PUBLIC SERVICE COMMISSION: Association hauling for hire furniture
MOTOR VEHICLES: of its members subject to Public Service Act.

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Mr. M. Stanley Ginn
Superintendent
Missouri State Highway Patrol
Jefferson City, Missouri

Dear Sir:

This will acknowledge receipt of your recent request for an opinion relative to a matter submitted by Captain W. J. Ramsey and which reads:

> "(1) The Agricultural Transportation Association of Springfield, Ill., leases trucks from individuals who are members of the Association and contracts to haul furniture of another member through the State of Missouri to Kansas, charging this member $150 for the trucking service. This fee is other than the Association dues.
>
> "(2) In case the individual moved is not a member of the Association and part of the fee charged for hauling is set aside as a membership fee, would this movement come under the Public Service Commission?"

The law is well settled that a person may lease a truck for a period not to exceed ten days and haul his own goods without coming within the Public Service Act. But here we have an entirely different set of facts. The Association leases the truck, it happens that the lessor is a member of said Association though that is immaterial, and the Association then agrees, for a stipulated amount of money, to haul furniture belonging to another individual who is also a member from the State of Illinois through Missouri to the State of Kansas.

Section 5720 (b), defines "motor carrier" as used in

Laws of Missouri 1941, page 523, is as follows:

> "(b) 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: Provided, however, this article shall not be so contrued as to apply to motor vehicles used in the transportation of passengers or property for hire, operating over and along regular routes within any municipal corporation or a municipal corporation and the suburban territory adjacent thereto, forming a part of transportation system within such municipal corporation or such municipal corporation and adjacent suburban territory, where the major part of such system is within the limits of such municipal corporation. And provided further, this article shall not be so contrued as to apply to motor vehicles operated between the State of Missouri and an adjoining state when the operations of such motor vehicles within the State of Missouri are limited exclusively to a municipality and its suburban territory as herein defined."

Section 5720 (C), page 523, Laws of Missouri 1941, defines "contract hauler" as used in the same Article and reads:

> "(c) 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."

Section 5721, R. S. Missouri 1939, contains certain exceptions to Article VIII, Chapter 35, R. S. Missouri 1939, regulating transportation of persons and property by motor vehicles and reads:

> "The provisions of this article shall not apply to any motor vehicle of a carrying capacity of not to exceed five persons, or one ton of freight, when operated under contract with the federal government for carrying the United States mail and when on the trip provided in said contract; nor to any motor vehicle owned, controlled or operated as a school bus; nor taxicab, as herein defined; nor to motor vehicles used exclusively in transporting farm and dairy products from the farm or dairy to a creamery, warehouse, or other original storage or market, and transporting stocker and feeder livestock from market to farm or from farm to farm nor to motor vehicles used exclusively in the distribution of newspapers from the publisher to subscribers or distributors. No provision of this article shall be so construed as to deprive any county or municipality within this state of the right of police control over the use of its public highways, or the state highway commission of the right of police control over the use of state highways. This article shall not apply to trucks used in work for the state or any civil subdivision thereof."

It is apparent that such Association does not come within the above exceptions.

Section 5726, R. S. Missouri 1939, specifically vests in the Public Service Commission authority to license, supervise

and regulate every "contract hauler" except as provided in Section 5721, supra, and reads in part:

> "The public service commission is hereby vested with power and authority and it shall be its duty to license, supervise and regulate every contract hauler in this state except as provided in section 5721 and to approve schedules containing the minimum charges of such contract haulers and to prescribe reasonable rules and regulations governing the filing and keeping open for public inspection of such schedules: * * * * * * * * * * * * * * *."

Section 5723, R. S. Missouri 1939, is authority for the Public Service Commission to regulate all motor carriers and reads in part:

> "The public service commission is hereby vested with power and authority, and it shall be its duty to license, supervise and regulate every motor carrier in this state to fix or approve the rates, fares, charges, classifications and rules and regulations pertaining thereto; to regulate and supervise the accounts, schedules, service and method of operating of same; to prescribe a uniform system and classification of accounts to be used, which among other things shall set up adequate depreciation charges, and after such accounting system shall have been promulgated, motor carriers shall use no others; to require the filing of annual and other reports and any other data; and to supervise and regulate motor carriers in all matters affecting the relationship between such motor carriers and the public.
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> "(b) The public service commission shall have power and authority by general order or otherwise to prescribe rules and regulations governing all motor carriers as herein defined:* *."

