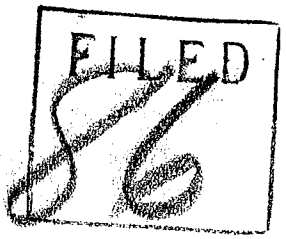
PRIVATE CARRIERS: PUBLIC SERVICE COMMISSION PERMITS: A manufacturing company that transports its own products in furtherance of its business is a private carrier.



December 29, 1955

Honorable Lyndon Sturgis
Prosecuting Attorney
Greene County
Springfield, Missouri

Attention of Robert R. Northcutt
Assistant Prosecuting Attorney

Dear Sir:

You state in your request for an opinion from this office as follows:

> "The problem is this. A Missouri cheese manufacturing company manufactures cheese of different varieties upon order for Wilson & Company. This cheese is labeled and packaged in Wilson & Company containers. The cheese is ordinarily ordered from the Wilson & Company office in Chicago to be delivered to a store or warehouse outside of the State of Missouri. The cheese plant manufactures upon order and loads the cheese, which is marked Wilson & Company, into their own trucks for out of state delivery. The bills of lading which go along with the truck are all marked Wilson & Company, Inc., consignor, and the recipient, of course, consignee. The same day that the cheese manufacturing company ships this cheese from its plant, Wilson & Company in Chicago is billed for the cheese. The claim of the cheese manufacturing company is that this cheese remains their property until delivered to the consignee and, therefore, they claim that they do not need

> any Public Service Commission authority for their trucks. It is our contention, of which we are not sure, that even though they manufacture this cheese and even though they deliver it in their own trucks, that according to the above set out facts, they should be required to have Public Service Commission authority. This is the question we wish answered."

From the facts thus submitted it is clear that the manufacturing company does not"hold itself out to the general public to engage in transportation * * * for hire or compensation * * *." Therefore, the answer hinges upon a determination of whether or not by such an arrangement as you mention, the manufacturing company should be classified as a contract or a private carrier. Of course, if it is a private carrier, it is according to Section 390.031, V.A.M.S., exempt from regulation.

Section 390.020, paragraph 5, V.A.M.S., defines a common carrier as:

> "The term 'common carrier', unless modified by words including common carriage by other facilities, means any person which holds itself out to the general public to engage in the transportation by motor vehicle of passengers or property for hire or compensation upon the public highways."

Section 390.020, paragraph 6, defines a contract carrier as:

> "The term 'contract carrier' means any person which, under individual contracts or agreements, engaged in the transportation (other than transportation referred to in subsection 5 of this section) by motor vehicle of passengers or property for hire or compensation upon the public highways."

Section 390.020, paragraph 7, defines a private carrier as:

> "The term 'private carrier' means any person engaged in the transportation by motor vehicle upon public highways of persons or property, or both, but not as a common carrier by motor vehicle or a contract carrier by motor vehicle; and includes any person who transports property by motor vehicle where such transportation is incidental to or in furtherance of any commercial enterprise of such person, other than transportation."

Some pertinent questions that immediately arise are: Do the facts as stated show that individual contracts or agreements are made for the transportation of the cheese "for hire or compensation"; Does this make any difference; Does the title to the cheese pass to Wilson & Company when it is packaged and loaded in Springfield; Does it matter who owns the property when it is transported; Is the transportation of the cheese in this situation "incidental to or in furtherance of" the commercial enterprise of manufacturing it as contemplated in paragraph 7 of Section 390.020, V.A.M.S.

A further question arises, though we think of less importance here: Does said paragraph 7 of Section 390.020 contemplate the transportation only of one's own property incident to or in furtherance of its enterprise? The Missouri courts have not determined these questions. The Missouri statutes are similar in many respects to the federal statutes concerning motor carriers.

49 U.S.C.A., 303(14), contains the same definition for a common carrier by motor vehicle as does the Missouri statute.

49 U.S.C.A., 303 (15), defines a contract carrier by motor vehicle as follows:

> "The term 'contract carrier by motor vehicle' means any person which, under individual contracts or agreements, engages in the transportation (other than transportation referred to in paragraph (14) of this section and the

> exception therein) by motor vehicle of passengers or property in interstate or foreign commerce for compensation."

49 U.S.C.A., 303(17), defines a private carrier by motor vehicles as follows:

> "The term 'private carrier of property by motor vehicle' means any person not included in the terms 'common carrier by motor vehicle' or 'contract carrier by motor vehicle,' who or which transports in interstate or foreign commerce by motor vehicle property of which such person is the owner, lessee, or bailee, when such transportation is for the purpose of sale, lease, rent, or bailment, or in furtherance of any commercial enterprise."

Your stated facts do not show whether or not there is any compensation for the transportation of the cheese from Springfield to the destination. Nevertheless, such will be presumed herein.

If title passes as soon as the cheese is labeled and loaded, then there is compensation for transporting Wilson's property; if the title does not pass until delivery to the consignee, then there is compensation to the manufacturing company for transporting its own property. However, in the latter case, the transportation would likely be "incidental to" or "in furtherance of" its commercial enterprise. It is pointed out that ownership alone is not the sole determining factor in your problem. If the transportation of the cheese was the main business here, as seems required by paragraph 6 of Section 390.020, ownership of the cheese transported would not take the manufacturing company out from under the permit requirements. One can be, under certain circumstances, a contract carrier even though hauling his own goods, but in that case the transportation of it would have to be the main enterprise.

