NOT DESIGNATED FOR PUBLICATION

No. 114,168

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

MIDWEST CRANE & RIGGING, LLC,
Appellant,

v.

KANSAS CORPORATION COMMISSION,
Appellee.

MEMORANDUM OPINION

Appeal from Shawnee District Court; REBECCA W. CROTTY, judge. Opinion filed August 5, 2016. Affirmed.

Kurt S. Brack, of Overland Park, for appellant.

Dustin L. Kirk, assistant general counsel, of the Kansas Corporation Commission, for appellee.

Before BUSER, P.J., ATCHESON and SCHROEDER, JJ.

BUSER, J.: Under provisions of the Unified Carrier Registration Act (UCR) and agreement, 49 U.S.C. § 14504a (2012), motor carriers, motor private carriers, and freight forwarders operating in interstate or international commerce must pay an annual registration fee (UCR fee) to their '"base-State"' in an amount calculated on the size of their '"commercial motor vehicle"' fleet. 49 U.S.C. § 14504a(a)(1), (2), (f) (2012). The UCR was implemented by an interstate agreement under which individual states have the option of participating in the collection and sharing of UCR fee revenues. 49 U.S.C. § 14504a(e), (g), (h). Kansas is among the states that have elected to participate in the UCR. See K.S.A. 2015 Supp. 66-1,115; K.S.A. 2015 Supp. 66-1,139a; K.A.R. 82-4-

30a(c) (2015 Supp.) ("An interstate regulated motor carrier shall not operate in interstate commerce over the highways of this state unless the carrier is registered in the carrier's base state pursuant to 49 U.S.C. 14504a(a)(2) [of the UCR].").

The UCR grants participating states the authority to enforce its provisions by issuing citations and imposing fines and penalties on any motor carrier, motor private carrier, freight forwarder, broker, or leasing company that fails to submit required information documents or pay UCR fees. 49 U.S.C. § 14504a(i)(4). See K.S.A. 66-1,142b(a) ("Any person violating any statute, commission orders or rules and regulations adopted by the state corporation commission pursuant to the motor carrier act and other laws relevant to motor carriers shall be subject to a civil penalty of not less than $100 and not more than $1,000 for negligent violations, and not more than $5,000 for intentional violations.").

After a trooper with the Kansas Highway Patrol cited Midwest Crane & Rigging, LLC (Midwest)—a limited liability company in the business of leasing cranes and skilled operators to the construction industry—for failing to register and pay UCR fees, the Kansas Corporation Commission (KCC) assessed a civil penalty against Midwest. Midwest sought judicial review, but the district court upheld the agency action. Midwest appeals.

On appeal, Midwest challenges the assessment of the civil penalty on two grounds. First, Midwest contends it is not obligated to comply with the requirements of the UCR because its self-propelled cranes do not qualify as commercial motor vehicles. Second, Midwest contends the traffic stop that led to the citation and civil penalty was unconstitutional under the Fourth Amendment to the United States Constitution, and § 15 of the Kansas Constitution Bill of Rights. Having carefully considered the parties' arguments and the record, we affirm the judgment of the district court.

FACTUAL AND PROCEDURAL BACKGROUND

On October 24, 2013, Kansas Highway Patrol Trooper Christopher Beas stopped one of Midwest's vehicles on I-35 in Johnson County because it did not display a license plate. The vehicle, a 1992 Mack Truck with a Gross Vehicle Weight Rating (GVWR) of 33,001 pounds, had an ordinary truck chassis with a boom crane attached between the cab and the flat bed of the truck. Trooper Beas testified that although he believed the vehicle qualified as a "straight truck" at the time of the traffic stop, he later learned that the vehicle was more accurately classified as a self-propelled crane.

The driver of the vehicle informed Trooper Beas that he had been traveling to a job site in Linwood, Kansas, where the boom crane would be used to hoist and position an air conditioning unit on a roof. In order to accomplish this task, the vehicle was hauling a tool known as a "spreader beam," that crane operators use to lift air conditioning units. This long, metal beam prevents the hoisting cables from crushing the sides of the unit. At the time of the vehicle stop, the spreader beam was not attached to the crane. It was transported on the bed of the truck and secured by rigging.

Trooper Beas, a "Commercial Vehicle Safety Alliance (CVSA) Level II Inspector," believed the driver and vehicle were subject to the rules and regulations of the Federal Motor Carrier Safety Administration (FMCSA). As a result, Trooper Beas performed a "Level II Walk-Around inspection" of the vehicle to "determine compliance with the laws, rules and regulations relating to motor carriers." As part of the inspection, Trooper Beas contacted his dispatcher to "run a [UCR] check on Midwest." The dispatcher reported that Midwest had not paid UCR fees for 2014 or any other year.

Based on his inspection, Trooper Beas determined that Midwest was not in compliance with motor carrier safety rules and regulations, and he completed a "Driver/Vehicle Examination Report" which listed two violations by the company: (1) a

"Vio Code" of "392.2UCR," described as "Failure to pay UCR fee," contrary to section "392.2" and (2) a "Vio Code" of "392.2RG," described as "State vehicle registration or License Plate violation, vehicle not registered," contrary to section "392.2."

Trooper Beas also issued the driver a misdemeanor citation under K.S.A. 2014 Supp. 8-142 for the license plate registration violation. But the State voluntarily dismissed the citation after it determined that Midwest's vehicle qualified as a self-propelled crane, which was exempt from state vehicle registration and licensing requirements under K.S.A. 2015 Supp. 8-128(b) and this court's holding in *State v. Zeit*, 39 Kan. App. 2d 364, 180 P.3d 1068 (2008).

On October 29, 2013, the KCC issued a "Notice of Violation" of the "Federal Motor Carrier Safety Regulations, as adopted by K.S.A. 66-1,129 and K.A.R. 82-4-3 et seq." against Midwest. Based on Trooper Beas' inspection of the self-propelled crane, the KCC cited Midwest for "[f]ailure to register and pay UCR [f]ees" in violation of "392.2," and it assessed a civil penalty of $300. Midwest subsequently requested an administrative hearing "concerning the placement of a UCR violation on [its] carrier profile."

An administrative hearing was held on May 9, 2014. Testimony and arguments presented to the KCC focused on whether Midwest's self-propelled cranes qualified as commercial motor vehicles under the UCR.

