

CORPORATIONS: Minnesota corporation has no officer, agent
FOREIGN: or employee in Missouri soliciting business.
WHEN DOING BUSINESS It solicits business by advertising matter in
IN MISSOURI: magazines, newspapers, over radio and tele-
vision, and by U.S. mail sent from its
Minnesota plant. Orders for goods are accepted
at plant but filled and shipments to customers
are from stock kept in warehouse in Missouri, by Missouri warehouse cor-
poration. Latter corporation has no relationship with former except by
contract. Former furnishes directions to latter for filling orders and
shipping goods to customers, and shipments are not in interstate com-
merce, but are intrastate, and Minnesota corporation is doing business
in Missouri within the meaning of Chapter 351, RSMo 1949, and must
procure certificate from secretary of state authorizing it to do busi-
ness in Missouri as required by Sec. 351.570, RSMo 1949.

February 15, 1957

Honorable Walter H. Toberman
Secretary of State
State Capitol Building
Jefferson City, Missouri



Dear Mr. Toberman:

This department is in receipt of your request for our
official opinion, which reads as follows:

"Your official opinion is respectfully
requested upon facts hereinafter set
forth:

A foreign corporation, organized
and existing in the State of Minnesota,
who manufactures, distributes and sells
its product to wholesalers in every
state in the United States, proposes to
transport its product by carriers for
hire to a Missouri terminal and ware-
house corporation to be held by that
terminal and warehouse, in transit, for
an undetermined time, there to be mingled
with other shipments from Minnesota;
neither the foreign corporation nor the
domestic Missouri terminal warehouse
corporation or the stockholders, officers
or directors of either have any control
over the other save under the arrangement
hereafter mentioned, under the following
facts:

The foreign corporation receives
orders at its plant in Minnesota from
customers located in Missouri and other
states, requesting a shipment of the manu-
facturing corporation's product. On the

Honorable Walter H. Toberman

receipt of such orders, the manufacturing corporation will contact the carriers for hire to pick up a quantity of the corporation's product in Minnesota and move that product to the location of the terminal and warehouse corporation in Missouri. Then and thereafter the manufacturing corporation will issue shipping instructions from Minnesota by mail, to the terminal and warehouse corporation to move out of the terminal and warehouse various sized units of the product to customers of the manufacturing corporation by common carrier and other transportation services not belonging to the foreign corporation to ultimate destinations, both within and without the State of Missouri.

The corporation's product is classed as drugs in glass and comes packed in standard case units direct from the plant in Minnesota and is shipped by the terminal and warehouse corporation in the same original packaged case units which are not opened until reaching the customer.

The manufacturing corporation does not have and will not have an officer, salesman or employee whatsoever in Missouri. It will have no supervision, direction, or control over the terminal and warehouse corporation other than the warehouse arrangements previously described herein. All business is solicited by means of national and local advertising in magazines, U. S. mail, newspapers, radio, television and other like advertising media. The whole intent and purpose of the warehouse arrangement was and is to provide a directive in transit shipping method through which customers and users of the manufacturing corporations product may receive the benefits of more rapid and flexible delivery of the product as the orders are placed, as all orders to the manufacturer must be placed, at the plant of the corporation in Minnesota.

"QUESTION: Is the foreign corporation under the above facts doing business in the State of Missouri within the meaning of the General Corporation Act?"

Honorable Walter H. Toberman

Chapter 351, RSMo 1949, is in regard to general and business corporations and is ordinarily referred to as the general corporation act. Subsection 2, Section 315.015, provides that the terms "foreign corporation," as used in the chapter, unless the context otherwise requires it, mean a corporation for profit, organized under laws other than the laws of this state. Section 351.570, RSMo 1949, requires a foreign corporation, organized for profit, before transacting business in the State of Missouri, to procure a certificate authorizing it to do so, and reads as follows:

"A foreign corporation organized for profit before it transacts business in this state, shall procure a certificate of authority so to do from the secretary of state. Any foreign corporation organized for profit, other than a foreign corporation seeking authority to engage in the banking business in this state or a foreign corporation seeking authority to engage in a business in this state, the grant or refusal of which is at the time vested exclusively in some other board, bureau or administrative agency of this state, upon complying with the provisions of this chapter, may secure from the secretary of state a certificate of authority to transact business in this state, but a foreign corporation shall not be denied a certificate of authority by reason of the fact that the laws of the state under which such corporation is organized governing its organization and internal affairs differ from the laws of this state, and nothing in this chapter contained shall be construed to authorize this state to regulate the organization or the internal affairs of such corporation."

