No. SC92314

IN THE SUPREME COURT OF MISSOURI

AMERICAN AIRLINES, INC.

Appellant

v.

DIRECTOR OF REVENUE,

Respondent

On Petition for Review from the Administrative Hearing Commission

Hon. Sreenivasa Rao Dandamudi, Commissioner

APPELLANT AMERICAN AIRLINES, INC.'S OPENING BRIEF

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JURISDICTIONAL STATEMENT

American Airlines bought jet fuel for delivery at Lambert St. Louis International Airport. American Airlines supplied jet fuel to Trans-States Airlines, Inc, and Chautauqua Airlines, Inc., two regional airlines that operated AmericanConnection flights out of St. Louis. American Airlines provided the fuel for exclusive use on these flights and the AmericanConnection contract carriers were prohibited from using the fuel for any other purpose.

American invoiced the two regional airlines each month for the actual cost of the fuel. It collected sales tax from the regional airlines on these transactions, and remitted it to the Department of Revenue. At the end of each month, American Airlines reimbursed the regional airlines for the amounts they had paid for jet fuel for AmericanConnection flights, including the sales tax that American Airlines had previously charged them.

American contended before the Administrative Hearing Commission that its control over the operations of Trans-States and Chautauqua and its control over the use of the jet fuel prevented the transaction by which the fuel was supplied to the regional airlines from being a "sale at retail" under § 144.010.1(10) RSMo 2005 Supp.[1] because there was no

[1] Section 144.010.1(10) was redesignated Section 144.010.1(11) RSMo 2011 Supp. effective August 28, 2011. For consistency with the record, all references to this statute are to the version in effect during the relevant tax period.

transfer of title or ownership to the fuel. The Commission rejected that contention, and denied American's request for a refund.

The resolution of this petition for review requires the construction of the revenue laws of this State, in particular, whether there was a "sale at retail" within the meaning of § 144.010.1(10) RSMo. Accordingly, the jurisdiction of this Court is invoked under Article V, Section 3 of the Missouri Constitution and § 621.189 RSMo.

STATEMENT OF FACTS

The parties entered into a Stipulation that, along with the attached exhibits, sets forth the facts in detail. (The Stipulation was filed with the Commission at the time of the hearing and is included in the record with the exhibits that were attached to it.)

In summary, during the period involved in this case (October 1, 2004 through September 30, 2007)[2] AMR Corporation, American Airlines' parent company, was a party to Air Services Agreements with Chautauqua Airlines and Trans-States Airlines.[3]

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[2] American Airlines filed three additional complaints for refunds for subsequent periods covering April 1, 2008 through June 30, 2008, January 1, 2009 through March 31, 2009, and April 1, 2009 through June 30, 2009. These cases, Nos. 08-1832 RS, 09-0988 RS, and 09-1288 RS, are being held in abeyance pending the result in this matter.

[3] Although AMR was the contracting party in the Air Services Agreements, American Airlines was the intended third party beneficiary of the contracts. *See, e.g., L.A.C. v. Ward Parkway Shopping Center, Co., L.P.*, 75 S.W.3d 247, 260 (Mo. banc 2002).

Exs. 3 and 4. These Agreements called for the latter companies to operate flights under the AmericanConnection brand name, providing feeder air services from smaller airports to and from St. Louis for American Airlines.

The Air Services Agreements with Chautauqua and Trans-States were what is known in the industry as "wet" leases. Stip. No. 12. This meant that American Airlines not only contracted for use of specific airplanes, but also for the personnel that operated them. Stip. No. 12. The type and number of aircraft were approved by American Airlines, and entirely dedicated to the AmericanConnection flights. Ex. 3, p. 3-31; Ex. 4, pp. 4-89, 4-125 ; Stip. No. 12.[4]

Although Chautauqua and Trans-States operated flights for carriers other than American Airlines, they were neither permitted to use the AmericanConnection aircraft for such flights nor permitted to operate such flights on routes that competed with the AmericanConnection routes. American Airlines was not permitted to operate flights that competed with AmericanConnection routes to and from St. Louis. Chautauqua's AmericanConnection routes did not compete with Trans-States' AmericanConnection

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Therefore, for clarity, further references to the contractual parties will be to American Airlines, Chautauqua, Trans-States, or the AmericanConnection carriers.

