

**IN THE  
SUPREME COURT OF MISSOURI**

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**SC87142**

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**COOK TRACTOR CO., INC.,**

**Appellant,**

**v.**

**DIRECTOR OF REVENUE,**

**Respondent.**

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**RESPONDENT'S BRIEF**

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**ATTORNEYS FOR RESPONDENT  
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## **RESPONSE TO APPELLANT’S JURISDICTIONAL STATEMENT**

The Court has jurisdiction over cases involving “the construction of the revenue laws of this state.” Mo. Const. Art. V § 3. Here, the Court’s jurisdiction is somewhat problematic because of Cook Tractor’s reliance on something other than a revenue law.

Cook Tractor says that the “principal question presented is whether Cook Tractor is a common carrier and more specifically, the meaning and effect of the language, ‘holds itself out to the general public[,]’ contained in the statutory definition of common carrier in Section 390.020(6), RSMo.” Appellant’s Brief (“App. Br.”) at 5. Section 390.020(6) is not, of course, a “revenue law[] of this state.” The only “revenue law” at issue here is § 144.030.2(3), which exempts from sales and use tax the purchase of “[m]aterials, replacement parts and equipment purchased for use directly upon, and for the repair and maintenance or manufacture of, motor vehicles, watercraft, railroad rolling stock or aircraft engaged as common carriers of persons or property.” If, therefore, the meaning of § 390.020(6) is the only issue of construction here, then the case falls outside this Court’s jurisdiction.

But the issue is whether Cook Tractor operates as a “common carrier” as that term is used in Chapter 144. The definition in § 390.020(6) applies, by its express terms, only to Chapter 390; the Court does not need to construe it.

Nor does the Court have to construe “common carrier” as that term is used in § 144.030.2(3). As discussed in part B of the Argument below, the Court has previously addressed what constitutes a “common carrier,” albeit well outside the tax context. More

important, as discussed in part C of the Argument, Cook Tractor is not operating as a “common carrier” regardless of how the term is construed. But the jurisdictional issue is not whether the case “requires” construction of a revenue law, but merely whether it “involves” such construction. Despite Cook Tractor’s focus on § 390.020(6), its argument does “involve” construction of the term “common carrier” in a revenue law, hence the Director does not contest that this Court has jurisdiction.

## STATEMENT OF FACTS

### Cook Tractor's Business.

Cook Tractor Co., Inc., “buys, sells, and transports large farm equipment and construction equipment.” A3<sup>1</sup>. In addition to selling equipment that it purchases, Cook sells equipment on consignment. A3. Cook holds monthly auctions of farm and construction equipment. *Id.* Cook sells approximately 800 pieces of equipment each month. A4; Tr. at 50, 59.

At the auctions, Cook publicly announces that it can haul the equipment for purchasers. A3. Cook hauls equipment using its own fleet of trucks, A3, which can accommodate 400 or more pieces of purchased equipment each month. A4. Hauling the equipment purchased at each auction, as customers request, takes Cook about two weeks. A4. Cook normally charges per loaded mile. A4.

In addition to hauling equipment purchased from Cook or at Cook auctions, Cook will sometimes “grant its customer’s request that it haul equipment from other locations.” A3. It restricts its hauling to certain types of items, because its trailers are “designed for hauling farm or construction equipment.” A4.

“Cook does not advertise itself as a hauler of goods in the newspaper or telephone book.” A4. Though Cook advertises its auctions, those advertisements do not refer to transportation for hire. A4.

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<sup>1</sup>We cite to the Appellant’s Appendix, e.g., here to p. “A3”, for the decisions below.

Most of the freight income earned by Cook during 2002 – approximately 70% – “resulted from Cook picking up consigned goods and deducting the hauling charge from the consignee's settlement.” A6. And most of the rest came from “delivering goods to customers who either attended the monthly auction or bought equipment from Cook outside of the auction.” A6. Consistent with that result, Cook had no freight income during July – the month in which it did not hold an auction. A6. Cook and the Directors’ auditors could not trace 25 of Cook’s 134 freight tickets for 2002 back to particular sales. A6. But most of those hauls were for regular Cook customers. A6.