The UCR adopts the definition of commercial motor vehicle as set forth in Subchapter I of the Motor Carrier Safety Improvement Act (MCSIA), *i.e.*, 49 U.S.C. § 31100 *et seq*. (2012), which governs state grant programs. 49 U.S.C. § 14504a(a)(1)(A) (2012). Under the UCR, a commercial motor vehicle is a self-propelled vehicle "used on the highways in commerce principally to transport passengers or cargo" if the vehicle (1) has "a [GVWR] or gross vehicle weight of at least 10,001 pounds, whichever is greater," (2) is designed to transport more than 10 passengers (including the driver), or (3) is used

in the transportation of hazardous material. (Emphasis added.) See 49 U.S.C. § 14504a(a)(1)(A)(ii) (2012); 49 U.S.C. § 31101(1), (A) - (C) (2012).

This definition, however, is not used consistently throughout the MCSIA. For example, Subchapter III of the MCSIA, which governs the authority of the FMCSA, uses a different definition of the term commercial motor vehicle. 49 U.S.C. § 31132(1) (2012). According to 49 U.S.C. § 31132(1), (A) - (D) (2012), a commercial motor vehicle is a "self-propelled or towed vehicle used on the highways in interstate commerce to *transport passengers or property*" if the vehicle (1) has "a [GVWR] or gross vehicle weight of at least 10,001 pounds, whichever is greater, (2) "is designed or used to transport more than 8 passengers (including the driver) for compensation," (3) "is designed or used to transport more than 15 passengers, including the driver, and is not used to transport passengers for compensation," or (4) is used to transport hazardous material. (Emphasis added.)

During this litigation, the parties did not dispute that the self-propelled crane Trooper Beas inspected qualifies as a commercial motor vehicle for purposes of Subchapter III of the MCSIA. In *Midwest Crane v. Federal Motor Carrier Safety*, 603 F.3d 837 (10th Cir. 2010), the United States Court of Appeals for the Tenth Circuit found that Midwest is a motor private carrier subject to the jurisdiction of the FMCSA because its self-propelled cranes fall within Subchapter III's definition of a commercial motor vehicle.

Apart from the definition of a commercial motor vehicle found in Subchapter III of the MCSIA, which applies to vehicles used "to transport passengers or property," however, the UCR applies to vehicles used "principally to transport passengers or cargo." (Emphasis added.) See 49 U.S.C. § 14504a(a)(1)(A)(ii) (2012); 49 U.S.C. § 31101(1) (2012); 49 U.S.C. § 31132(1) (2012). As a consequence, the critical question before the

KCC was: While Midwest uses its self-propelled cranes to transport property, does it also use its vehicles to principally transport cargo?

At the administrative hearing, William Miller, Midwest's Managing Member, testified that Midwest is registered to do business in at least Kansas and Missouri and the company operates in interstate commerce. Midwest owns and operates about 33 cranes—27 rubber-tired cranes and 6 track cranes—and Miller testified the crane at issue was one of Midwest's rubber tire cranes. According to Miller, "[The cranes] are only on the road an incidental amount of time. Typically, the cranes work at construction sites for extended periods of time and then travel to the next construction site, where they again are utilized." In other words, "the crane[s are] on the road simply to get either from [Midwest's] yard to a job site or from one job site to another." Miller also testified that Midwest's cranes "do not principally transport passengers or cargo" for hire; instead, Midwest is simply a "crane service." Miller maintained that the cabs of the cranes generally only hold one person (the driver) and, similar to the spreader beam transported on the vehicle in this litigation, the only property operators transport to job sites, aside from the cranes themselves, are the company tools used in the operation of the crane.

While Midwest conceded that it qualifies as a motor private carrier under federal law, Midwest argued that it was "not subject to UCR fees assessed against [such] carriers according to the number of commercial motor vehicles in its fleet" because its self-propelled cranes do not fall within the UCR's definition of the term commercial motor vehicle. In particular, Midwest argued its cranes do not principally transport persons or cargo.

At the hearing, Midwest insisted the words cargo and property could not be conflated because cargo, *i.e.*, "'[g]oods transported by a vessel, airplane, or vehicle; Freight,'" is merely a subset of the broad and inclusive term "personal property." In short, although all cargo is property, not all property is cargo. On the other hand, the KCC staff

contended that Midwest was subject to the requirements of the UCR because the terms "'cargo' and 'property' must be read interchangeably," since the word cargo is most appropriately defined as any "personal property that may be moved" from one location to another for commercial purposes.

On August 28, 2014, the KCC issued an order upholding the civil assessment levied against Midwest for failure to pay UCR fees. The KCC recognized that Midwest "now accepts the FMCSA's jurisdiction over its operation in the field of motor carrier safety" due to the Tenth Circuit's holding in *Midwest Crane*. Although the KCC tacitly accepted Midwest's assertion that its duty to register and pay UCR fees turned on the status of its vehicles as "commercial motor vehicle[s]," the KCC disagreed with Midwest's attempt to place its self-propelled cranes outside the purview of the UCR.

In particular, the KCC determined that while the MCSIA contains two different definitions of the term commercial motor vehicle, it was unreasonable to interpret 49 U.S.C. § 31101(1) (2012) and 49 U.S.C. § 31132(1) (2012) in a manner that would place Midwest under the jurisdiction of the FMSCA but exclude Midwest from the purview of the UCR. Consequently, the KCC concluded that Midwest bore a duty to register and pay UCR fees because it "is a motor carrier operating commercial motor vehicles," and due to Midwest's obligation "to pay UCR fees for the self-propelled crane at issue in this [case]," *i.e.*, a "straight truck with a crane apparatus, or personal property, attached," the company must pay the civil penalty.

After the KCC denied Midwest's request for reconsideration, Midwest petitioned for judicial review. Ultimately, the district court affirmed the KCC's ruling and it also denied Midwest's constitutional challenge to the legality of the stop itself.

In its ruling, the district court found that substantial competent evidence supported the KCC's determination that the vehicle at issue in this case was a "straight truck with a

crane apparatus attached" and, thus, Midwest qualified as a motor private carrier that transports property. The district court further found the KCC's interpretation of the terms cargo and property was "reasonable" because the terms "are used within a single act [and] it is proper statutory interpretation to conclude one definition of '[commercial motor vehicle]' is meant to be regulated by the statute as a whole. [Citation omitted.]" Lastly, the district court ruled the traffic stop was legal because Trooper Beas made a mistake of fact, not a mistake of law, when he stopped Midwest's vehicle for not displaying a license plate.