[4] References to Exhibit 4 are to the October 2002 Amended and Restated Air Services Agreement between AMR and Trans-States. Similar provisions are in the 2001 Agreement.

routes. Trans-States' AmericanConnection routes did not compete with Chautauqua's AmericanConnection routes. Stip. No. 13.

Under the Agreements, Chautauqua and Trans-States agreed to:

- use the AmericanConnection brand, colors, and designs on all aircraft and ground equipment leased for AmericanConnection flights (Ex. 3, p. 3-29; Ex. 4, p. 4-88);
- use the AmericanConnection brand, colors, and designs on all signage at the airport ticket counters and gates used for AmericanConnection flights (Ex. 3, p. 3-29-30; Ex. 4, p. 4-88);
- use American Airlines-approved AmericanConnection uniforms for all ramp and gate employees, crew members, and any other employee having direct interaction with the public on AmericanConnection routes (Ex. 3, p. 3-30; Ex. 4, p. 4-88);
- use the AmericanConnection brand in all advertising and promotional materials if Chautauqua or Trans-States advertised the AmericanConnection routes (Ex. 3, p. 3-30; Ex. 4, p. 4-88);
- utilize the American Airlines reservation system for all reservation and ticketing services for the AmericanConnection flights (Ex. 3, p. 3-33; Ex. 4, p. 4-93); and
- comply with American Airlines' customer service guidelines on AmericanConnection routes, except as prohibited by Chautauqua's or Trans-

States' own labor agreements to the contrary (Ex. 3, p. 3-37; Ex. 4, p. 4-92, 4-130).

American Airlines was responsible for:

- designating the routes and frequency of service for the AmericanConnection flights operated by Chautauqua and Trans-States (Ex. 3, p. 3-32; Ex. 4, p. 4-122);
- setting the price for AmericanConnection flights operated by Chautauqua and Trans-States (Ex. 3, p. 3-38; Ex. 4, p. 4-98);
- advertising and promoting the AmericanConnection flights operated by Chautauqua and Trans-States (Ex. 3, p. 3-37; Ex. 4, p. 4-96); and
- providing access to the American Airlines systems for the reservation and ticketing of all AmericanConnection flights operated by Chautauqua and Trans-States for the benefit of American Airlines (Ex. 3, p. 3-34 Ex. 4, p. 4-92).

Neither Chautauqua nor Trans-States offered or issued tickets in its own corporate name for commercial flights into or out of Missouri. Stip. No. 11. Neither company conducted commercial flights into or out of Missouri under its own corporate name. Stip. No. 11. The tickets for all AmericanConnection flights operated by Chautauqua and Trans-States in Missouri during the period October 1, 2004 through September 30, 2007 were issued by American Airlines on its Federal Aviation Administration-approved ticket stock — not by either Chautauqua or Trans-States. Stip. No. 11; Ex. 3, 3-37; Ex. 4, p. 4-96 – 4-97; Tr. 25-27.

The Air Services Agreements provided that American Airlines would pay the AmericanConnection carriers on a "block hour" basis plus a per passenger stipend. Ex. 3, p. 3-80; Ex. 4, p. 4-132 – 4-141; Stip. No. 25. A block hour is defined as "that time when an aircraft moves under its own power for the purpose of flight and ends when the aircraft comes to rest after landing" (Ex. 3, p. 3-22; Ex. 4, p. 4-80) — essentially measured from the time the aircraft leaves the gate at departure until it arrives at the gate at its destination.

The price per block hour, as one of its components, assumed that aviation jet fuel would cost a certain amount per gallon. For the Chautauqua contract, the assumed price was $0.85 per gallon (Ex. 3, p. 3-80); for the Trans-States contract, the assumed price was $1.05 per gallon (Ex. 4, p. 4-139). If the actual cost of fuel exceeded the assumed amount, then American Airlines paid the difference to the AmericanConnection carrier in order to cover the AmericanConnection carrier's operating costs, alleviating the risk of fluctuating fuel prices. (Ex. 3, p. 3-80; Ex. 4, p. 4-139.) During the relevant period, the cost of fuel always exceeded the assumed amount. Stip. No. 26; Tr. 21.

