

2611

OPINION INVOLVING THE TRANSPORTATION OF MATERIALS USED BY A CONTRACTOR PERFORMING PUBLIC ROAD WORK. §§4923.01, R.C. 4923.02, 4923.17, R.C.

SYLLABUS:

1. Under the exemption provisions of division (A) (7) of Section 4923.02, Revised Code, persons operating motor vehicles for contractors on public road work are not "private motor carriers" or "contract motor carriers by motor vehicle" under Sections 4923.01 through 4923.17, Revised Code; and such is true even though said motor vehicles are not operated exclusively on the area where the road work is being performed, so long as the operation is for the purpose of the road work.

2. Where an operator of a motor vehicle transports road materials to a stockpile, said materials to be used by a contractor on public road work, and such transporting is done for the contractor, the exemption provision of division (A) (7) of Section 4923.02, Revised Code, applies to the operation of the motor vehicle.

3. If the exemption provision of division (A) (7) of Section 4923.02, Revised Code, is to apply, the person transporting the materials must be doing so under agreement with the contractor performing the public road work; and where the transporter is operating under agreement with some party other than the contractor, the operation of the motor vehicle is not "for the contractor" within the exemption provision.

4. For the exemption to apply, there is no necessity that the contractor pay the transporter for the delivery or removal of any road materials or other matter associated with the road work; and the exemption will apply even if the transporter does his work for no pay, or even pays the contractor to remove materials or matter, so long as said transporter is working under an agreement with the contractor.

5. As used in division (A) (7) of Section 4923.02, Revised Code, the word "contractor" does not include a governmental agency which performs public road work with its own forces.

Columbus, Ohio, November 7, 1961

Hon. Edward J. Kenealy, Chairman
Public Utilities Commission, Columbus, Ohio

Dear Sir:

Your request for my opinion reads as follows:

“Section 4923.02 of the Ohio Revised Code reads in part as follows:

“‘As used in sections 4923.01 to 4923.17, inclusive, of the Revised Code:

“‘(A) ‘Private motor carrier’ or ‘contract carrier by motor vehicle’ includes every corporation, company, association, joint-stock association, person, firm, or copartnership, their lessees, legal or personal representatives, trustees, or receivers or trustees appointed by any court, not included in the definition under section 4921.02 of the Revised Code, when engaged in the business of private carriage of persons or property, or both, or of providing or furnishing such transportation service, for hire, in or by motor-propelled vehicles of any kind, including trailers, over any public highway in this state, but does not include any corporation, company, association, joint-stock association, person, firm, or copartnership, their lessees, legal or personal representatives, trustees, or receivers or trustees appointed by any court:

“* * * * *

“‘(7) Engaged in the operation of motor vehicles for contractors on public road work:

“* * * * *

“We request your opinion as to whether or not this exemption is limited to the operation of motor vehicles for contractors on the area where public road work is being performed.

“In the event that your answer to the previous question is in the negative, we ask your opinion as to the applicability of the exemption contained in Section 4923.02 (A) (7) of the Ohio Revised Code to the following situations:

“1. The operation of motor vehicles in transporting gravel, sand, salt, aggregates and other materials of whatever nature used on public road work to a stock pile for later use on public road work?

“(a) is the fact that any portion of the materials are or may be diverted to another use than public road work pertinent?

"2. The operation of motor vehicles transporting gravel, sand, salt, aggregates and other materials of whatever nature used on public road work, to township, city, county or state highway garages for later use by such governmental agency on public road work.

"(a) Does the fact that the transportation charges are paid for by either the shipper or the governmental agency pertinent?

"3. The operation of motor vehicles in transporting materials for road work on roads running through parks, cemeteries, or other grounds, if such roads are open for public use even though restricted otherwise.

"4. The operation of motor vehicles transporting materials for road work when the transportation charges are paid for by an agency of the federal government.

"5. The operation of motor vehicles to remove gravel, sand, dirt or other materials from the site of public road work.