### **Cook Tractor’s Registrations.**

In order to engage in intra- and interstate hauling for hire, Cook has registered as a motor carrier with both state and federal regulators.

Cook registered as a “motor carrier” with the Division of Motor Carrier and Railroad Safety, then part of the Missouri Department of Economic Development (now part of the Department of Transportation), for 2000, 2001, and 2002. A4. Each time Cook sought to renew its registration, it described itself as a “private carrier.” A4.

Cook also registered with the Missouri Highway Reciprocity Commission. A4. There, too, Cook indicated that it was a private carrier. A4.

Cook also obtained a certificate of authority from the Federal Highway Administration. A4. Cook originally obtained that certificate in 1997. A4. The certificate permits Cook to engage in transportation as a common carrier. A4.

But in 2003, Cook registered with the U.S. Department of Transportation, Federal

Motor Carrier Safety Administration, as a private carrier. A5.

**The Director's Audits and Assessments, and Cook's Protest.**

The Director audited Cook Tractor for 2000-2002. A5. Cook agreed to some of the audit findings, and paid some additional sales and use taxes. A5. But Cook, claiming that it was a common carrier, refused to pay taxes on its purchase of materials and parts for its trucks and trailers. A5. The Director disagreed, and assessed \$2,742.27 in sales and use taxes, plus interest, on Cook's purchases of vehicle parts and materials.

Cook filed a complaint with the Administrative Hearing Commission (AHC), again claiming that it was operating as a common carrier and using its trucks and trailers in common carriage, and thus that it was entitled to the sales and use tax exemption found in § 144.030.2(3)<sup>2</sup>. The AHC heard testimony and, in some instances over the Director's objections, received exhibits. A1-A2.

On September 2, 2005, the Administrative Hearing Commission issued its final Decision, A1-A19, holding that "Cook is subject to sales/use tax as the Director assessed, plus interest." Cook filed a timely petition for review in this Court.

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<sup>2</sup>All statutory references are to RSMo 2000.

## ARGUMENT

**I. Cook Tractor is not entitled to the common carrier exemption because it is not using its trucks as a common carrier.**

**A. To obtain the benefit of the common carrier exemption, Cook Tractor must use its trucks and trailers in the common carriage of persons or goods.**

Cook Tractor seeks to use the tax exemption granted to equipment used in the common carriage of goods. That exemption applies only to:

(3) Materials, replacement parts and equipment purchased for use directly upon, and for the repair and maintenance or manufacture of, motor vehicles, watercraft, railroad rolling stock or aircraft engaged as common carriers of persons or property;

§ 144.030.2, RSMo 2000. The requirements are simple and unambiguous. The language pertinent here requires that the goods purchased be materials, replacement parts, or equipment. Those goods must be purchased for use upon or for repair or maintenance of a motor vehicle. And that motor vehicle must be engaged as a common carrier of property.

This statute thus contrasts with the exemption at issue *Emerson Electric Co. v. Director of Revenue*, 133 S.W.3d 31 (Mo. banc 2004). Emerson Electric invoked § 144.030.2(2), which exempts from the sales and use tax “(20) All sales of aircraft to common carriers for storage or for use in interstate commerce.” The Court held that the

facts that Emerson's common carrier business was a tiny portion of the company and that the aircraft was not to be used in that portion of the business were insufficient to deprive Emerson of the exemption. Keys to the decision were the Director's concessions that Emerson Electric held the certificates required to operate as a common carrier, and that its small (relative to the company as a whole) transportation division did, in fact, operate as a common carrier.