American Airlines bought the jet fuel for its own use (and subsequently for use on the American Airlines routes sub-contracted to the AmericanConnection carriers) from ConocoPhillips and Sunoco. American Airlines paid use tax on its purchases until the amount of the taxes reached the statutory cap of $1,500,000 (usually in May of each year). Stip. Nos. 17-19.

As a high-volume purchaser of fuel at Lambert Airport, American Airlines could purchase fuel more cheaply than the AmericanConnection carriers, reducing American

Airlines' costs associated with providing this regional air service. Stip. Nos. 20, 21. Accordingly, the parties orally agreed that American Airlines would supply the fuel for AmericanConnection flights out of St. Louis. American Airlines therefore directed its suppliers to fuel the leased aircraft operated by Chautauqua and Trans-States on American Airlines' behalf. Stip. Nos. 20, 21.

American Airlines and the AmericanConnection carriers reached an oral side agreement that the latter could not use the jet fuel for any flights other than those they flew for American Airlines and the fuel was to be used only in the aircraft American Airlines approved for AmericanConnection flights. Stip. No. 23; Ex. 3, p. 3-31; Ex. 4, pp. 4-89, 4-125 ; Stip. No. 12.

Business personnel at the companies agreed that American Airlines would "sell" the fuel to Chautauqua and Trans-States at the cost at which American Airlines bought it from their fuel supplier. Stip. Nos. 20, 21. (The parties stipulated that whether the transactions were "sales" within the meaning of the statute is disputed. Stip. Nos. 20, 21.) But the Air Services Agreement also provided that American Airlines would reimburse the AmericanConnection carriers monthly for the cost above the assumed cost of fuel that was already reimbursed by American to the AmericanConnection carriers through the block hour payments. Stip. Nos. 25-26; Ex. 3, p. 3-80; Ex. 4, p. 4-139.

At the end of each month during the relevant period, American Airlines repaid Trans-States and Chautauqua not only the cost of the fuel supplied at Lambert, but also the entire amount of the sales tax that American Airlines previously charged and collected from them. Stip. No. 27; Exs. 7 and 8.

In 2003, Mary Ann Reeves, one of the American Airlines' business persons involved in the transactions, contacted Robert Glenn, then Manager of Transaction Taxes, regarding the tax aspects of the transactions with the AmericanConnection carriers. Tr. 16. She did not fully describe the details — in particular, she did not provide Mr. Glenn with the information concerning American Airlines' complete control over the use of the fuel or the company's agreement to reimburse the AmericanConnection carriers for the cost above the block hour assumed cost. Tr. 17, 18. All she asked was whether Missouri had a sales tax on the sale of aviation jet fuel, as many states do not. Tr. 17. Mr. Glenn answered, correctly, that Missouri did impose a tax on the sale of aviation jet fuel. Tr. 17-18.

Based on this advice, American Airlines collected and remitted sales tax on the transactions with Chautauqua and Trans-States when American Airlines provided fuel to them. Stip. No. 24. American Airlines then reimbursed the AmericanConnection carriers not only for the cost of the fuel previously purchased by American Airlines and passed on to the AmericanConnection carriers, but for the sales tax at issue here that had been collected and remitted to the Director. Stip. No. 27; Exs. 7 and 8.[5]

[5] Section 144.805 RSMo. puts an annual "cap" of $1,500,000 on sales and use taxes that airlines have to pay for fuel. American Airlines reached the cap in each tax year at issue. Stip. Nos. 18-19. Until it reached the cap, American Airlines, in effect, paid tax on the aviation jet fuel twice — a use tax when the company bought the fuel from its fuel supplier and a sales tax when it reimbursed the AmericanConnection carriers for the sales

When Mr. Glenn later discovered the full details of these transactions, including the terms of the Air Services Agreements and the side agreement concerning the supply of fuel at Lambert, he directed that the company no longer charge or collect sales tax from the AmericanConnection carriers for the fuel that was supplied to them. Tr. 22-24.