Midwest timely appeals.

MIDWEST'S OBLIGATION TO COMPLY WITH THE UCR

On appeal, Midwest contends the district court erred when it upheld the KCC's assessment of a civil penalty for failure to pay UCR fees because, despite the district court's contrary finding, the company is not subject to the requirements of the UCR. Midwest insists that its vehicles do not fall within the UCR's definition of the term commercial motor vehicle, that is, "a self-propelled . . . vehicle used on the highways in commerce *principally* to transport passengers or cargo." See 49 U.S.C. § 14504a(a)(1)(A)(ii) (2012); 49 U.S.C. § 31101(1) (2012). In order to resolve this issue, we must interpret and apply 49 U.S.C. § 14504a(a) (2012), related statutes and regulations.

In matters of statutory interpretation, we are guided by the following rules and standards of review. We exercise unlimited review over questions involving the interpretation or construction of a statute, owing "'[n]o significant deference'" to the agency's interpretation or construction. *Ft. Hays St. Univ. v. University Ch., Am. Ass'n of Univ. Profs*, 290 Kan. 446, 457, 228 P.3d 403 (2010); see also *Douglas v. Ad Astra Information Systems*, 296 Kan. 552, 559, 293 P.3d 723 (2013) ("[T]he doctrine of

operative construction . . . has been abandoned, abrogated, disallowed, disapproved, ousted, overruled, and permanently relegated to the history books where it will never again affect the outcome of an appeal.").

The most fundamental rule of statutory construction is that the intent of the legislature governs if that intent can be ascertained. *Neighbor v. Westar Energy, Inc*., 301 Kan. 916, 918, 349 P.3d 469 (2015). An appellate court must first attempt to ascertain legislative intent through the statutory language enacted, giving common words their ordinary meanings. *Cady v. Schroll*, 298 Kan. 731, 738, 317 P.3d 90 (2014). Where there is no ambiguity in the statutory language, the court does not need to resort to statutory construction; only if the statute's language or text is unclear or ambiguous does the court use canons of construction or legislative history to construe the legislature's intent. 298 Kan. at 738-39.

In performing our analysis, we are also mindful of the provisions of the Kansas Judicial Review Act (KJRA), K.S.A. 77-601 *et seq*. Under the KJRA—which governs our standard of review for appeals from KCC decisions—we review a challenge to the KCC's factual findings in light of the record as a whole to determine whether the findings are supported to the appropriate standard of proof by substantial competent evidence. See K.S.A. 66-118c; K.S.A. 2015 Supp. 77-621(c)(7).

"'[S]ubstantial evidence' refers to "'evidence possessing something of substance and relevant consequence to induce the conclusion that the award was proper, furnishing a basis [of fact] from which the issue raised could be easily resolved.'" *Ward v. Allen County Hospital*, 50 Kan. App. 2d 280, 285, 324 P.3d 1122 (2014). In considering the record as a whole, we must "(1) review evidence both supporting and contradicting the agency's findings; (2) examine the presiding officer's credibility determination, if any; and (3) review the agency's explanation as to why the evidence supports its findings." *Williams v. Petromark Drilling*, 299 Kan. 792, 795, 326 P.3d 1057 (2014); see K.S.A.

2015 Supp. 77-621(d). We must not, however, reweigh the evidence or make our own independent review of the facts. K.S.A. 2015 Supp. 77-621(d); *Williams*, 299 Kan. at 795.

Having summarized our rules and standards of review, we return to the issue presented. The crux of this appeal centers on the meaning of the term commercial motor vehicle.

At the outset, it is worth noting that this controversy could have been avoided. As mentioned above, in *Midwest Crane*, the United States Court of Appeals for the Tenth Circuit found that Midwest is a motor private carrier. 603 F.3d at 839-41. The UCR requires any motor carrier, motor private carrier, and freight forwarder operating in interstate or international commerce to pay a UCR fee to their '"base-State"' in an amount dependent upon the size of the commercial motor vehicle fleet the carrier operates. 49 U.S.C. § 14504a(a)(1), (2), (f) (2012). According to 49 C.F.R. § 367.30 (2015), which outlines the UCR fee schedule for registration years beginning in 2010, motor carriers, motor private carriers, or freight forwarders that own or operate "0-2" commercial motor vehicles are required to pay a UCR fee of $76. It appears, therefore, that Midwest's duty to register and pay fees under the UCR is grounded in its identity as a motor private carrier, rather than the number of commercial motor vehicles in its fleet. Nevertheless, in this appeal the parties focus on whether the self-propelled crane Trooper Beas inspected qualifies as a commercial motor vehicle for purposes of the UCR, and we will address the issue the parties have presented.

As explained above, commercial motor vehicle is a term of art, which is defined differently throughout federal statutes and regulations. See, *e.g.*, 49 U.S.C. §§ 31101(1); 31132(1); 31301(4) (2012); 49 C.F.R §§ 350.105; 382.107; 390.5 (2015). The UCR defines a commercial motor vehicle as follows:

"(A) In general.—Except as provided in subparagraph (B), the term 'commercial motor vehicle'—

(i) for calendar years 2008 and 2009, has the meaning given the term in section 31101; and

(ii) for years beginning after December 31, 2009, means *a self-propelled vehicle described in section 31101*.

(B) Exception.—With respect to determining the size of a motor carrier or motor private carrier's fleet in calculating the fee to be paid by a motor carrier or motor private carrier pursuant to subsection (f)(1), the motor carrier or motor private carrier shall have the option to include, in addition to commercial motor vehicles as defined in subparagraph (A), any self-propelled vehicle used on the highway in commerce to transport passengers or property for compensation regardless of the gross vehicle weight rating of the vehicle or the number of passengers transported by such vehicle." (Emphasis added.) 49 U.S.C. § 14504a(a)(1) (2012).

In other words, for purposes of the UCR, a commercial motor vehicle is, for the years after December 31, 2009, a self-propelled vehicle described in 49 U.S.C. § 31101(1) (2012), which is the definitional statute for Subchapter I of the MCSIA. 49 U.S.C. § 14504a(a)(1)(A)(ii) (2012).

