 9 S. W. (2d) 589.

The Public Service Commission's powers are limited to those conferred by the Public Service Commission Act. (State ex rel Rutledge v. Public Service Commission, 289 S. W. 785, 316 Mo. 233.)

The law applicable to your request is Section 5720, Laws of Missouri, 1941, page 522. This section repealed Section 5720, Article 8, Chapter 35 of the Revised Statutes of Missouri, 1939, and was re-enacted for the purpose of preventing trade barriers at the respective state lines. The only additional definition appears in Section 5720, Laws of Missouri, 1941, supra, in the last provision of paragraph (b) of the section.

Paragraph (b), of Section 5720, Laws of Missouri, 1941, page 522, partially reads as follows:

> "The term 'motor carrier,' when used in this article, means any person, firm, partnership, association, joint-stock company, corporation, lessee, trustee, or receiver appointed by any court whatsoever, operating any motor vehicle with or without trailer or trailers attached, upon any public highway for the transportation of persons or property or both or of providing or furnishing such transportation service, for hire as a common carrier: * * * * * * * * * *."

This part of Section 5720 was in Section 5720 R. S. Missouri, 1939, which was the re-enacted Laws of 1931, page 304.

Paragraph (b) of Section 5720 R. S. Missouri, 1939, was construed in the case of State v. Witthaus, 102 S. W. (2d) 99, l. c. 101, where the court after setting out what

is now paragraph (b) of Section 5720, Laws of Missouri, 1941, page 522, said:

> "* * * This definition gives the term 'motor carrier' a meaning equivalent to that of a common carrier. Schwartzman Service, Inc., v. Stahl et al., supra.
>
> "In State ex rel. v. Public Service Commission, 275 Mo. 483, 205 S. W. 36, 42, 18 A. L. R. 754, the following from 1 Wyman on Public Service Corporations, 227, was quoted with approval: 'The fundamental characteristic of a public calling is indiscriminate dealing with the general public. As Baron Alderson said in the leading case: "Everybody who undertakes to carry for any one who asks him is a common carrier. The criterion is whether he carries for particular persons only, or whether he carries for every one. If a man holds himself out to do it for every one who asks him, he is a common carrier; but if he does not do it for every one, but carries for you and me only, that is a matter of special contract." * * * .'" (Underscoring ours.)

Under the facts in your request, and according to the above holding, the employee who hauls other specific employees to Fort Leonard Wood is not a "common carrier" for the reason that he is not offering to carry every one, but carries only specific persons to the place where he is employed.

The court in the above case has held that where the operator of the motor vehicle held himself out as a carrier of either goods or persons to anyone who would

employ him he would then come within the Public Service Commission Act. The court, in that instance, said:(l.c. 101)

> "' * * * This regular course of public service without respect of persons makes out a plain case of public profession by reason of the inevitable inference which the general public will put upon it. "One transporting goods from place to place for hire, for such as see fit to employ him, whether usually or occasionally, whether as a principal or an incidental occupation, is a common carrier."' * * * * "

The main question is whether or not the owner of the automobile is dealing as a carrier for transportation of persons with the public, or whether or not he is dealing as a carrier of persons for transportation with specific persons. In the case of State v. Witthaus, supra, the court, in passing upon that subject said: (l. c. 102)

> "* '* * We are dealing with a case where the carrier made the transportation of household goods part of its regular business, advertised that business in a way to solicit custom from the general public. An unavoidable implication arises that it holds itself in readiness to engage with any one who might apply.' The essential feature of a public use is that it is not confined to privileged individuals, but is open to the indefinite public. It is this indefinite or unrestricted quality that gives it its public character. White v. Smith, 189 Pa. 222, 42 A. 125,