On February 5, 2008, American Airlines filed a sales tax refund claim with the Director in the total amount of $5,440,219.96, plus applicable interest. Of this refund claim, $5,179,361.62 was for the sales tax American Airlines had collected and remitted to the Director on its "sales" of aviation jet fuel to Chautauqua and Trans-States during the period from October 1, 2004 to September 30, 2007. (The remaining $260,858.34 was for erroneous overpayments of sales tax based on errors by American in preparing its sales tax returns. American dropped this claim before the Commission.)

On March 20, 2008, the Director of Revenue issued a final decision denying American Airlines' claim for refund of $5,179,361.62 for sales taxes (plus applicable interest) that American Airlines collected from Chautauqua and Trans-States for the

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tax charged them. American Airlines continued to collect and remit sales tax on the transactions with the AmericanConnection carriers even after American Airlines itself reached the cap. Stip. No. 24. Neither of the AmericanConnection carriers paid enough sales taxes to reach the cap. Stip. No. 24. Therefore, whether Chautauqua or Trans-States would have qualified as common carriers under the statute to be eligible for the cap is not an issue in this case.

period October 1, 2004 through September 30, 2007 and remitted to the Department of Revenue for the aviation jet fuel used by American Airlines on the routes sub-contracted to the AmericanConnection carriers. Ex. 10.

On January 6, 2012, the Commission denied American's complaint. American filed its petition for review on February 2, 2012.

POINT RELIED ON

The Administrative Hearing Commission Erred In Denying American Airlines' Request For A Refund Of Sales Taxes Because American Airlines Did Not Transfer Title To, Or Ownership Of, Jet Fuel To The AmericanConnection Carriers As Required For A "Sale At Retail" Under § 144.010.1(10) RSMo. In That American Airlines Retained Complete Control Over The Use Of The Jet Fuel By Restricting Its Use To American Airlines' Flights Flown By Aircraft Specifically Identified By And Approved By American Airlines And Sub-Contracted To The AmericanConnection Carriers Pursuant To The Terms And Restrictions Contained In The Air Services Agreements

Olin Corp. v. Director of Revenue, 945 S.W.2d 442 (Mo. banc 1997).

Ovid Bell Press, Inc. v. Director of Revenue, 45 S.W.3d 880 (Mo. banc 2001).

§ 144.010.1(10) RSMo.

ARGUMENT

The Administrative Hearing Commission Erred In Denying American Airlines' Request For A Refund Of Sales Taxes Because American Airlines Did Not Transfer Title To, Or Ownership Of, Jet Fuel To The AmericanConnection Carriers As Required For A "Sale At Retail" Under § 144.010.1(10) RSMo. In That American Airlines Retained Complete Control Over The Use Of The Jet Fuel By Restricting Its Use To American Airlines' Flights Flown By Aircraft Specifically Identified By And Approved American Airlines And Sub-Contracted To The AmericanConnection Carriers Pursuant To the Terms And Restrictions Contained In The Air Services Agreements

A. Introduction

The transactions by which American Airlines supplied aviation jet fuel to Chautauqua and Trans-States at Lambert Airport were not "sales at retail" because American Airlines did not transfer either title to, or ownership of, the fuel to the AmericanConnection carriers. The fuel was only used on American Airlines flights under the AmericanConnection banner pursuant to a lease arrangement whereby American Airlines maintained complete control over the operations. American Airlines chose the aircraft that it leased. American Airlines designated the routes to be served and the schedules. American Airlines controlled the aircraft appearance and configuration, the advertising, the signage, and even the uniforms worn by AmericanConnection employees working the flights. And, perhaps most important, American Airlines issued the tickets

to the passengers, meaning that the contract for carriage was solely between American Airlines and the passenger.

The AmericanConnection carriers had no dominion or control over the fuel — they used it on the designated AmericanConnection flights and no others. And although money changed hands when the fuel was initially provided to the AmericanConnection carriers, American Airlines reimbursed the entire amount paid for fuel — including the sales tax.