Here, by contrast, the statute requires actual use of the vehicle in common carriage, and the Director directly challenged Cook Tractor's claim that it used its trucks in that fashion. The AHC found as a matter of fact that Cook Tractor's trucks were not "engaged as common carriers of persons or property."

**B. To claim the exemption for use of equipment as a common carrier, a carrier must not just haul goods, but communicate to the public its willingness to carry goods for any willing purchaser of such services.**

The tax statute does not, of course, explain what it means to "engage as [a] common carrier[]." There are three logical places to look for assistance in defining "common carrier": dictionary definitions, other statutes, and precedent. Combined, those three routes lead to a series of questions to be used in determining whether a particular business is operating as a common carrier.

Black's defines a "common carrier" as "[a] carrier that is required by law to transport passengers or freight, without refusal, if the approved fare or charge is paid."

BLACK'S LAW DICTIONARY (7<sup>th</sup> ed. 1999) at 205. That definition has three elements: (1) that the carrier is required by law (2) to carry freight without refusal (3) for an approved fare or charge. Perhaps it is possible, after the days of deregulation, that the "fare or charge" not be "approved" in advance. But the definition contemplates that there is a published or posted fare or charge that is paid by anyone who uses the carrier's services.

Webster's gives a somewhat different definition:

one that undertakes for hire the carrying of goods, persons, or messages treating its whole clientele without individual preference or discrimination and being responsible for all losses and injuries except those in consequence of an act of God, or of the enemies of the country, or of the owner of the property himself; 2: a public utility or public service company; 3 ... : a carrier offering its services to all comers for interstate transportation by ... motor vehicle .... Compare contract carrier.

WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (1993) at 456. Webster's defines the complementary term, "contract carrier," as "[a] transport line that carries persons or property under contract to one or a limited number of shippers." *Id.* at 494. Webster's would require, then, that to qualify as a "common carrier" a company not just offer transportation to all comers, but that it assume the risk of damages and injury.

In Chapter 390, RSMo, which addresses motor carriers, Missouri provides somewhat different insights into the term, though ones that are fundamentally consistent

with dictionary definitions. Chapter 390 opens with definitions, binding only within that chapter. Among them are three for different types of “carriers.”

(6) “Common carrier”, 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 and airlines engaged in intrastate commerce;

(7) “Contract carrier”, any person under individual contracts or agreements which engage in transportation by motor vehicles of passenger or property for hire or compensation upon the public highways;

\* \* \*

(23) “Private carrier”, any person engaged in the transportation of property or passengers by motor vehicle upon public highways, but not as a common or 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 his commercial enterprises[.]

§ 390.020. A “contract carrier” carries property for hire or compensation by individual arrangement. A “private carrier” is one outside the definitions of “common” and “contract,” who nonetheless carries property in furtherance of its business. A “common carrier” must “hold itself out to the general public” to carry “property for hire or compensation.”

Chapter 390 does not define “hold out.” We turn again to the dictionary.

Webster's gives various meanings, but two synonyms seem to best fit the meaning intended by § 390.020: "offer" and "proffer." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY at 1079. Those who hold themselves out to the public would be those who offer or proffer transportation services to the general public.

But the definition section is not the only part of Chapter 390 that provides some light to the question of what Missouri law would consider a "common carrier." Common carriers that operate solely within the State of Missouri are subject to § 390.051, which requires them to obtain a common carrier certificate. To do so, they must submit an application that includes "[t]he complete route or routes over which [they] desire[] to operate," and their "proposed rates, schedule or schedules, or timetable." § 390.051.2(2) & (3). That requirement can be simply applied to the stereotypical "common carriers," *i.e.*, airlines, railroads, courier services, etc. Anyone who wants to use the service can do so, and is entitled to service at uniform rates. But the requirement, by statute, applies to common carriers of all kinds. It would apply to Cook Tractor, were Cook Tractor a common carrier operating only within Missouri.