Subchapter 49 U.S.C. § 31101(1) (2012) provides:

"In this subchapter—

"(1) 'commercial motor vehicle' means (except in section 31106) a self-propelled or towed vehicle used on the highways in commerce *principally to transport passengers or cargo*, if the vehicle—

(A) has a [GVWR] or gross vehicle weight of at least 10,001 pounds, whichever is greater;

(B) is designed to transport more than 10 passengers including the driver; or

(C) is used in transporting material found by the Secretary of Transportation to be hazardous under section 5103 of this title and transported in a quantity requiring placarding under regulations prescribed by the Secretary under section 5103." (Emphasis added.)

As explained above, however, Subchapter III of the MCSIA operates under a different definition of the term commercial motor vehicle, and it contains its own definitional statute, 49 U.S.C. § 31132(1) (2012), which provides:

> "In this subchapter—
>
> "(1) 'commercial motor vehicle' means a self-propelled or towed vehicle used on the highways in interstate commerce to *transport passengers or property*, if the vehicle—
>
> (A) has a gross vehicle weight rating or gross vehicle weight of at least 10,001 pounds, whichever is greater;
>
> (B) is designed or used to transport more than 8 passengers (including the driver) for compensation;
>
> (C) is designed or used to transport more than 15 passengers, including the driver, and is not used to transport passengers for compensation; or
>
> (D) is used in transporting material found by the Secretary of Transportation to be hazardous under section 5103 of this title and transported in a quantity requiring placarding under regulations prescribed by the Secretary under section 5103." (Emphasis added.)

In reaching their legal conclusions, the KCC and the district court conflated the definitions of the term commercial motor vehicle in 49 U.S.C. § 31101(1) (2012) and 49 U.S.C. § 31132(1) (2012). The commission and the court found the interchanging of the terms cargo and property was reasonable because the two similar definitions exist within the same statutory scheme. As the KCC explained:

> "The Commission agrees with [Midwest]'s argument that although 'cargo' includes 'property,' not all 'property' is 'cargo.' The terms can be used synonymously in some instances, but not all. The commission does not agree, however, that the definition of 'commercial motor vehicle' is different in meaning and purpose throughout the FMCSA statutes such that [Midwest]'s cranes would fall into one category but not the other. Rather, the meaning of 'commercial mother vehicle' is consistent between 49 U.S.C. § 31101(1) and 49 U.S.C. § 31132."

We question this approach. Chapter 311 of Title 49 of the United States Code deals with "Commercial Motor Vehicle Safety," and 49 U.S.C. § 31101 (2012) and 49 U.S.C. § 31132 (2012) are part and parcel of this federal statutory scheme. 49 U.S.C. § 31101 (2012), however, is found within Subchapter I of Chapter 311, which is entitled "General Authority and State Grants"; whereas 49 U.S.C. § 31132 (2012) is found within Subchapter III of Chapter 311, which is entitled "Safety Regulations."

We are persuaded that Congress' inclusion of two differing definitions for the term commercial motor vehicle within the same statutory scheme was not accidental or the result of legislative oversight. Instead, the different definitions evidence Congress' intent to narrow the definition of commercial motor vehicle in some ways and broaden it in others to fit the various needs of each Subchapter within Chapter 311.

For example, with regard to *safety* matters covered in Subchapter III, Congress utilized a broader definition of commercial motor vehicle that encompasses vehicles that carry property, rather than just cargo. But Congress employed a narrower definition of commercial motor vehicle in Subchapter I, which does not address safety matters per se. Similarly, with respect to *public finance* matters addressed in Subchapter I, the definition set forth in 49 U.S.C. § 31101(1) (2012) is broader than the Subchapter III definition, since Subchapter I applies to vehicles in *intra*state commerce, a provision that is constitutionally permissible in an interstate compact like the UCR, but not in a federal mandate like the Subchapter III-based FMCSA. In short, Congress' inclusion of two similar, but not identical definitions for the term commercial motor vehicle within the same statutory scheme appears intentional.

Nevertheless, while the KCC erred when it found the terms for property and cargo may be used interchangeably within the MCSIA, we find the KCC's determination that Midwest was subject to the UCR was correct for a different reason: The self-propelled crane at issue meets the UCR's definition of a commercial motor vehicle because

Midwest's self-propelled vehicle principally transported cargo—the crane apparatus and tools necessary for its operation including, in this case, the spreader beam tied down to the truck bed.

Congress did not define the term cargo in either the UCR or the MCSIA. Given the absence of a statutory definition, both parties advance a definition for the term cargo, which they insist comports with the term's ordinary meaning found in dictionaries and in common parlance. According to the KCC staff: "The crane itself is the property. It is being transported on the truck whenever it is moving. It is a good being transported which fits the definition of 'cargo.' It is an extremely persuasive proposition if not an absolute truism—cargo is property."

On the other hand, Midwest argues that property is a determinate thing over which an individual possesses a "right of ownership," whereas the term cargo is "'goods or merchandise conveyed in a ship, airplane, or vehicle.'" As the KCC in its ruling understood Midwest's legal position:

> "Respondent concedes its self-propelled cranes are 'property' for purposes of FMCSA safety regulations, and even recognizes its cranes fall under the title of 'commercial motor vehicle' under the same safety regulations. Respondent does not believe, however, that it is subject to FMCSA's UCR fees, arguing its cranes are outside the definition of 'commercial motor vehicle' as pertaining to UCR fees because they do not transport cargo. Respondent reasons that 'cargo is a separate, narrower category than 'property,' concluding that although 'cargo' is 'property' not all 'property' is 'cargo.'"

What is meant by the term cargo as used in the UCR's definition of a commercial motor vehicle? At the outset, we note that Congress has defined cargo for purposes of air commerce and safety as "property, mail, or both." 49 U.S.C. § 40102(a)(12) (2012). This definition, in a related federal statutory context, suggests that property is cargo when it is

transported by air in commerce. Clearly, in this context, cargo is a kind of property with the defining difference being that it is being moved or transported by air.

Beyond the context of air transportation and federal regulations, standard dictionary definitions of cargo are consonant with this understanding. According to Black's Law Dictionary 255, 782 (10th ed. 2014), cargo is most appropriately defined as "[g]oods transported by a vessel, airplane, or vehicle; FREIGHT," and freight is defined as "[g]oods transported by water, land, or air." Webster's II New College Dictionary 168, 447(1995) defines cargo as "[f]reight carried by a ship, aircraft, or other transport vehicle," and freight is defined as "[g]oods transported by a vessel or vehicle, esp. goods transported as cargo by a commercial carrier . . . [a] burden: load," or "[the c]ommercial transportation of goods." Finally, the American Heritage Dictionary of the English Language 282, 701 (5th ed. 2011) contains a similar definition for the term cargo, "[t]he freight carried by a ship, an aircraft, or another vehicle," with freight defined as "[g]oods carried by a vessel or vehicle, especially by a commercial carrier; cargo . . . [a] burden; a load," or the "[c]ommercial transportation of goods."