> 43 L. R. A. 498. 'It follows that the use must be so extensive as to imply an offer to serve all of the public, or that there be other circumstances from which it may be reasonably inferred that the carrier was undertaking to serve all to the limit of his capacity. One, however, does not become a public carrier because he is engaged exclusively in transporting persons or property or because the person or persons whom he serves take all his facilities. The test is whether he has invited the trade of the public.' Klawansky v. Public Service Commission, 123 Pa. Super. 375, 187 A. 248, 251. But, 'the public does not mean everybody all the time.' Spontak v. Public Service Commission, 73 Pa. Super. 219, loc. cit. 221 citing Peck v. Tribune Co., 214 U. S. 185, 29 S. Ct. 554, 53 L. Ed. 960, 16 Ann. Cas. 1075. If the carrier carries goods as a public employment, undertaking to carry goods for persons generally, and holds himself out to the public as ready to engage in that business as a business, and not as a casual occupation, he comes within the definition of a common carrier. Story on Bailments, sec. 495."

There is no question but that paragraph (b) of Section 5720, Laws of Missouri, 1941, supra, only applies to "motor carriers" and not to "contract haulers." It was so held in the case of State v. Sanderson, 128 S. W. (2d) 277, Par. 2, where the court said:

> "It is the contention of the prosecution in this case, which contention we

> think is correct, that the word 'carrier' in Section 5277 means 'common carrier', and not 'contract hauler' as defined in Section 5264(c) of the same act. It is our conclusion that the provisions of Section 5277 apply to common carriers only and not to contract haulers. The evidence clearly shows that the defendant did not make application for a certificate or permit within ninety days after the present law went into effect, as provided by the latter part of said Section 5277."

Paragraph (c) of Section 5720, Laws of Missouri, 1941, Page 522, reads as follows:

> "The term 'contract hauler,' when used in this article, means any person, firm or corporation engaged, as his or its principal business, in the transportation for compensation or hire of persons and/or property for a particular person, persons, or corporation to or from a particular place or places under special or individual agreement or agreements and not operating as a common carrier and not operating exclusively within the corporate limits of an incorporated city or town, or exclusively within the corporate limits of such city or town and its suburban territory as herein defined."

It will be specifically noted that Paragraph (c) contains the following phrase:

> "The term 'contract hauler,' when used in this article, means any person, firm or corporation engaged, as his or its principal business, * * * ."

Under the facts in your request, you state that four or five employees commute from Richland to Fort Leonard Wood in the car of another employee. We are presuming that the employee, when carrying the other employees to Fort Leonard Wood is also employed at the Fort and performs his duties at the same time the other employees do.

Since the carrying of the other employees is not his principal business he is not considered as a "contract hauler."

Paragraph (c) of Section 5720, supra, is unambiguous and requires no construction. Under the holding in the case of State v. Witthaus, supra, it is a question of fact as well as law, whether or not the owner of the automobile, as described in your request, is dealing with the public at large, or with certain individuals. If he is dealing with the public at large he comes within the powers of the Public Service Commission, as set out in Section 5726, paragraph (d), of the Revised Statutes of Missouri, 1939, which gives the Public Service Commission power over contract haulers, but, since we are holding that the employee is not a "motor carrier," as defined by Section 5720, supra, and since he is not a "contract hauler," as set out in paragraph (c) of said Section 5720, supra, he does not come within the powers of the Public Service Commission.

CONCLUSION

In answer to your first question, it is the conclusion of this department that owners of private vehicles who are employed at, and are employees of, Fort Leonard Wood themselves, and who are transporting employees on a

per diem basis, but when such transportation is not their principal business, are not subject to criminal prosecution under the Public Service Commission Act, for the reason that it is a matter of special contract with certain individuals and is not the promiscuous hauling of the public in general.

In answer to your second question, it is the opinion of this department, that, since the employee of Fort Leonard Wood is not a "motor carrier" and is not a "contract hauler," the other employees who enter into an agreement with him for transportation on a per diem basis are not subject to prosecution under the Public Service Commission Act.

Respectfully submitted

W. J. BURKE
Assistant Attorney General

APPROVED:

_____

ROY McKITTRICK
Attorney General of Missouri

WJB:RW