B. An Essential Element Of A "Sale At Retail" Is The Transfer Of "Title" Or "Ownership"

A "sale at retail" occurs when there is "any transfer . . . of the ownership of, or title to, tangible personal property, for use or consumption and not for resale . . ., for a valuable consideration." § 144.010.1(10) RSMo. Under the sales tax law, "the event giving rise to taxation is the transfer of title or ownership." *Olin Corp. v. Director of Revenue*, 945 S.W.2d 442, 443 (Mo. banc 1997). [6]

Title and ownership are usually, but not always, transferred at the same time to the purchaser. *Buchholz Mortuaries, Inc. v. Director of Revenue*, 113 S.W.3d 192, 194 (Mo. banc 2003). "Title" ordinarily means the entire bundle of rights a person has in property.

[6] The parties stipulated to the dispositive facts in the case. The issue is whether the Commission correctly interpreted § 144.010.1(10) RSMo, which is reviewed *de novo*. *See, e.g., Krispy Kreme Donut Corp. v. Director of Revenue*, 358 S.W.3d 48, 51 (Mo. banc 2011)).

It is usually expressed as a formal "legal link" between a person and the property or refers to the legal evidence of ownership rights. *See, e.g.*, Bryan A. Garner, *A Dictionary of Modern Legal Usage* (2d ed. 2001) at 883. A person can have legal title to property, regardless of who has possession, so long as one retains the right to control or dispose of the property. Bryan A. Garner (ed.), *Black's Law Dictionary* (8th ed. 2004) at 1522 (defining "title").

Given that the words "title" and "ownership" are both found in § 144.010.1(10), the latter means something other than legal title. *See State ex rel. Thompson-Stearns-Roger v. Schaffner*, 489 S.W.2d 207, 215 (Mo. 1973), *overruled on other grounds by Olin Corp. Director of Revenue*, 945 S.W.2d at 444. The Court has said that "ownership" in this context means that a person " 'has dominion or control over a thing, the title to which is in another.' " *State ex rel. Thompson-Stearns-Roger v. Schaffner*, 489 S.W.2d at 215, *quoting* the Fourth Edition of *Black's Law Dictionary*.

The current edition of *Black's Law Dictionary* defines "ownership" to refer to "the bundle of rights allowing one to use, manage, and enjoy property, including the right to convey it to others, Ownership implies the right to possess a thing, regardless of any actual or constructive control." *Black's Law Dictionary* (8th ed. 2004) at 1138.

The common thread among all of these definitions is the right to control the use or disposition of the property. Whoever has that right has title or ownership.

C. American Did Not Transfer Either Title Or Ownership Of The Jet Fuel To The AmericanConnection Carriers Because It Retained Absolute Discretion Over How, Where, And When The Jet Fuel Was To Be Used

The application of the title or ownership definition for sales tax purposes is illustrated in *Olin Corp. Director of Revenue*, 945 S.W.2d 442 (Mo banc 1997). In *Olin*, the taxpayer operated and maintained an ammunition plant for the United States government under a management contract. The government paid Olin an annual fee plus a reimbursement for the cost of operating the plant. Olin furnished all of the equipment, materials, and supplies. Olin purchased the necessary supplies, but its purchase orders provided that the title to the property passed directly from the vendor to the United States government upon delivery to the plant. *See id*. at 443.

Olin's contract with the government provided that Olin had to manufacture the ammunition in accordance with strict contract specifications, and precluded Olin "from using the property in any manner inconsistent with those specifications." *Id*. at 444. The contract included "detailed and comprehensive provisions on the acquisition, storage, consumption, utilization, maintenance and disposition of the property." *Id.* And Olin was permitted "to use the property only for those purposes authorized in the contract." *Id*. Finally, Olin offered an affidavit from a military officer that said that the government "had absolute discretion in the utilization of the property, including how, where, and when the property was to be used." *Id*.

The Director of Revenue, relying upon *State ex rel. Thompson-Stearns-Roger v. Schaffner*, 489 S.W.2d 207, 215 (Mo. 1973), argued that the vendors transferred

"ownership" of the property to Olin when they sold it for use at the plant. *Schaffner* involved the identical factual situation: a government contractor bought materials under purchase orders that specified that title passed to the United States government. The *Schaffner* Court held that the transaction was a sale at retail because the taxpayer received "ownership" of the property in that it had the right to direct who the recipient of title should be. *See id*. at 215.