Cook Tractor, of course, operates between states, and is thus subject not to § 390.051, but to § 390.071. The later section makes no distinction among private, contract, and common carriers. That Cook Tractor files the documents necessary to apportion taxes (*see* ¶ 12, A4; such allocation is the responsibility of the Missouri Highway Reciprocity Commission) among various jurisdictions merely demonstrates that Cook Tractor operates across state lines. And that Cook Tractor obtained a common

carrier certificate from one federal authority (*see* ¶ 13, A4-A5 – though not another, ¶ 14 A5), merely shows that Cook Tractor wanted the legal authority to be a common carrier, not that it generally, nor that any particular truck, actually engaged in the common carriage of property. But that does not mean that the Court should ignore the concepts embodied in Missouri’s regulatory scheme for intrastate carriers.

When that scheme is viewed alongside the inapplicable but somewhat helpful statutory definition in § 390.020 and the dictionary definitions, it seems apparent that to qualify for the “common carrier” exemption, a company must affirmatively offer to all comers services at specified and uniform rates.

Missouri case law is consistent the dictionary and Missouri statutes. There, “[a] common carrier has been defined variously, the definitions not being necessarily inharmonious.” *Walton v. A.B.C. Fireproof Warehouse Co.*, 151 S.W.2d 494, 497 (Mo. App. K.C. 1941). Most of that case law arises in the context of damages – *i.e.*, because of the difference in liability that distinguishes common carriers from others who haul for hire, a difference recognized in Webster’s definition of “common carrier,” quoted above.

Thus nearly a century ago the Missouri Court of Appeals held that one could be a “private carrier for hire,” *i.e.*, that the mere fact that one carries goods for another for compensation does not make one a common carrier. *Collier v. Langan & Taylor Storage & Moving Co.*, 127 S.W. 435, 440 (Mo. App. St. L. 1910). *See also State ex rel. Public Serv. Comm’n v. Logan*, 411 S.W.2d 86, 88 (Mo. 1967) (One who makes a single isolated movement of property from one point to another in this state on the public highway for

hire does not for that reason alone ‘engage in the business of a common carrier in intrastate commerce.’ He must hold himself out to the general public to engage in the transportation by motor vehicle of property for hire.”). But Langan & Taylor “held itself out as engaged in the general business of moving for all who chose to employ it.” *Id.* at 444. The Court thus imposed on Langan & Taylor the higher standard applicable to common carriers. *See also Fewel v. St. Louis & S.F. Ry Co.*, 267 S.W. 960 (Mo. App. K.C. 1925); *State ex rel. Anderson v. Witthaus*, 102 S.W. 99 (Mo. banc 1937).

A key to common carrier status, in Missouri cases, is the extent to which transportation is made available to the general public, *i.e.*, whether the service is made available to “for all who chose to employ it.” Thus in *Fewel* the Court observed that common carriers take upon themselves obligations to provide services to the public: “However, common carriers are public servants, and must equip themselves to take care of normal traffic with reasonable dispatch and efficiency.” *Id.* 267 S.W. at 963. That does not mean, of course, that a common carrier must actually be prepared to serve, or actually serve, everyone who seeks service. But a common carrier must make its service available to the public.

Put another way, the common carrier must make its facilities available for “public use.” *Witthaus*, 102 S.W.2d at 1011. This Court explained the need for and meaning of the adjective, “public”:

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. 498 [(1899)]. “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 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. Pubic Service Commission*, 123 Pa.Super. 375, 187 A. 248, 251 [(1936)].

102 S.W. 2d at 1011-1012.

There must, of course, be some sort of public invitation. That invitation may be made by various means, such as

by advertising, solicitation, or the establishment in a community of a known place of business where requests for service will be received. However the result may be accomplished, the essential thing is that there shall be a public offering of the service, or, in other words, a communicating of the fact that service is available to those who may wish to use it.