Given the frequent reference to the term goods used in defining the term cargo, we note that Black's Law Dictionary 808-09 (10th ed. 2014), defines goods as, "[t]angible or moveable personal property other than money." Here again, the definition of cargo relates closely to personal property with the additional quality that it is capable of being "moveable" which suggests its ability to be transported.

Applying these definitions, we conclude that for purposes of the UCR, the term cargo is most appropriately defined as goods, *i.e.*, tangible or moveable personal property, other than money, transported or conveyed by a self-propelled vehicle for commercial purposes.

With this definition in mind, we must resolve the question: In the present case, does the crane apparatus, spreader beam, and tools Midwest was hauling on the self-propelled vehicle to the job site in Linwood, Kansas, qualify as cargo?

Midwest claims that its cranes do not "fall under the narrower 'cargo' definition" and then provides a definition of a crane which includes, in part, "'a big machine with a long arm that is used by builders for lifting and moving heavy things.'" Midwest does not explain, however, how this equipment is not a moveable piece of personal property transported on a self-propelled vehicle.

Although Midwest does not argue that the crane apparatus cannot be cargo because it is attached to the self-propelled truck, the KCC points out that although the crane apparatus is affixed to the truck chassis, the apparatus itself is still a form of moveable personal property which Midwest transports for commercial purposes. Alternatively, the KCC asserts that if the crane apparatus does not qualify as cargo, Midwest's vehicles "haul other cargo; the equipment necessary to operate the crane."

The KCC's initial point is essentially derived from the findings of the United States Court of Appeals as explained in *Midwest Crane v. Federal Motor Carrier Safety*, 603 F.3d 837, 841 (10th Cir. 2010), when it determined: "The record indicates that Midwest's self-propelled cranes are designed to operate, and do operate, in highway traffic to transport property in the performance of a commercial function."

In making this finding, the Tenth Circuit relied on *Harshman v. Well Service, Inc*., 248 F. Supp. 953 (W.D. Pa.1964), *aff'd per curiam* 355 F.2d 206 (3d Cir. 1965). In *Harshman*, the plaintiff argued that its cement-pumping equipment, which was permanently mounted on a truck and transported to job sites was not property for purposes of 49 U.S.C. § 31132(1). The judge in *Harshman* rejected the plaintiff's argument reasoning:

> "It is fair to say that whenever those pump trucks moved in interstate commerce, as they often did, the prime purpose . . . of such movement was to transport the pumping equipment . . . to and from a job site. Plaintiffs contend that there was no such 'property' transported by the trucks, since, by their view, the pumping equipment has to be viewed as 'unitized' in the truck itself. This view I regard as highly unrealistic. The pumping equipment had nothing to do with the mechanical function of the trucks. Had it not been permanently affixed to the truck chassis, it is scarcely imaginable that [Midwest] would contest its classification in the category of 'property' for transportation." 248 F. Supp. at 958.

From this federal caselaw it is apparent that the permanent attachment of the crane to the truck does not vitiate its characterization as property. But is it cargo?

We are persuaded the self-propelled vehicle in question was a commercial motor vehicle for purposes of 49 U.S.C. § 31101(1) (2012). The vehicle was used on the highway in commerce principally to transport the crane, spreader beam, and tools to the job site in Linwood in order to hoist an air conditioner onto the roof of the building. In this commercial enterprise, Midwest's crane, spreader beam, and tools were separate, moveable items of personal property or goods which, transported together to the worksite, were all necessary to enable Midwest Crane to hoist an air conditioner onto the roof of the building. Under these circumstances, Midwest's moveable personal property constituted cargo for purposes of the UCR.

Finally, similar to *Midwest Crane*, the crane in this case does not cease to be cargo, *i.e.*, moveable personal property, simply because it is affixed to the truck on which it is transported. Despite their attachment, the truck and crane retain their independent character because the crane does not in any way affect the mechanical functioning of the truck. The attachment merely makes the crane easier to transport from one jobsite to another without the need for loading and unloading.

On a related matter on appeal, Midwest also asserts the KCC "produced no evidence at the hearing that Midwest used the cranes to *principally* transport passengers or cargo." As claimed by Midwest, "The KCC's orders must be invalidated because neither is supported by substantial competent evidence in light of the record as a whole." As summarized earlier, under the KJRA we review Midwest's challenge to the KCC's factual findings in light of the record as a whole to determine whether those findings are supported by substantial competent evidence. See K.S.A. 2015 Supp. 66-118c; K.S.A. 2015 Supp. 77-621(c)(7).

In support of this issue, Midwest notes Miller's testimony stating that Midwest does not principally transport passengers or cargo. But this testimony is predicated on Miller's understanding of the term cargo as meaning "hauling something for someone. Cargo, typically, like in trucking, it's a load you're hauling for somebody, taking it to a destination." (Interestingly, on appeal, Midwest does not argue that Miller's understanding of the term cargo is appropriate in this case.)

Our review of the record convinces us there was substantial competent evidence to show that Midwest operated the self-propelled vehicle on the highway in commerce principally to transport cargo. See 49 U.S.C. § 31132(1) (2012). Trooper Beas described the vehicle, crane apparatus, and spreader beam, and pictures corroborated his testimony. Evidence showed that the vehicle was traveling to a job site where it would be used for its sole intended purpose—to hoist an air conditioner onto a roof using the crane and spreader beam.

Moreover, Mike Hoeme, Director of Transportation for the KCC testified that Midwest was in the business as a private motor carrier utilizing commercial motor vehicles to transport their own equipment to jobsites. According to Hoeme, the "crane and/or any pieces of equipment they use to transport would be considered cargo or property. I believe they are one and the same."

Finally, the record reflects Midwest's own concession that the crane apparatus and spreader beam are cargo. The UCR provides:

> "The number of commercial motor vehicles owned or operated by a motor carrier, motor private carrier, or freight forwarder for purposes of [determining the appropriate UCR fee] shall be based either on the number of commercial motor vehicles the . . . carrier . . . has indicated it operates on its most recently filed MCS-150 or the total number of such vehicles it owned or operated for the 12-month period ending on June 30 of the [prior] year." 49 U.S.C. 14504a(f)(3).