The *Olin* Court, while agreeing that in some instances the ability to designate who will receive title may be a sufficient indicator of ownership within the meaning of § 144.010.1(10), overruled *Shaffner* because the taxpayer had to follow the federal government's direction to require that title be vested in the United States. Thus it "could not exercise the necessary dominion or control over the property" to have acquired "ownership." *Olin*, 945 S.W.2d at 444. Therefore, the transactions at issue were not "sales at retail" to the taxpayer.

Here, as in *Olin*, American Airlines did not transfer title or ownership of the jet fuel to the AmericanConnection carriers. American Airlines, like the United States government in *Olin*, through the written and oral agreements with its contracting parties "had absolute discretion in the utilization of the property, including how, where, and when the property was to be used." *Id.* at 444.

The Commission disagreed, for four reasons. But none of these reasons can withstand a close examination.

D. American Airlines Reimbursed The Entire Cost Of Jet Fuel Above The Contractually Assumed Price, Including The Total Amount Of Sales Tax Collected From The AmericanConnection Carriers, And Thus The Latter Did Not "Pay" The Tax

The Commission noted that the AmericanConnection carriers paid money to American Airlines for the fuel. Decision at 12, L.F. 54; App. A12. While it is true that money initially changed hands, it is also true that American Airlines reimbursed the entire amount paid to the AmericanConnection carriers in excess of the assumed price of the jet fuel used in the block hour payments[7] — reimbursements that included the entire amount of the sales tax collected and remitted by American Airlines to the Department of Revenue. Stip. Nos. 25-26; Ex. 3, p. 3-80; Ex. 4, p. 4-139; Stip. No. 27; Exs. 7 and 8.

Therefore, the AmericanConnection carriers did not pay for the fuel and, under the terms of the agreements between the parties, were never intended to bear such costs. The cost covered by the block hour payments was reimbursed in accordance with the provisions of the written contract, and the amounts above the assumed cost per gallon were separately reimbursed on a monthly basis. Stip. Nos. 25-26; Ex. 3, p. 3-80; Ex. 4, p.

[7] The block hour payments are a form of cost-plus contract similar to that in *Olin*. The contract assumed a certain level of costs for various items — including the cost of fuel — for which American Airlines reimbursed the AmericanConnection carriers. American Airlines' monthly payments were adjusted for certain "pass through" costs, including any increase in the cost of fuel over that assumed in the contract.

4-139; Stip. No. 27; Exs. 7-8. There is no question that the tax burden associated with the purchase of the fuel at issue here fell squarely on the shoulders of American Airlines.

And, indeed, when the company's tax professionals were advised of the complete facts regarding the transactions by which American Airlines was supplying the fuel, the company stopped charging the AmericanConnection carriers for the fuel and stopped collecting and remitting sales tax. Tr. 22-24. American Airlines then sought a refund of the sales taxes it had both collected from the AmericanConnection carriers and reimbursed to them.[8]

E. The Terms Of The Explicit Written And Oral Agreements Between The Parties Made Clear That The AmericanConnection Carriers Lacked The Right To Control Or Dispose Of The Jet Fuel, And Thus They Lacked Title To It

The Commission said that there was no explicit agreement regarding title to the jet fuel between American Airlines and the AmericanConnection carriers. Decision at 12, L.F. 54; A12. While the agreement did not use the word "title," the explicit restrictions on the AmericanConnection carriers' use of the fuel negates any notion that they acquired "title" to it. American Airlines directed how, where, and when the fuel would be used. The AmericanConnection carriers could not use the jet fuel for any flights other than those they flew for American Airlines. The aircraft in which the jet fuel was placed

[8] American Airlines, as the party legally obligated to collect sales tax (if any is due), had the right to seek a refund of taxes that were "erroneously collected" under § 144.190.2.

could only be used for AmericanConnection flights. Stip. No. 23; Ex. 3, p. 3-31; Ex. 4, pp. 4-89, 4-125 ; Stip. No. 12. The AmericanConnection carriers "rights" to the jet fuel were contractually limited — they were prohibited from exercising any discretion with regard to the use of the jet fuel received from American Airlines, as the holder of legal title or ownership would naturally have.