*Vincent v. United States*, 58 A.2d 829 (D.C. Mun. App.1948), quoted with approval, *State ex rel. Public Serv. Comm’n v. Logan*, 411 S.W.2d at 88-89.

Combined, the dictionary definitions, other statutes, and precedents do not establish a single, simple criteria to distinguish "common" from other carriers. But from them we can derive a set of questions that the Director, the AHC, and the courts should

ask:

- (1) Does the carrier carry freight or passengers without individual preference or discrimination, not refusing any customer, except for lack of capacity?
- (2) Does the carrier have an established set of rates that it offers all potential customers?
- (3) Does the carrier have the certificates and authority necessary to legally offer common carriage?
- (4) Does the carrier communicate its willingness to carry to the general public, using means that extend the message beyond its existing customers, including customers of other parts of the carrier company's business?

Though the fifth question is the result of being a common carrier, not a criteria for becoming one, if answered in the affirmative it supports the conclusion that a company is a common carrier:

- (5) Does the carrier assume the liability assigned to common carriers?

Cook Tractor, of course, would have the Court look only to whether the company holds itself out as willing to provide transportation to all comers. That may be an adequate shorthand for these considerations only if “holding out” is broadly construed. But it is certainly not enough that a company announce to its customers that it will carry goods home for them, and that it put its name and phone number on the door of its trucks.

**C. Rather than holding itself out to provide hauling services to all comers, Cook Tractor hauls goods as a private service for itself**

**and its customers.**

When we ask the five questions posed above, it is evident that the record before the AHC does not establish that Cook Tractor is operating as a common carrier.

(1) There is testimony that Cook Tractor accepts unsolicited requests for hauling services, and that it turns down requests when the goods to be hauled do not match Cook Tractor's equipment. But there is no evidence regarding preferences, nor what Cook Tractor does when a request comes at a time when Cook Tractor's trucks are already busy, such as during the two weeks after each auction. There is little or no evidence to support Cook Tractor's claim that it carries freight without individual preference or discrimination, not refusing any customer.

(2) The record as to rates is limited to the single statement that rates imposed are on a per-mile basis. The manner in which rates are imposed does not explain what those rates are, nor that they are offered without discrimination to all potential customers.

(3) The record shows that Cook Tractor had some of the necessary certificates, but not all. Notably, its certificate from the Federal Motor Carrier Safety Administration was as a private, not as a common carrier. ¶ 14 A5. Thus the record does not demonstrate that Cook Tractor, at least for the years at issue, had the certificates and authority necessary to legally offer common carriage.

(4) The record shows that Cook Tractor “does not advertise itself as a hauler of goods in the newspaper or telephone book.” ¶ 9 A4. Rather, Cook Tractor communicates the availability of hauling services in just two ways.

First, it announces at its auctions that it can get customers' purchases home for them. But that is not communication to the general public; it is communication of the sort expected of a private carrier. *See* ¶ 3, A3. Regardless of whether Cook Tractor builds delivery into the price of goods, as a furniture or appliance store might do, withholds it from consignment payments, ¶ 19 A6, or, perhaps simply charges a fee, providing hauling services incident to Cook Tractor's other business (which is what Cook Tractor's trucks spend most of their time doing, *see* ¶ 7 A4) does not make it a common carrier. That is true even if Cook Tractor occasionally hauls equipment for existing auction or consignment customers where the sale is not itself being handled by Cook Tractor – the type of haul that constitutes nearly all of Cook Tractor's non-auction hauling. *See* ¶ 19 A6.

Second, Cook Tractor places its name, phone, and registration numbers on its trucks. ¶ 15 A5. But that is barely more than the law requires. *See* ¶ 15 A5; 7 C.S.R. 265-10.025(1); 49 C.F.R. 390.21. And it communicates no message about willingness to haul. Hence the calls that come from potential customers who see the truck are to ask whether Cook Tractor will haul, *see* ¶ 5 A3; Tr.37, not to schedule a pickup and delivery, as one would do with true common carriers like Fed Ex and UPS. The bit of information Cook Tractor places on its trucks, even when combined with the auction announcements, is insufficient to demonstrate that Cook Tractor operates as a common carrier.