At the administrative hearing, a copy of a "Motor Carrier Identification Report" that Midwest filed with the FMCSA on May 3, 2013, was admitted in evidence. On the report, Midwest was asked to circle any and all "Cargo Classifications" that apply. In response, Midwest circled "Machinery, Large Objects." In short, the agency action was supported by substantial competent evidence.

In summary, we have considered all the issues and arguments raised by Midwest in its brief related to the matter of the UCR classification. We find no reversible error. Although we find error in the KCC and district court's conflation of the terms property and cargo as used within the MCSIA, we find their determination that Midwest was subject to the UCR was correct. Midwest is subject to the requirements of the UCR because the self-propelled vehicle in question was hauling cargo. When an agency tribunal or district court reaches the right result, its decision will be upheld even though the tribunal or court relied upon the wrong ground or assigned erroneous reasons for its decision. See *In re Tax Appeal of Fleet*, 293 Kan. 768, 775, 272 P.3d 583 (2012); *Hockett v. The Trees Oil Co.*, 292 Kan. 213, 218, 251 P.3d 65 (2011).

THE LEGALITY OF THE TRAFFIC STOP

Midwest contends: "Because Trooper Beas made a mistake of law, he had no reasonable suspicion to stop the self-propelled crane. Without reasonable suspicion to stop the self-propelled crane, any and all evidence from the resulting stop must be suppressed." The KCC makes two responses. First, the KCC asserts that K.S.A. 74-2108(b) authorizes Kansas Highway Patrol troopers to stop private motor carriers without any reasonable suspicion of criminal conduct and inspect their vehicles to determine compliance with laws, rules, and regulations pertaining to motor carriers. Alternatively, the KCC argues that Trooper Beas had a reasonable belief based on a mistake of fact that the vehicle was in violation of Kansas law. As a result, the stop was legally permissible.

The record shows that Trooper Beas testified that he is a Commercial Vehicle Safety Alliance (CVSA) Level II Inspector. According to the trooper:

> "K.S.A. 74-2108 gives the Kansas Highway Patrol the authority to require the driver of any motor vehicle operated by any motor carrier to stop and submit to an inspection to determine compliance with the laws, rules and regulations relating to motor carriers. Additionally, K.A.R. 82-4-2a gives the Kansas Highway Patrol the authority to examine motor carrier equipment operating on the highways in Kansas, and examine the manner of the motor carrier's conduct as it relates to the public safety and the operation of commercial motor vehicles in Kansas."

Trooper Beas testified that he stopped the Midwest vehicle due to its failure to display a valid license plate. According to the trooper:

> "Whenever I inspect a vehicle, I like to have—I don't like to just pull vehicles over and not have any findings. But I like to have, if I'm pulling somebody over as far as a commercial motor vehicle, I would prefer to have something to put in there. Rather than just pulling over anybody and having no violations at all, I prefer to have some kind of

> violation. So whenever I saw a vehicle that didn't have registration, I believed that I had at least one violation at that point.
>
> . . . .
>
> "I assumed that if there wasn't a registration on there, that there was probably other violations and I wanted to investigate further."

Trooper Beas confirmed, however, that as a trooper he was authorized to inspect motor carriers at any time. Moreover, had he not observed any purported violations related to the Midwest vehicle he was still permitted to stop it to conduct a motor carrier inspection.

Upon stopping the Midwest vehicle, Trooper Beas conducted an extensive Level II Walk-Around inspection which involved a detailed examination of documents and assessment of vehicle safety and operating systems. At the conclusion of the inspection, the trooper completed a driver/vehicle examination report for submission to the Kansas Highway Patrol's Motor Carrier Safety Assistance Department. This report referenced two violations, one of which was "Failure to pay UCR fee."

Prior to our consideration of the merits, we consider a procedural matter. An appellant is required, under the Kansas Rules of Appellate Procedure, to begin each issue "with citation to the appropriate standard of appellate review." Supreme Court Rule 6.02(a)(5) (2015 Kan. Ct. R. Annot. 41). Midwest seeks judicial review of this issue pursuant to K.S.A. 77-621(c)(1) which permits our review when the "agency action, or the statute or rule and regulation on which the agency action is based, is unconstitutional on its face or as applied." Although Midwest cites this standard of review, it fails to explain or brief how the KCC's order requiring Midwest to pay UCR fees is unconstitutional either facially or as applied. Midwest does not challenge, let alone brief, the constitutionality of any enabling statutes or the authority of the KCC to issue its order. Moreover, Midwest has wholly failed to argue or provide any statutory or caselaw precedent which shows that a trooper's motor carrier inspection which follows a vehicle

stop made without reasonable suspicion of a crime thereby renders a KCC statute or order unconstitutional.

This failure by Midwest is consequential. A point raised incidentally in a brief and not argued therein is deemed abandoned. *Friedman v. Kansas State Bd. of Healing Arts*, 296 Kan. 636, 645, 294 P.3d 287 (2013). Additionally, failure to support a point with pertinent authority or show why it is sound despite a lack of supporting authority is akin to failing to brief the issue. *State v. Tague*, 296 Kan. 993, 1001, 298 P.3d 273 (2013). Under K.S.A. 2015 Supp. 77-621(c)(1) we can only order relief if we determine that the agency's action, statutes, or regulations are unconstitutional. Midwest has failed to identify, argue, or brief an issue for which judicial review is permitted under K.S.A. 2015 Supp. 77-621(c)(1), thus abandoning this issue.

We note, however, that our review of the search and seizure question may be appropriate under a statutory provision that Midwest does not cite with respect to this issue. K.S.A. 2015 Supp. 77-621(c)(4) permits a court to consider whether the "agency has erroneously interpreted or applied the law." Given that the statute does permit our review under this subsection we will address the merits of this search and seizure issue.