In the case of A. W. Stickle Co. v. Interstate Commerce Commission, 128 Fed. (2d) 155, the Stickle Company bought lumber at mills, and delivered it itself to its purchasers. The sales

price exceeded the purchase price by approximately the same amount that contract or common carriers would charge for the same services. The court said, l. c. 160:

> "Ownership of the commodity transported is not the sole test. The primary test in sections 203(a) (14) and 203(a) (15) is transportation for compensation."
>
> (Note: the 203(a) referred to herein in the Interstate Commerce Act is Section 303 in the U.S.C.A.)

The court further said that under the facts in that case "The transportation is not merely incidental to the business of selling lumber. It is a major enterprise in and of itself."

If one owns the property and there is no charge for transporting it, he is clearly a private carrier.

In the case of Interstate Commerce Commission v. Tank Car Oil Corporation, 151 Fed. (2d) 834, the company owned the oil, sold it at destinations at competitive community prices. It hauled the oil in its own trucks, retained title until delivery. The court said, l.c. 836:

> "Under the facts the defendant comes clearly within the statutory definition of a private carrier of property by motor vehicle. The defendant: (a) was the owner of the property transported; (b) was transporting it for sale; and (c) was transporting it in furtherance of its commercial enterprise as a dealer at wholesale and retail in the products which it transported. * * *"

Your stated facts do not bring your case clearly within the holding of either of these two cases. The manufacture of not the transportation of the cheese, remains the major enterprise and compensation for transporting it is presumed.

The federal cases have further held that compensation alone is not the primary test. The test appears to be: is the main agreement one to engage in transportation for compensation.

In the case of Brooks Transp. Co. et al. v. United States et al., 93 Fed. Supp. 517, the court said, l. c. 524:

> "The history of the Act, we think, completely demolishes the validity of plaintiff's compensation criterion and supports the Commission's criterion of Primary business purposes."

The court had further stated in this case, l.c. 522:

> "The Commission, in deciding that Lenoir and Schenley were private carriers, as opposed to contract carriers or common carriers, applied what is known as the primary business test. In other words, if it is established that the primary business of a concern is the manufacture or sale of goods which the owner transports in furtherance of that business and the transportation is merely incidental thereto, the carriage of such goods from the factory or other place of business to the customer is private carriage even though a charge for transportation is included in the selling price or is added thereto as a separate item. The Commission has so held consistently in its interpretation of the statutory provisions regulating the various categories of motor carriers. See Congoleum-Nairn, Inc., Common Carrier Application, 2 M.C.C. 237; D.L. Wartena, Inc., Common Carrier Application, 4 M.C.C. 619; Swanson, Contract Carrier Application, 12 M.C.C. 516; Murphy Common Carrier Application, 21 M.C.C. 54; Dull Contract Carrier Application, 32 M.C.C. 158; Woitishek Common Carrier Application, 42 M.C.C. 193."

In this case both the Lenoir Chair Company and the Schenley Company made transportation charges for their products to various destinations comparable to those of common, rail or motor carriers and showed the figure separately on their invoices.

Under the federal statute it is clear that one can transport his own property for sale, lease, rent or bailment or in furtherance of any commercial enterprise, if such transportation does not become the major enterprise or activity in itself.

Under the state statute it is not clear whether or not one may transport property belonging to another and still be classified as a private carrier, even if the transportation is in furtherance of one's commercial enterprise or incidental to it. It is our understanding, however, that the Public Service Commission has interpreted our statute, 390.020, paragraph 7, as applicable only to the transportation of one's own property.

Naturally, the Commission's conclusions of law do not have the same claim to finality as do their findings of fact; nevertheless the courts, through the years, both state and federal, have given great weight to the interpretation of an act by an agency enjoined with the responsibility of administering it.

From your statement "The cheese is ordinarily ordered from the Wilson & Company office in Chicago to be delivered to a store or warehouse outside of the State of Missouri," one may safely conclude that the contract is not complete between the Springfield company and Wilson's until delivery is made, and that the parties intended that title would not pass until then. The time for the passing of title depends upon the intent of the parties. See Keen v. Rush, 19 S. W. (2d) 25 and Calcara v. United States, 53 Fed. 767.

It is admitted that the fact that the Springfield company prepares bills of lading with Wilson's as consignor, instead of trip tickets or some other type of document, is inconsistent with the company's claim of ownership. However, this could well be explained as a matter of convenience to the Springfield company. The packaging of the cheese in Wilson's containers, or containers with Wilson's labels, whether in compliance with an agreement or performed as a service, is, we think, not a controlling factor in the question of ownership.

Honorable Lyndon Sturgis

You state that the manufacturing company bills Wilson & Company on the same day that the cheese is shipped, but its claim of ownership, and transportation of the cheese in its own trucks, the practice of various factories and commercial concerns that do the same thing, all combine to lead us to the conviction that the manufacturing company would run the risk of loss or damage in transit, and all combine to lead us to the conviction that the cheese remains the property of the manufacturing company until delivered at its destination, and lead us to believe that the parties so intend, notwithstanding the few minor factors that you cite that indicate the contrary.

CONCLUSION

We therefore conclude that under your statement of the facts in the present case, the cheese manufacturing company is primarily engaged in the manufacture and the sale of cheese which it transports incidental to and in furtherance of that business, and that the transportation of such goods is private carriage, even though a charge for transportation might be included in the selling price or even might be added thereto as a separate item, and that the cheese manufacturing company should properly be classified as a private carrier and thus, under the provisions of Section 390.031, V.A.M.S., exempt from the regulations of motor carriers and contract haulers.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Russell S. Noblet.

Very truly yours

John M. Dalton
Attorney General

RSN:lc