American Airlines specified the origin, destination, and frequency of each flight for which the fuel was used. Ex. 3, p. 3-32; Ex. 4, p. 4-122. Each flight was scheduled by American Airlines in accordance with airport and Federal Aviation Administration guidelines. *See id*. Each aircraft, and its crew, was leased by American Airlines solely for American Airlines' use. Each ticket for each flight was issued on American Airlines own ticket stock — not by either Chautauqua or Trans-States. Stip. No. 11; Ex. 3, 3-37; Ex. 4, p. 4-96 – 4-97; Tr. 25-27. Each flight was an American Airlines flight.

American Airlines specified the aircraft that were allowed to use the fuel. It specified not only what the interior and the exterior of the aircraft would look like, it specified the type of engines that used the fuel and the type of flight instruments the aircraft would have that controlled and monitored the use of the fuel. Ex. 3, p. 3-36; Ex. 4, p. 4-125.

In short, the AmericanConnection carriers lacked the right to control or dispose of the jet fuel, and thus lacked "title" to, or "ownership" of, the fuel.

F. The Intent Of The Parties Was That American Airlines Retained The Right To Control The Use Of The Jet Fuel It Supplied To The AmericanConnection Carriers

The Commission noted that the AmericanConnection carriers received possession of the fuel, which (it said) was *prima facie* evidence of ownership. The Commission also said that the AmericanConnection carriers exercised dominion and control over the fuel, "which is the essence of ownership." Decision at 12, L.F. 54; App. A12.

Possession is a question of fact, not law. *See, e.g.*, Garner, *A Dictionary of Modern Legal Usage* at 673 (pointing out that "a thief may acquire possession of a billfold, but the owner retains the rights of ownership"). The Court has recognized that "possession is not conclusive of title or ownership." *Ovid Bell Press, Inc. v. Director of Revenue*, 45 S.W.3d 880, 885 (Mo. banc 2001). Rather, the key is the intent of the parties. *See id.*, *citing Kurtz Concrete, Inc. v. Spradling*, 560 S.W.2d 858, 861 (Mo. banc 1978).

Here, the intent of the parties — as demonstrated by their express agreement — was that American Airlines retained the right to control the use of the jet fuel it supplied to the AmericanConnection carriers at Lambert. True, the AmericanConnection carriers "possessed" the jet fuel, but they had to use it in aircraft that American had leased from them and only as directed by American Airlines. While the AmericanConnection carriers' employees operated the aircraft that used the fuel, they did so in flying American Airlines flights on American Airlines tickets, in uniforms specified by American Airlines, in aircraft whose appearance and equipment was specified by American Airlines, on

schedules as directed by American Airlines, under contracts that controlled every important aspect of the air services provided to the passengers.[9]

In other words, American Airlines controlled and directed "how, where, and when" the jet fuel would be used. *Olin*, 945 S.W.2d at 444.

G. American Airlines Controlled Every Aspect Of The Use Of The Jet Fuel, Including How, Where, And When The Fuel Was To Be Used

The Commission held that American Airlines did not have the same degree of control over the operations of the AmericanConnection carriers as the United States government had over the taxpayer in *Olin*, where the Commission noted the contract had "comprehensive provisions concerning the acquisition, storage, consumption, utilization,

[9] The Air Services Agreements were a form of "wet lease." A wet lease is "a lease between direct air carriers by which the lessor provides all or part of the capacity of the aircraft, and its crew." 14 C.F.R. § 212.2. Federal regulations make clear that the defining feature of any wet lease is that it covers not only the aircraft itself, but also the crew to operate it. *See, e.g.,* 14 C.F.R. § 217.2, § 257.3(a) (wet lease is "lease by which the lessor provides an aircraft or crew dedicated to a particular route(s)"). Some airlines' entire business, like the AmericanConnection carriers here, consists of leasing their aircraft and crews to other carriers to operate routes for them. *See, e.g., Air Support International, Inc. Atlas Air, Inc.*, 54 F.Supp.2d 158, 160 (E.D.N.Y. 1999).

maintenance, and disposition" of the property . Decision at 15, L.F. 57; A15. The stipulated facts, however, demonstrate otherwise.