With regard to the merits of the vehicle stop, Midwest invokes the constitutional protections against unreasonable searches and seizures found in the Fourth Amendment to the United States Constitution, made applicable to the states through the Fourteenth Amendment, and § 15 of the Kansas Constitution Bill of Rights. Constitutional issues may be raised at the agency level, but they are decided by the courts. *In re Property Valuation Appeals of Various Applicants*, 298 Kan. 439, 446-47, 313 P.3d 789 (2013), *cert. denied* 135 S. Ct. 51 (2014); *Katz v. Kansas Dept. of Revenue*, 45 Kan. App. 2d 877, 895, 256 P.3d 876 (2011), *rev. denied* 297 Kan. 1246 (2013). After Midwest raised this issue before the KCC, it reprised its argument before the district court that the vehicle stop was unconstitutional because Trooper Beas made a mistake of law when stopping

the vehicle. The district court disagreed, finding that the trooper made a reasonable mistake of fact, "because he stopped the vehicle believing it to be a straight truck that required registration." As a result, the district court ruled that "the stop was proper and the exclusionary rule d[id] not apply."

On appeal, Midwest claims that Trooper Beas' mistake was not of fact but of law, and his mistaken belief that the vehicle required license plate registration meant "the subsequent stop was unlawful and all evidence gathered following the stop should be suppressed." By asserting that whatever evidence that was seized by Trooper Beas as a result of the inspection must be suppressed, Midwest tacitly invokes the exclusionary rule.

The exclusionary rule operates to protect Fourth Amendment rights in criminal cases by preventing the use of unconstitutionally obtained evidence against the subject of the illegal search and seizure. *State v. Daniel*, 291 Kan. 490, 496, 242 P.3d 1186 (2010), *cert. denied* 563 U.S. 945 (2011). This rule is a judicially created sanction for constitutional violations, not a constitutional right in itself. See *Davis v. United States*, 564 U.S. 229, 248, 131 S. Ct. 2419, 180 L. Ed. 2d 285 (2011).

But Midwest does not argue or brief the application of the exclusionary rule in the present unique situation—an administrative proceeding involving the assessment of a civil fine against a motor carrier whose employee was stopped while driving the company's vehicle. Midwest's failure to adequately brief the applicability of the exclusionary rule is readily apparent in three contexts.

First, Midwest has failed to establish or even address the company's standing to object to the vehicle stop in the context of an administrative hearing. See *State v. Talkington*, 301 Kan. 453, 473, 345 P.3d 258 (2015) ("standing" in the Fourth Amendment context is an aspect of the substantive law, *i.e.*, whether the Fourth

Amendment protected *this particular* litigant's rights); see also 6 LaFave, Search and Seizure § 11.3(e), p. 266 (5th ed. 2012) ("An absent owner lacks standing to object to a temporary *seizure* of the vehicle, for such an intrusion 'is personal to those in the car when it occurs,' although 'unusual circumstances' could produce a different result, for a 'stop might implicate a vehicle owner's possessory interests, as where the stop meaningfully deprives the vehicle owner of the anticipated use of his car or truck.'") Here, Midwest makes no claim or showing that the brief stop of the vehicle and driver meaningfully deprived the company of the use of its vehicle. In short, Midwest assumes standing in this administrative context but does not argue, brief, or prove it.

Second, presuming that Midwest has standing to object to the vehicle stop, and the stop was unconstitutional, Midwest does not assert or brief that the exclusionary rule may be applied in this unique context—a KCC administrative proceeding. In *Martin v. Kansas Dept. of Revenue*, 285 Kan. 625, 641, 176 P.3d 938 (2008), our Supreme Court quoted the United States Supreme Court that "'[i]n the complex and turbulent history of the [exclusionary] rule, the Court never has applied it to exclude evidence from a civil proceeding, federal or state.'" Moreover, in *Martin*, our Supreme Court pointed out: "Nor does our research reveal any case in which we have previously applied the exclusionary rule to suppress unlawfully obtained evidence in an *administrative* or civil context." (Emphasis added.) 285 Kan. at 641. Indeed, our Supreme Court adopted the view of the United States Supreme Court that the exclusionary rule is "applicable only where its deterrence benefits outweigh its substantial social costs." 285 Kan. 626, Syl. ¶ 8. In the case on appeal, Midwest assumes the applicability of the exclusionary rule without any argument or briefing regarding the benefits versus the social costs of applying the exclusionary rule to a KCC administrative proceeding.

Third, assuming Midwest has standing, the vehicle stop was unconstitutional, and the exclusionary rule applies, Midwest does not address how the vehicle stop produced evidence to be suppressed. "[E]vidence will not be excluded as 'fruit' unless the illegality

is at least the 'but for' cause of the discovery of the evidence." *Segura v. United States*, 468 U.S. 796, 815, 104 S. Ct. 3380, 82 L. Ed. 2d 599 (1984). In other words, there must be "a 'factual nexus between the illegality and the challenged evidence,'" which requires that, "at a minimum, 'a defendant must adduce evidence at the suppression hearing showing the evidence sought to be suppressed would not have come to light but for the government's unconstitutional conduct.' [Citations omitted.]" *United States v. Chavira*, 467 F.3d 1286, 1291 (10th Cir. 2006). For example, a person's name is "not excludable evidence and may not serve as second-generation excludable 'fruits' or as the first-generation 'poisonous tree' that may yield such fruits." *Gibson v. State*, 138 Md. App. 399, 414, 771 A.2d 536 (2001).

Inexplicably, Midwest does not identify or describe what evidence was illegally seized during the stop. We are left to assume that Midwest means the KCC's mere use of information obtained by Trooper Beas during the vehicle stop and inspection was improper because, according to Midwest, the vehicle stop was not supported by the trooper's reasonable suspicion of a violation of law.

Trooper Beas contacted the dispatcher about Midwest's UCR registration during the vehicle inspection, but the *stop* arguably did not *cause* the resultant evidence. Since Midwest's name was emblazoned on the door of the vehicle in question, and the truck's characteristics were in plain view as it traveled down the highway, Trooper Beas did not need to stop or seize the vehicle to learn Midwest's name, observe that it was a commercial vehicle traveling down the highway, or contact the dispatcher to ascertain whether the requisite UCR payment had been made.

"The burden of proving the invalidity of agency action is on the party asserting invalidity." K.S.A. 2015 Supp. 77-621(a)(1). In the present case, Midwest has failed in all three aspects to prove that the KCC's imposition of fees was invalid because evidence obtained by Trooper Beas' vehicle stop should have been suppressed pursuant to the

exclusionary rule. Moreover, Midwest has failed to even argue or brief these important aspects of the search and seizure issue it has raised.