Section 351.575, RSMo 1949, gives the powers and duties of a foreign corporation desiring to do business in Missouri, and reads as follows:

"No foreign corporation shall transact in this state any business which a corporation organized under the laws of this state is not permitted to transact. A foreign corporation which shall have received a certificate of authority under this chapter

Honorable Walter H. Toberman

shall, until a certificate of revocation or of withdrawal shall have been issued as provided in this chapter, enjoy the same, but no greater, rights and privileges as a domestic corporation organized for the purposes set forth in the application pursuant to which such certificate of authority is issued; nor shall it hold any real estate for any period longer than six years, except such as may be necessary and proper for carrying on its legitimate business; and, except as in this chapter otherwise provided, shall be subject to the same duties, restrictions, penalties, and liabilities now or hereafter imposed upon a corporation of like character organized under or subject to this chapter. Such foreign corporation so qualifying shall not, however, have the power to exercise in the state of Missouri any rights or powers which by any statute of the state of Missouri now in force are restricted specifically to domestic corporations or are specifically denied to foreign corporations."

The power to regulate commerce with foreign nations and among the several states has been granted to the Congress of the United States by Section 8, Article I of the Federal Constitution. Therefore, Missouri, nor any other state, cannot enact laws regulating business transactions between litigants of different states and which are in interstate commerce. If the activities of a foreign corporation, alleged to be doing business in Missouri, are actually transactions between citizens of Missouri and a foreign corporation, when such transaction takes place outside of Missouri, although finally completed in Missouri, they would be in interstate commerce and the above-quoted statutes pertaining to registration of foreign corporations would be inapplicable.

Doing business within a state by foreign corporations is more a question of fact than of law. The general rule and some illustrations as to when the foreign corporation is doing business within a state have been given in 20 C.J.S., page 46, and read as follows:

"The general rule is that, when a foreign corporation transacts some substantial part of its ordinary business in a state, continuous in character, it is doing, transacting, carrying on, or engaging in business therein, within the meaning of the statutes under consideration.

"Illustrations. In accord with this principle the following transactions have been held to constitute doing, transacting, carrying on, or engaging in business in a state: The making within the state of sales or of contracts for the sale of goods; the making of loans; the making of contracts of insurance; the execution of surety bonds; the acquisition and holding of real estate situated within a state; the management or development of such real property; the making of sales or contracts for the sale of such property, or of property situated elsewhere; the carrying on of a real estate brokerage business; the leasing of a machine for use in the state; the construction of railroads; the assembling, erection, or installation of machinery, and of office fixtures, screens, doors, and windows; the purchase of goods for resale; the management and operation of a manufacturing plant; the maintenance and display of printed advertisements; the carrying on of a 'trade campaign;' the making of contracts to furnish theatrical entertainments; and the contracting for and construction of a highway within the state. * * *"

From the facts related in the opinion request, a manufacturing corporation organized under the laws of the State of Minnesota does not have any agents, salesmen or officers, or any place of business in Missouri, and business is solicited in Missouri by magazine and newspaper advertisements and radio, television, and ads sent through the United States mail. Orders from customers in Missouri and other states for goods are received at the corporation's plant in Minnesota, where they are accepted or rejected.

Shipments of goods are sent to a warehouse in Missouri by common carrier, where the goods are stored. The corporation owning the Missouri warehouse is said not to have any connection with the Minnesota corporation except by contract, and for which it performs certain services for a consideration. It appears that the goods sent to the Missouri warehouse are packed at the factory, and upon their receipt at the warehouse they are not unpacked but are stored with other goods thus received. When the manufacturer accepts an order from a customer in Missouri or a neighboring state, it transmits a request to the warehouse corporation for a certain quantity of goods with which to fill the order from the stock stored in the warehouse, together with shipping instructions for sending the goods to the buyer.

Honorable Walter H. Toberman

It is claimed that the whole intent and purpose of the warehouse arrangement is to provide a directive in transit shipping method through which customers and users of the manufacturer's product may receive the benefits of more rapid and flexible delivery of the product as orders are placed.

It is undisputed that the warehouse corporation in Missouri is the paid agent or employee of the foreign corporation. Actually, the warehouse corporation fills the orders and ships same to customers and acts only under instructions of the foreign corporation. It appears that such corporation is doing something more than having its goods stored in Missouri. The warehouse corporation is as much an employee of the foreign corporation as it would be if it were a part of the corporation's sales, production, or some other department or division of its organization in the State of Minnesota, and it further appears that the activities of the corporation are those for which it was organized, and it is believed that such practice is sufficient to take the entire transaction out of the exemption provided for interstate commerce under provisions of the Federal Constitution.

In this connection, we call attention to the case of *Western Outdoor Advertising Co. v. Berbiglia, Inc.*, 263 SW2d 205. A foreign corporation engaged in the erection and maintenance of outdoor signs in Missouri was held to be doing business within the meaning of the statutes requiring foreign corporations doing business in Missouri to register and otherwise comply with said statutes.