As was held in Schwartzman Service vs. Stahl, 60 Federal (2) 1034, l. c. 1037, the State has authority to regulate motor vehicles upon the highways. The court said:

> "At the outset it must be acknowledged that the state has the power to regulate and control the movements of motor vehicles over its highways. This it may do in the interest of public convenience and safety and for the protection of the highways. Provisions of this character have been uniformly sustained. Buck v. Kuykendall, 267 U. S. 307, loc. cit. 314, 45 S. Ct. 324, 69 L. Ed. 623, 38 A. L. R. 286; Stephenson v. Binford et al. (D. C.) 53 F. (2d) 509.
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> "Moreover, while 'a citizen may have, under the Fourteenth Amendment, the right to travel and transport his property upon them by auto vehicle,' yet 'he has no right to make the highways his place of business by using them as a common carrier for hire. Such use is a privilege which may be granted or withheld by the state in its discretion, without violating either the due process clause or the equal protection clause.' Packard v. Banton, 264 U. S. 140, loc. cit. 144, 44 S. Ct. 257, 68 L. Ed. 596."

In Prouty vs. Coyne, 55 Federal (2) 289, l. c. 292, the court held that a state may tax interstate commerce and in so holding said:

> "* * * * * * * * * *The state may constitutionally impose a tax burden on interstate commerce as compensation for the use of the public highways, provided the charge is only a reasonable and fair contribution to the expense of construction and maintenance of such highways and of regulating the traffic thereon. (Cases cited.)."

See also State vs. Public Service Commission, 108 S. W. (2) 116, l. c. 119, wherein the court said:

> "Is the tax imposed upon the appellant (an interstate carrier), by section 5272 as added by section 1 of the Laws of 1931 (Mo. St. Ann. Sec. 5272, p. 6689) for the use of the highways in this state a reasonable charge and a fair contribution to the expense of construction and maintenance of such highways and of regulating the traffic thereon? If so, then the tax is valid, even if it is a burden on interstate commerce. Kane v. New Jersey, 242 U. S. 160, 37 S. Ct. 30, 61 L. Ed. 222; Clark v. Poor, 274 U. S. 554, 47 S. Ct. 702, 71 L. Ed. 1199; Prouty v. Coyne (D. C.) 55 F. (2d) 289."

In the instant case the name "Agricultural Transportation Association" indicates to the writer that said Association is organized for the purpose of transporting agriculture products belonging to the members of that Association and no one else and for no other purpose under some kind of a limited or special contract. Not knowing all the facts such as the purpose, organization of the Association, whether the payment of membership fees limits the membership, by-laws, etc., it is difficult to pass intelligently upon this question. We are assuming, for the purpose of this opinion, that said Association is in the nature of a cooperative association created for the benefit of its members and no one else. Naturally, its charter or by-laws must prescribe certain purposes for such organization and it is limited to those particular functions. Unless this Association, under the above facts, comes within the above statutory provisions defining motor carrier and contract hauler it does not come under the jurisdiction and supervision of the Public Service Commission.

Whether or not a person or association is a common carrier is a question of fact. However, we think this Association is not a common carrier. This Association apparently is not indiscriminately dealing with the general public. In Osage Tie and Timber Company vs. Gorg-Murphy Timber & Grain Company, 191 S. W. 1026, l. c. 1028, the court defined who is a common carrier and said:

> "* * *It appears that on the Osage river plaintiff was engaged principally in transporting it own ties, and that thereafter it was engaged almost exclusively, if not entirely so, in transporting ties for defendant.

> "'The test of whether the business is a public calling is whether there is indiscriminate dealing with the general public. 1 Wyman on Pub. Service Corp. Section 227. It is the willingness to serve all that makes the employment a public one. If the carrier, however, does not deal with the public indiscriminately as a matter of routine, but in effect makes an individual bargain in each case, this course of business shows that the service is upon a private basis. 1 Wyman on Pub. Serv. Corp. Section 239. * * * * Whether a person is not a common carrier is to be determined from the facts bearing upon the nature of the calling, the basis on which he contracts and whether he holds himself out to the public as a carrier in such manner as to render himself liable to an action if he should refuse to carry for any one who wished to employ him.'
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> "See Campbell v. Storage & Van Co., 187 Mo. App. loc cit. 570, 571, 174 S. W. 140, loc. cit. 141, and authorities cited."

In Dairymen's Co-op. Sales Asso. vs. Public Service Commission, 98 A. L. R. 218, the court held that such an association was not a common carrier but a private carrier. (See also Public Utilities Commission vs. Haines, 171 N. E. 255.)

Therefore, we must conclude this Association is not a common carrier, nor is it a public carrier when operated for its members only under a special contract but more in the nature of a private carrier. (Hissem vs. Guran, 112 Ohio State 59, 146 N. E. 808.) Neither do we think that such an Association is a motor carrier.