Once again, issues not briefed by the appellant and points raised incidentally in a brief and not argued therein are deemed waived or abandoned on appeal. See *Friedman*, 296 Kan. at 645; *Superior Boiler Works, Inc. v. Kimball*, 292 Kan. 885, 889, 259 P.3d 676 (2011). Similarly, failure to support a point with pertinent authority or show why it is sound despite a lack of supporting authority or in the face of contrary authority is akin to failing to brief the issue. See *Tague*, 296 Kan. at 1001. Given Midwest's several failures to establish the Fourth Amendment's constitutional framework that must be shown in order to warrant imposition of the exclusionary rule, we find that Midwest has waived or abandoned its claim that the vehicle stop was unconstitutional.

Nevertheless, even if Midwest had properly briefed its Fourth Amendment claim, its argument still fails on its merits because Trooper Beas had a lawful basis to conduct the traffic stop. As the KCC points out, Trooper Beas, a member of the Kansas Highway Patrol, has the "authority to stop 'any or all motor carriers, trucks or truck tractors for the purpose of conducting spot checks to insure compliance with any state law relating to the regulation of motor carriers, trucks or truck tractors.' [Citation omitted.]"

Importantly, in reply, Midwest does not challenge the constitutional validity of K.S.A. 74-2108(b) which permits troopers to conduct random, regulatory stops, and inspections of motor carriers. Nor does Midwest controvert that Trooper Beas had the authority pursuant to that statute to randomly stop Midwest's vehicle to conduct an inspection on October 24, 2013. Instead, Midwest simply states that the trooper's reason or subjective purpose in making the stop (a mistaken belief that the vehicle was required to display a license plate) controls the constitutionality of the regulatory inspection which followed the vehicle stop.

In Kansas, "[c]ommercial motor carriers are highly regulated." *State v. Bone*, 27 Kan. App. 2d 582, 584, 6 P.3d 914 (2000). As a result, Kansas Highway Patrol troopers are "authorized and directed to execute and enforce the laws of this state relating to public and private motor carriers of passengers or property, including any rules and regulations relating to such laws." K.S.A. 74-2108(b). This power includes the authority to require the driver of any commercial vehicle to "stop and submit such vehicle to an inspection to determine compliance with such laws and rules and regulations." K.S.A. 74-2108(b). See K.S.A. 2015 Supp. 66-1324(c) (nothing in this section, which governs the operation of inspection stations for motor carriers, "shall be construed as prohibiting the superintendent of the highway patrol or any member of the state highway patrol from stopping any or all motor carriers, trucks or truck tractors for the purpose of conducting spot checks to insure compliance with any state law relating to the regulation of motor carriers, trucks or truck tractors").

"Individuals engaged in a closely regulated industry have a significantly reduced expectation of privacy." *Bone*, 27 Kan. App. 2d at 585. Moreover, in *State v. Crum*, 270 Kan. 870, Syl. ¶ 1, 19 P.3d 172 (2001), our Supreme Court found that random stops of commercial vehicles by Kansas Highway Patrol troopers to conduct motor carrier inspections do not violate the Fourth Amendment:

> "A warrantless inspection of a motor vehicle authorized to transport property for hire and subject to regulations of the State of Kansas that was stopped by an officer of the Kansas Highway Patrol solely to conduct an inspection pursuant to K.S.A. 74-2108(b) without any suspicion on the part of the officer that there was a violation of any laws of the State of Kansas, does not violate either the Fourth Amendment to the United States Constitution or Section 15 of the Bill of Rights of the Kansas Constitution."

Midwest focuses on Trooper Beas' initial subjective reason for making the stop, his mistaken belief that the Midwest vehicle should have displayed a license plate. But the trooper testified that his intent was two-fold; to cite the vehicle for failing to display a

license plate *and* perform a regulatory inspection. As the trooper testified, "I assumed that if there wasn't a registration on there, that there was probably other violations and I wanted to investigate further." As a result, Trooper Beas conducted an extensive Level II Walk-Around inspection as he was authorized to do under K.S.A. 74-2108. The record shows that Trooper Beas had two reasons to stop the Midwest vehicle, and one of those reasons—to conduct an inspection—was clearly authorized under Kansas law. This inspection resulted in the KCC's finding of a regulatory violation, not a violation of the criminal or traffic laws.

In this unique factual context, Trooper Beas' initial subjective purpose for making the vehicle stop is irrelevant to Fourth Amendment analysis. What *is* relevant is whether the vehicle stop was legally justified under an objective view of the particular facts and circumstances. We consider Trooper Beas' lawful authority under K.S.A. 74-2108(b) to make a vehicle stop to conduct an inspection—which Midwest does not contest on appeal—is determinative in establishing the validity of the stop.

Midwest presumes that because Trooper Beas did not have a reasonable suspicion of a traffic violation that his mistaken belief abrogates the statutory authority provided to the Kansas Highway Patrol to conduct random, warrantless commercial vehicle stops without the need of any reasonable suspicion of a violation of law. We know of no such legal precedent. On the contrary, *Crum* provides guidance that regulatory inspections conducted pursuant to K.S.A. 74-2108 are in compliance with Fourth Amendment precepts without any requirement of reasonable suspicion.

On this record, we hold that Trooper Beas was within his lawful authority to stop Midwest's vehicle in order to inspect it, with or without any reasonable suspicion of a violation of Kansas law. Additionally, any evidence obtained as a result of the regulatory inspection was admissible at the KCC administrative hearing. The ruling of the district court that the vehicle stop was proper and the exclusionary rule did not apply under the

circumstances is affirmed despite the court's reliance on mistaken reasons for its decision. See *In re Tax Appeal of Fleet*, 293 Kan. at 775; *Hockett*, 292 Kan. at 218.

Affirmed.

* * *

ATCHESON, J., dissenting: Distilled to its essence, this case presents a simple question for our consideration: Is a crane permanently affixed to the chassis of a truck and then used with the truck as a single piece of equipment on construction projects "cargo" within the common meaning or understanding of the word? After performing some linguistic magic, the majority concludes it must be so, leaving me mystified and confused. I can't see how that trick was done. The crane shouldn't be considered cargo. I would reverse the rulings of the Kansas Corporation Commission and the Shawnee County District Court and set aside the civil penalty imposed on Midwest Crane & Rigging.

Midwest Crane attached a crane to a Mack truck chassis and drives the truck-crane unit to various job sites, where the crane—still and permanently on the truck—lifts stuff. The company has a number of comparable truck-crane units. They do not travel on public roads other than going to and from jobs. