

IN THE SUPREME COURT  
STATE OF MISSOURI

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NO.SC87142

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COOK TRACTOR CO., INC.,  
Appellant,

vs.

DIRECTOR OF REVENUE, STATE OF MISSOURI,  
Respondent.

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ON PETITION FOR REVIEW  
FROM THE MISSOURI ADMINISTRATIVE HEARING COMMISSION  
NO. 03-2184 RS  
THE HONORABLE JOHN J. KOPP, COMMISSIONER

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REPLY BRIEF FOR APPELLANT  
COOK TRACTOR CO., INC.

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## ARGUMENT

The Respondent argues that in *Emerson Electric Co. v. Director of Revenue*, 133 S.W.3d 31 (Mo. banc 2004), the "key" reason the Court found Emerson Electric to be a common carrier is that the company held the certificates required to operate as a common carrier. (Resp. Br. at 11). In looking at the opinion of this Court it appears that the "key" factor was that the statute permitted such tax exemption. The Respondent fails to cite to any authority to support such a conclusion. In *Emerson* the Director of Revenue inferred that Emerson was not entitled to the tax exemption because the aircraft that was purchased was not "encompassed by the common carrier tax exemptions." (*Emerson* at 32.). Section 144.030(20) gives a tax exemption for the purchase of an aircraft by a common carrier for storage or use in interstate commerce. The Court found that the storage of the aircraft purchased by the common carrier was sufficient enough for the tax exemption to apply. (*Emerson* at 32). In *Emerson*, the Court mentions very briefly that the Department of Revenue approved previous tax exemptions for Emerson. *Id.* The Court did not state that their finding that storage of the aircraft in interstate commerce was sufficient to grant the tax exemption, only if Emerson Electric held the required certificates as a common carrier. The decision in *Emerson* does not mention whether Emerson does or does not have the proper certificates to operate as a common carrier.

The Respondent fails to cite authority for the conclusion that the Administrative Hearing Commission (AHC) found that Cook Tractor's trucks were not engaged as a common carrier. This misstates the AHC's decision. The AHC found that Cook Tractor was not registered as a common carrier with the state and did not advertise as a common carrier and therefore is not entitled to the tax exemption. (A15). The Respondent's statement gives the Court the impression that Cook Tractor did not use its truck to transport property. The AHC determined based on the facts presented, that Cook Tractor uses its "fleet of trucks" "to haul equipment." (A3). Cook Tractor uses its fleet of trucks to haul property through interstate commerce. (Tr. 14).

### ***DEFINITION***

The Respondent argues that Cook Tractor does not fall under the plain meaning of a common carrier by using definitions from various dictionaries. (Resp. Br. 12-14). A common carrier is "[a] commercial enterprise that holds itself out to the public as offering to transport freight or passengers for a fee. A common carrier is generally required by law to transport freight or passengers or freight, (sic) without refusal, if the approved fare or charge is paid." BLACK'S LAW DICTIONARY (8th ed. 2004) at 226. Black's goes on to state that "[A] 'common carrier' is bound to take all goods of the kind which he usually carries, unless his conveyance is full, or the goods be specially dangerous; but may charge

different rates to different customers.” Id. This contradicts the Respondent’s independent, unsupported conclusion that the “fare or charge” must be a posted fare or charge. (Resp. Br. 12). There is nothing in the statutes, cases, or regulations that supports that a fare or charge must be posted, or that anything has to be posted.

Cook Tractor fits the definition of a common carrier as defined in Webster’s Dictionary cited by the Respondent. (Resp. Br. 12) Cook Tractor does offer “its services to all comers for interstate transportation by motor vehicle.” Id. Cook Tractor maintains the amount of liability insurance required of common carriers (Tr. 38).

Cook Tractor does not fit the definition of a contract carrier as defined by Webster. (Resp. Br. 12). Cook Tractor does not haul for one person or a limited number of people. Cook Tractor will haul for anyone that wants large machinery hauled and is willing to pay the charge. (Tr. 64 & 37).

There is no indication as to how the dictionary would define “holding out.” The Respondent would have the Court believe that it is synonymous with offer and proffer. The Respondent cites no authority for this conclusion. (Resp. Br. 14).