The corporation continued to deal with the signs after interstate commerce ceased and derived its sole benefits from such dealings, title remaining in the corporation, and the corporation was to maintain the signs. It was also held that such corporation could not maintain an action for rental due on signs from a Missouri customer since it had not received a certificate authorizing it to transact business in the state. At l.c. 209 the Kansas City Court of Appeals said:

"In support of its contention that it was not doing business in this state contrary to the statutes plaintiff cites *Republic Steel Corp. v. Atlas Housewrecking & Lumber Corp.*, 232 Mo. App. 791, 113 S.W. 2d 155; *International Text-Book Co. v. Gillespie*, 229 Mo. 397, 129 S.W. 922; *York Mfg. Co. v. Colley*, 247 U.S. 21, 38 S. Ct. 430, 62 L. Ed. 963; *Hess Warming & Ventilating Co. v.*

Honorable Walter H. Toberman

Burlington Grain & Elevator Co., 280 Mo. 163, 217 S.W. 493; Irvine Co. v. McColgan, 26 Cal. 2d 160, 157 P. 2d 847, 167 A.L.R. 934, and State ex rel. Hays v. Robertson, supra. We have read these cases and do not consider them controlling because of the different factual situations. In the Republic Steel Corp. case, we held that sales on consignment by a foreign corporation to a local factor was interstate commerce, and the presence of a sales office in the state did not convert the transaction to intrastate business. However, we recognized the rule that a determinative factor of whether the business was intrastate in nature was the question of continued dealing by the foreign corporation with the property after interstate commerce had wholly ceased, and whether that continued dealing was an isolated transaction or a continuing form of the business of the foreign corporation. That is the rule which is applicable in the instant case. * * *

In the present instance, if it were to be conceded that the shipments by the Minnesota corporation of goods to its Missouri warehouse was in interstate commerce, and that the shipper was not doing business in Missouri, the interstate nature of the transaction would end whenever the shipments had been received at the Missouri warehouse, and any further dealings, such as filling customers' orders from such shipments, would constitute intrastate and not interstate commerce transactions.

In pointing out our thought on this matter, we cite the case of Seneca Textile Corporation v. Missouri Flower & Feather Co., 119 SW2d 991. Plaintiff, a New York corporation, not qualified to do business in Missouri, brought suit in a justice of the peace court of St. Louis, Missouri, to recover the price of goods sold to a Missouri corporation. The defendant filed a general denial and further alleged that the plaintiff had failed to comply with the Missouri corporation statutes and was doing business within the state without first having procured a license authorizing it to do so. Upon appeal, the circuit court decided in favor of the defendant, and the case was thereafter appealed to the St. Louis Court of Appeals. In discussing the question

Honorable Walter H. Toberman

as to whether or not plaintiff was doing business in Missouri within the meaning of the applicable Missouri statutes, the court said at l.c. 994:

"We have reached the conclusion that there is ample evidence in the record to support the finding and judgment of the learned trial judge. The lack of qualification of plaintiff to do business in Missouri at the time of the transaction is not in dispute. In fact, it is conceded. A corporation can only act and do business by agents. Morris Friedman was its St. Louis agent. The business in St. Louis was conducted by him as plaintiff's alter ego and with the apparent intent to make it appear that the plaintiff was merely engaged in interstate commerce with which, under the authorities, there could be no interference. However, plaintiff maintained an office in St. Louis as well as a home office in New York. When it made a shipment of goods from New York and it was placed in the warehouse operated by the Holstein Express Company in St. Louis its interstate journey was ended. Then, when its agent, Morris Friedman caused these goods to be shipped out of the warehouse, to fill orders he had procured from St. Louis customers, that became an intrastate shipment and constituted 'doing business' by the plaintiff in the State of Missouri. This method of doing business made no interference with interstate commerce."

In view of the foregoing, it is our thought that the Minnesota corporation referred to in the opinion request is doing business within the State of Missouri, within the meaning of those terms as used in Chapter 351, RSMo 1949, the general corporation act, and must comply with Section 351.570 thereof, requiring a foreign corporation for profit, before transacting business within the state, to procure a certificate of authority to do so from the Secretary of State.

CONCLUSION

It is, therefore, the opinion of this department that a manufacturing corporation organized under the laws of Minnesota

Honorable Walter H. Toberman

having no officer, agent or employee in Missouri to solicit business and such business is solicited by advertising in magazines, newspapers and advertising matter sent through the mail and over radio and television to prospective customers from its plant in Minnesota where all orders for goods are accepted, and such orders are filled and shipments to customers made from the corporation's stock of goods kept in a warehouse located in Missouri and owned by a Missouri warehouse corporation which has no relation to the former except by contract, and the Minnesota corporation furnishes directions for filling orders and making shipments to customers to said warehouse corporation, that such shipments to customers are not in interstate commerce but are intrastate shipments and the Minnesota corporation is doing business in Missouri within the meaning of such terms as used in Chapter 351, RSMo 1949, the general corporation act, and must procure a certificate from the Secretary of State authorizing it to do so under provisions of Section 351.570, RSMo 1949.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Paul N. Chitwood.

Yours very truly,

JOHN M. DALTON
Attorney General

PNC:sm;ml