"(a) In particular when the carrier pays the contractor for the material to be removed and in turn sells it for a profit; or where the carrier receives the material to be removed free and in turn sells it for his own benefit.

"6. The operation of motor vehicles transporting materials for public road work when the prime contractor sublets a contract for the transportation of materials.

"(a) If the sub-contractor hires motor vehicles other than those which he owns and operates, does the exemption in Section 4923.02 (A) (7) of the Ohio Revised Code apply?

"7. Must the transportation charges for operations on public road work always be paid for by the contractor in order to fall under the exemption in Section 4923.02 (A) (7) of the Ohio Revised Code?

"8. Does the word 'contractor' in Section 4923.02 (A) (7) of the Ohio Revised Code include a governmental agency (city, county, township or state) if such governmental agency is doing the public road work and hiring motor vehicles?"

Under division (A) (7) of Section 4923.02, Revised Code, cited in your request, a corporation, company, association, joint-stock association, person, firm, or copartnership, their lessees, legal or personal representatives, trustees, or receivers or trustees appointed by any court, *which is engaged in the operation of motor vehicles for contractors on public road work*, is not a "private motor carrier" or "contract motor

carrier by motor vehicle” under Sections 4923.01 through 4923.17, Revised Code. You ask whether or not this exemption is limited to the operation of motor vehicles for contractors “ON” the area where public road work is being performed.

As to this first question, from the language used it would appear that the exemption applies so long as the corporation, etc., is operating motor vehicles for a contractor as a part of the public road work in which the contractor is involved. That is, I interpret the words “on public road work” to mean that the operation of the motor vehicles is for the purpose of the road work, not that the motor vehicles are operated strictly on the area where public road work is being performed. To adopt this latter interpretation it would be necessary to infer language that is not there. And in this regard, the language reads “on public road work,” not “on the area where public road work is being performed.” I, therefore, answer your initial question in the negative.

In addition to the question above considered you have posed other questions to be considered if said initial question is answered in the negative. Coming to the question designated “1.,” if the operation of the motor vehicles in transporting gravel, etc., is for a contractor on public road work, then I am of the opinion that such operation comes within the exemption of division (A) (7) of Section 4923.02, *supra*, even though said gravel, etc., is stock-piled for later use rather than being used immediately on the road work. In this regard, I see no reason to differentiate the case where the material is brought directly to the sites from the case where there is a “break” in the delivery; the deciding factor being whether the transfer of material is part of the road work. I deem it essential, however, that the public road work be in progress, and that there is no doubt that the gravel, etc., is to be used on such work.

Referring to question “1. (a),” there is not question but what the materials hauled must be for public road work for the exemption to apply. Thus, it appears obvious that if any part of the materials are to be used for another purpose, the motor vehicles in question are operating in a manner not within the purview of the exemption provision.

In considering your other questions, it will be necessary to ascertain the scope of the words “for contractors” as used in the exemption provision here under consideration.

The word "for" is defined in Webster's New Collegiate Dictionary, page 323, as:

"* * * 3. Instead of; in place of; as, an eye for an eye. 4.

In behalf of; in support of; as, to campaign for a cause. * * *"

Accordingly, it would appear that, as used in the exemption provision, "for" is the equivalent of "in behalf of."

The word "contractor" is defined in Ballentine's Law Dictionary, Second Edition, page 281, as:

"In its broadest sense, the word applies to every person who enters into a contract or takes upon himself contract obligations of any kind, but as the word is ordinarily used it is applied to any person who, in the pursuit of an independent business, undertakes to do a specific piece of work for other persons, using his own means and methods, without submitting himself to their control in respect to its details. The true test of a contractor would seem to be that he renders service in the course of an independent occupation, representing the will of his employer only as to the result of his work, and not as to the means by which it is accomplished. See *Storm v. Thompson*, 185 Iowa, 309, 20 A.L.R. 658, 660, 170 N.W. Rep. 403.

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A contractor on public road work is, therefore, a person (or company, etc.) who has contracted to perform public road work, such road work being done as an independent occupation.

Question "2." pertains to the transportation of gravel, etc., for "later use by such governmental agency on public road work." In this regard, I assume that the materials will be intended for use by the agency in doing road work with its own forces. Under the above definition of "contractor," however, I do not believe that a governmental agency can be considered a contractor within the purview of the exemption. In performing public road work, the state or a township, city, or county would be doing its own work, not working for another nor contracting to do work. Some might argue that the word "contractor" should apply to anyone doing the road work; however, in using that very word the legislature has limited the meaning to those contracting to do public road work—and a public agency cannot contract with itself. Accordingly, answering questions "2." and "8.," I conclude that a governmental agency doing

public road work with its own forces is not a "contractor" within the purview of the exemption provision.

It appears to be clear that where the contractor hires a carrier to deliver materials to be used on public road work, the motor vehicles used for the delivery of the materials would be operating *for the contractor*, and the exemption provision would apply. In such a case there would be an agreement between the contractor and the carrier. But where a contractor hires a party to transport road work materials and such party hires a third party to do the transporting, the operation of the motor vehicles would not be on behalf of (for) the contractor, there being no agreement between the contractor and the said third party (the carrier) for the transporting of the materials. Question "6." is, therefore, answered in the negative.

Also, if the federal government pays the carrier for transporting the materials, the operation of the motor vehicles would be for the federal government, not the contractor. Thus, Question "4." is also answered in the negative.

As to Question "3.," if the roads in question are public roads and if the motor vehicles are used for contractors as discussed above, then the exemption would clearly apply.

Coming to the situation where the motor vehicles are used to *remove* gravel, sand, dirt or other materials from the site of the public road work (Question "5.") it would appear that such should be considered as much a part of the road work as is the delivery of materials. And, in such a case, even though the carrier might pay the contractor for the material which is removed, or receive it free, I am of the opinion that the removal of the material would be *for the contractor* within the exemption provision.

Where the carrier obtains the material free, or actually pays for it (Question "5. (a)"), it is true that the situation is somewhat different from that where the carrier is hired to remove material. The fact remains, however, that the material is removed for the contractor, and the contractor must make some agreement to allow the carrier to remove the material; and there is no third party intervening such as discussed above. In actuality, in such a case, the carrier is given the privilege to remove the material for the contractor.

As to Question "7.," while that question refers to "transportation charges" I believe that the answer depends on who engages the carrier,

rather than who pays him—or even if he gets paid at all. That is, if the carrier is hauling the materials under agreement with, and for, the contractor, rather than for a third party, then the exemption will apply.

In conclusion, therefore, it is my opinion and you are advised:

1. Under the exemption provisions of division (A) (7) of Section 4923.02, Revised Code, persons operating motor vehicles for contractors on public road work are not “private motor carriers” or “contract motor carriers by motor vehicle” under Sections 4923.01 through 4923.17, Revised Code; and such is true even though said motor vehicles are not operated exclusively *on* the area where the road work is being performed, so long as the operation is for the purpose of the road work.

2. Where an operator of a motor vehicle transports road materials to a stockpile, said materials to be used by a contractor on public road work, and such transporting is done for the contractor, the exemption provision of division (A) (7) of Section 4923.02, Revised Code, applies to the operation of the motor vehicle.

3. If the exemption provision of division (A) (7) of Section 4923.02, Revised Code, is to apply, the person transporting the materials must be doing so under agreement with the contractor performing the public road work; and where the transporter is operating under agreement with some party other than the contractor, the operation of the motor vehicle is not “for the contractor” with the exemption provision.

4. For the exemption to apply, there is no necessity that the contractor pay the transporter for the delivery or removal of any road materials or other matter associated with the road work; and the exemption will apply even if the transporter does his work for no pay, or even pays the contractor to remove materials or matter, so long as said transporter is working under an agreement with the contractor.

5. As used in division (A) (7) of Section 4923.02, Revised Code, the word “contractor” does not include a governmental agency which performs public road work with its own forces.

Respectfully,

MARK McELROY

Attorney General