(5) The record is entirely silent as to liability. Thus we do not know whether Cook Tractor promises its customers the kind of protection that common carriers

generally must provide.

The key fact established in the record is that Cook Tractor does nothing to communicate that its hauling service is available to everyone. As a result, its hauling is almost entirely limited to movements of goods in connection with its auction and consignment sale business, and for existing customers of that business. To use the words of Cook Tractor's own witness, Cook Tractor merely "tr[ies] to accommodate people as much as we can helping people out." Tr. 56. "Helping people out" is a goal consistent with Cook Tractor's failure to advertise, solicit other hauling jobs, or establish "a known place of business where requests" for hauling services will be received (*Vincent*, 58 A.2d 829). So long as it remains focused on "helping people out," rather than on offering its hauling services to the public generally, Cook Tractor's hauling will remain "incidental to or in furtherance of his commercial enterprises" (§ 390.020(23)) and thus in the realm of private and contract, rather than common carriage. And Cook Tractor will remain ineligible to take advantage of § 144.030.2(3).

**II. Cook Tractor's attempt to retroactively "correct" its federal certificates neither remedies the problem created by its "private carrier" registration nor provides a basis for reversing the AHC's finding that Cook Tractor was not using its trucks as a common carrier.**

In its Point II, Cook Tractor argues that it met the Director's requirements for the common carrier exemption. The Director has defined "common carrier" by regulation:

Common carrier—any person that holds itself out to the public as engaging

in the transportation of passengers or property for hire. A common carrier is required by law to transport passengers or property for others without refusal if the fare or charge is paid. To qualify as a common carrier, a carrier must be registered as a common carrier with all agencies that require such registration, such as the United States Department of Transportation.

12 C.S.R. 10-110.300(2)(A) (2005). Cook Tractor addresses the last portion of that definition – the requirement that the carrier be properly registered as a common carrier.

But Cook Tractor concedes that it was not registered as a common carrier for the Department of Transportation during the tax years in question: “. . . Cook Tractor was registered as a private carrier for 2000, 2001, and 2002.” App. Br. 24. It goes on to assert that was “a clerical error on the part of Cook Tractor.” *Id.* Later, it reiterates that its “registration was wrong.” App. Br. at 25.

Despite its concession that it was not registered as a common carrier with the Department of Transportation for the tax years in question, Cook Tractor argues that it qualifies under the Director’s regulations because, first, it was properly registered with other agencies. But the regulation requires proper registration with “all agencies that require registration,” not with some or even nearly all. Second, Cook Tractor argues that it could somehow go back and correct the error after the fact, and thus qualify under the regulation. But it cites no authority for that proposition. And it provides no proof that the agencies accepted, or even had authority to accept, retrospective corrections.

But this case need not be resolved on the technical question of whether federal law

permits a company to retroactively change its applications and obtain new certificates for past years. It can be decided on the basis of the AHC's finding that Cook Tractor was not operating as a common carrier – a finding, as discussed in Point I above, for which there is substantial evidence in the record.

## CONCLUSION

For the reasons stated above, the decision of the Administrative Hearing Commission should be affirmed.

Respectfully submitted,

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## **CERTIFICATE OF SERVICE**

The undersigned hereby certifies that two copies of the foregoing were mailed, postage prepaid, via United States mail, on January 25, 2006, to:

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James R. Layton  
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## **CERTIFICATION OF COMPLIANCE**

The undersigned hereby certifies that the foregoing brief complies with the limitations contained in Rule 84.06, and that the brief contains 4,859 words.

The undersigned further certifies that the disk simultaneously filed with the hard copies of the brief has been scanned for viruses and is virus-free.

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James R. Layton