In *Olin*, the contract prevented Olin from using the property in a manner inconsistent with the contract or for any purposes not authorized by the contract. *See* 945 S.W.2d at 443. Here, the explicit agreement between American Airlines and the AmericanConnection carriers provided that the jet fuel supplied in these transaction could only be used on flights sub-contracted to the AmericanConnection carriers under the contracts. Stip. No. 23.

In *Olin*, the government's contract had detailed provisions on the acquisition, storage, consumption, utilization, maintenance and disposition of the property. *See* 945 S.W.2d at 443. Here, there was an explicit agreement on the acquisition of the fuel — American Airlines would supply the fuel at Lambert, and it would reimburse the AmericanConnection carriers for the entire cost on a monthly basis. Stip. Nos. 20, 21, 23; Stip. Nos. 25-26; Ex. 3, p. 3-80; Ex. 4, p. 4-139; Stip. No. 27; Exs. 7-8.

All of the fuel at Lambert was stored in the custody of a third party, so, unlike *Olin*, there were no provisions with regard to that aspect.

The agreement, as noted previously, was that "Chautauqua and Trans-States were not permitted to use and did not use any of the aviation jet fuel received from suppliers of American Airlines on any flights operated for their own common carrier business or for other carriers other than those operated under the AmericanConnection banner." Stipulation No. 23. Therefore, the fuel could be consumed or utilized only as American Airlines directed -- on American Airlines flights that the AmericanConnection carriers

flew on American Airlines schedules (and at American Airlines' discretion), and in aircraft whose appearance and equipment was specified by American Airlines and transported American Airlines passengers. Ex. 3, p. 3-64; Ex. 4, p. 4-125.

There was no particular maintenance necessary regarding the fuel. It was loaded on the aircraft as needed. The AmericanConnection carriers agreed in the contract to maintain the aircraft in accordance with Federal regulations. American Airlines had the right to inspect the AmericanConnection carriers' maintenance procedures regularly, and to require them to modify the aircraft designated to fly the American Airlines routes in accordance with service bulletins. Ex. 3, p. 3-65-66; Ex. 4, p. 4-126-127.

The jet fuel was used to fly the routes designated by American Airlines. The AmericanConnection carriers had no right to use or dispose of the fuel in any other way. Stip. No. 23.

In *Olin*, a military officer provided an affidavit that said that the government "had absolute discretion in the utilization of the property, including how, where, and when the property was to be used." *Id*. at 444. It is apparent from the Air Services Agreements and the oral side agreement regarding the jet fuel that American Airlines had absolute discretion in how the jet fuel was to be used, including "how, where, and when" it was to be used.

The jet fuel was to be used only in aircraft approved and leased by American Airlines. The aircraft were to be painted in accordance with American Airlines' directions, and the aircraft interiors were to be equipped as American Airlines directed. Ex. 3, p. 3-65; Ex. 4, p. 4-126. The aircraft were to have powerplants and avionics as

directed and approved by American Airlines. Ex. 3, p. 3-64; Ex. 4, p. 4-125. Even the uniforms worn by the flight and cabin crews, and the gate personnel, were required to be approved by American Airlines. Ex. 3, p. 3-30; Ex. 4, p. 4-88.

The schedules for the flights were to be set by American Airlines. The tickets for the flights were issued by American Airlines. The reservations for the flights were to be made through American Airlines' computer systems. Ex. 3, p. 3-34; Ex. 4, p. 4-92.

In short, American Airlines had extensive control over the AmericanConnection carriers operations in Missouri.

American Airlines did not transfer either title or ownership of the jet fuel to the AmericanConnection carriers operations. Its control over the use of the jet fuel was no less extensive than the government's in *Olin*. In these circumstances, there was no "sale at retail" as required by § 144.010.1(10).

CONCLUSION

For these reasons, American Airlines requests that the Court reverse the decision of the Administrative Hearing Commission, order the Director to refund to American Airlines the amount of $5,179,361.62, plus interest, and grant such other relief as the Court deems proper under the circumstances.

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that this brief contains the information required by Rule 55.03, complies with the limitations in Rule 84.06(b), and it contains 5,656 words, excluding the parts of the brief exempted; has been prepared in proportionally spaced typeface using Microsoft Word 2010 in 13 point Times New Roman font.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing was served through the electronic filing system this 5th day of June 2012 upon the following:

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