In Board of Railroad Commissioners et al vs. Gamble-Robinson Company et al., 111 Pac. (2) 306, l. c. 310-311, we find the court lays down a very clear definition of motor carrier which does not include one carrying one's own goods which transportation is incidental to their business and we think such definition clearly takes this Association out of such classification as a motor carrier. In so holding the court said:

> "It is well settled that a person who transports merely himself or his own property is not a carrier, and that by defining a carrier as one operating motor vehicles for the trans-

portation of 'persons and/or property' the legislature must have meant 'other persons and/or the property of others.' A person may be compensated directly or indirectly for transporting his own property, as the defendants have been in this instance. He may also be compensated directly or indirectly for transporting his own person, as is the doctor or the carpenter, plumber or tinsmith who conveys himself by motor vehicle to perform work at the premises of others. Their charges must necessarily defray their transportation expense, directly or indirectly. In such case they might strictly be claimed to be motor carriers within the terms of the Act because they are operating motor vehicles for the transportation of their own persons; but no one would seriously make such contention, because it would not be reasonable. Certainly no one would criticize reading the word 'other' into the definition in that connection, for no other meaning could have been intended unless everyone who conveys himself to work by a motor vehicle is within the definition and must obtain a certificate of public convenience and necessity from the Board of Railroad Commissioners. But it is no less inevitable that the same concept be read into the other half of the expression 'persons and/or property.' Certainly the doctor, carpenter, plumber or tinsmith, who could not logically be considered a carrier for transporting his own person, would not be brought within the definition because he carried his own instruments, tools and equipment; nor can the farmer who carries his own produce to market, or the wholesaler, jobber or retail grocer, who delivers his own merchandise in the regular conduct of his business. It would do violence to reason to construe a definition of motor carrier so as to include one's own person or property.

"A leading decision so holding is Holmes v. Railroad Commission, 197 Cal. 627, 242 P. 486, 490, in which the court said: 'One who transports merely his own freight over the highway is not a carrier, private or otherwise. He may be a farmer or a manufacturer or a merchant or what not, but the business in which he is engaged is not the business of trans-

portation. He is not a carrier unless he engages in the business of transportation of the persons or property of other for compensation. One who transports merely his own goods, is of necessity engaged in some business other than transportation, and the transportation of such goods is no more than an incident to such business. So, also, one, who transports the goods of another as a servant or agent of such other, is not engaged in the business of transportation, but in so doing is engaged in the business of his master or principal, whatever that business may be. But one, who engages as an independent calling in the transportation of goods for another or for others under contract and for compensation, is engaged in the business of transportation and is a carrier.'

"Other cases to the same general effect are People v. Montgomery, supra; Murphy v. Standard Oil Co., 49 S. D. 197, 207 N. S. 92; City of Sioux Falls v. Collins, 43 S. D. 311, 178 N. W. 950, and Roundtree v. State Corporation Commission, 40 N. M. 152, 56 P. 2d 1121; and while it may be said that the statutes of those states are not identical with ours, this court more than merely suggested a like construction of our own statute in Christie Co. v. Hatch, 95 Mont. 601, 28 P.2d 470, 472, when it said: 'Defendants and interveners are not motor carriers engaged in the business for hire, within the meaning of chapter 184.'"

Nor are we convinced that this Association is a "contract hauler" under the foregoing statutory definition. If our assumption is correct that the Association is transporting only products of its members and no one else and that it is operating within the provisions of its charter and by-laws, it falls more in the classification of a private carrier or as an individual transporting his own goods and not in the business of transporting for hire which indicates goods belonging to others.

As held in Davis v. People ex rel Public Utilities Commission 247 P. 801, l. c. 802, in determining whether a business is a common carrier, or we add, contract hauler or motor carrier, the important thing to determine is just what is the nature of said business and what is permitted under its charter and by-laws. There-

fore, unless there is something else to show that this plan was a mere scheme, device, or subterfuge to avoid the duties and responsibilities of a common and public carrier, or contract hauler as defined in the statutes, such action on the part of said Association does not come under the regulation of the Public Service Commission.

If, however, the facts are that this is an action against the driver and owner of said motor vehicle and the Association is in fact paying the owner and driver of his own motor vehicle to haul said furniture for a member of said Association and the driver and owner holds himself out to the general public for transportation of persons and property for hire he is evading the Public Service Act and would be a common carrier and subject to the Public Service Commission regulations.

Respectfully submitted

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APPROVED:

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