The AHC found that Cook Tractor was registered with the Federal Highway Administration and that Cook Tractor had a clerical error in registering with the Federal Motor Carrier Safety Administration, when it registered as a

private carrier. (A.12). Cook Tractor’s clerical error had no effect on how it conducted the business of hauling for hire. Cook Tractor continued to use its trucks in the transportation of property for hire despite the clerical error.

In looking at the definitions provided by the dictionary, Respondent’s Brief, and the statute, Cook Tractor only fits the definition of a common carrier, not a contract or private carrier.

***PUBLIC***

Appellants agree that it is key that transportation is made available to the public. (Resp. Br. 16). Linda Christy testified that Cook Tractor would accept any customer willing to pay the fee if the customer is the property is large machinery. (Tr. 64 & 37). Her testimony was uncontroverted on this issue

Respondent argues that Cook Tractor is not a common carrier because it does not advertise, solicit, nor has it established itself in a community as performing hauling services. (Resp. Br. 21). Cook Tractor has established itself in the community that uses large machinery as a known place of business that will haul for hire. To accomplish this Cook Tractor has announced its hauling services at the public auctions held every month and Cook Tractor has performed hauling services for auction customers and any other customer as well. The Respondent believes that the announcements are to “get customers’ purchases home for them.” (Resp. Br. 20). The testimony was that Cook Tractor announces its

hauling services to the public, during the auction, for anybody. (Tr. 34, 37, & 64). The salesmen or purchasing agents for Cook Tractor have advertised Cook Tractor's service of hauling for hire out-side of the state. (Tr. 36). *State ex rel. Public Serv. Comm'n v. Logan*, 411 S.W.2d 86, 89 (Mo. 1967), states that "advertising, solicitation, or the establishment in a community of a known place of business where requests for service will be received," is sufficient to qualify as a common carrier. *Logan* also states that the "essential thing is that there shall be a public offering of service, or, in other words, a communication of the fact that service is available to those who may wish to use it. *Id.* By making the announcements at the public auctions, Cook Tractor is making a public offering of its services to the public that will use its services. The advertising out side of the state is a public offering as well.

The Department of Revenue has taken it upon itself to establish a test that it believes the Court should use to establish a company's common carrier status. If the Court were to adopt these questions as the proper test, Cook Tractor would be a common carrier because:

Question 1. "[d]oes the carrier carry freight or passengers without individual preference or discrimination, not refusing any customer, except for lack of capacity?" (Resp. Br. 18). Linda Christy states that Cook Tractor will haul for anyone who wants large machinery hauled and who is willing to pay the fee. (Tr.

64 & 37). Linda Christy's testimony proves that Cook Tractor does not discriminate when potential customers call requesting hauling services.

Question 2. "[d]oes the carrier have an established set of rates that it offers all potential customers?" (Resp. Br. 18). Linda Christy stated that Cook Tractor charges per loaded mile for its hauling services. (Tr. 13). She did not state the amount that is charged per loaded mile, but this still qualifies as having an established charge, even though it is not required by any binding authority such as a statute or case. Question number 2 requires a common carrier to meet yet another requirement that is not set out by statute. By applying this question to every common carrier currently engaging in the business as a common carrier, could mean that their common carrier status is terminated because their "holding out" does not state their prices.

Question 3. "[d]oes the carrier have the certificates and authority necessary to legally offer common carriage?" (Resp. Br. 18). In this case the AHC found that Cook Tractor was registered with the federal authorities. (A.12). Even if Cook Tractor did not make the clerical error, the Department of Revenue would still have Cook Tractor registered as a private carrier as shown by Appellant's exhibits X and Y.

Question 4. "[d]oes the carrier communicate its willingness to carry to the general public, using means that extend the message beyond its existing customer,

including customers of other parts of the carrier company's business?" (Resp. Br. 18). This question goes to the heart of the issue in this case, the "holding out." Cook Tractor announces at its public auctions, where there are existing customers of Cook Tractor and the public that its hauling services are available. (Tr. 33-34). The Respondent argues that this is not the general public. (Resp. Br. 20). The public is invited to these auctions. The word "public" does not mean everybody all the time. *State ex rel. Anderson v. Witthaus*, 102 S.W.2d 99, 102 (Mo. Banc 1937). Cook Tractor announces its services to the type of public most likely to use its services. Cook Tractor also engages in hauling for hire which according to *U.S. v. One Rockwell Intern. Commander*, 754 F.2d 284, 287, 8<sup>th</sup> Cir. (N.D.) Feb 08, (1985), meets the requirement of holding out. The Respondent is failing to recognize that Cook Tractor has established itself as a common carrier by actually hauling for customers. The Respondent claims that by Cook Tractor putting its name, phone, and registration number on the trucks it is not holding out to the public. (Resp. Br. 21). Cook Tractor does more than just put its name, phone and registration number on the truck, in that the announcements are made at the public auction and it actually engages in the business. By actually hauling for hire Cook Tractor is establishing itself in the community as a business that offers such service, which qualifies as holding out according to *State ex rel. Public Serv. Comm'n v. Logan*, 411 S.W.2d 86 (Mo. 1967).

Cook Tractor goes beyond its existing customer base by salesmen or purchasing agents advertising Cook Tractor's services of hauling for hire outside of the state. (Tr. 36). The announcements made at the auction, the information on the side of the trucks, the advertising outside of the state, and actually engaging in the business of hauling for hire is sufficient enough for Cook Tractor to meet the requirements to be a common carrier.

The Respondent tries to show that Cook Tractor fails to communicate its hauling services because potential customers "ask whether Cook Tractor will haul." (Resp. Br. 21). The Respondent is referring to Linda Christy's answer in the affirmative if "members of the public have contacted you on the phone and asked if you have the service?" (Tr. 37). The Respondent fails to recognize the question in the proper context to get the meaning of the question. Even FedEx or UPS can receive phone calls on occasion asking if they have pick up service in a certain area. What is a common carrier to do in this situation? If the common carrier were to answer no then that means that they are being discriminatory, but if they answer yes then they are not a common carrier because they did not hold out to the public enough.

Question 5. "[d]oes the carrier assume the liability assigned to common carriers?" (Resp. Br. 19). Linda Christy stated that Cook Tractor carries the required insurance for common carriers. (Tr. 38).

The Respondent argues that Cook Tractor meets the requirements of the holding out only if “holding out” is broadly construed. (Resp. Br. 19). Any ambiguities should be “construed in favor of the taxpayer.” *J.B. Vending Company v. Director of Revenue*, 54 S.W.3d 183, 187 (Mo. banc 2001). When interpreting a statute the Court is to construe the statute to conform to the legislative intent. *Id.* The legislative intent of section 144.030 is “to encourage the sale of machinery and equipment that have the aim or end ultimately to generate a sale within the meaning of the sales tax laws.” *International Business Machines Corp. v. Director of Revenue*, 958 S.W.2d 186 (Sup. 1997). In finding that Cook Tractor engages in the business of hauling for hire and determining that it is entitled to the tax exemption would be promoting the legislature’s intent in establishing the statute.

The reason that there is no testimony from Linda Christy regarding their acceptance or denial of customers the two weeks after Cook Tractor’s auction is because there is no difference. Cook Tractor will accept any customer willing to pay the fee for having large machinery hauled. (Tr. 37 & 64).

### ***CONTRACT OR PRIVATE***

The Respondent argues that Cook Tractor is only trying to help people out and not make a business out of hauling for hire. (Resp. Br. 21). The statement made by Linda Christy that the Respondent is referring to is merely trying to show

that Cook Tractor will hold equipment at its business location until the owners have it hauled or pick it up. (TR. 56).

### ***REGISTRATION***

The Respondent tries to argue that by Cook Tractor fixing its clerical error that Cook Tractor is trying to make their registration retroactive. (Resp. Br. 23). The only reason that Cook Tractor relies on this information about the registration form is to show that despite how Cook Tractor registered, the Department of Revenue kept their records the same. Cook Tractor was not trying to change the registration for the years before but was trying to change the registration for that year and all following years. The Respondent fails to cite any authority justifying that Cook Tractor wanted or was even trying to change the registration for previous years.

### **CONCLUSION**

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

Respectfully Submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that two true and accurate copies of the foregoing, as well as a labeled disk containing the same, were mailed, postage prepaid, via United States mail, on this 8<sup>th</sup> day of February, 2006, to:

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**RULE 84.06(c) CERTIFICATION**

The undersigned counsel hereby certifies that this brief includes the information required by Rule 55.03, and this brief complies with the limitations contained in Rule 84.06(b). This brief contains 2703 words counted using Microsoft Word, 2000. Counsel also certifies that the attached floppy disc containing this brief has been scanned for viruses and is virus-free.

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JAMES K. JOURNEY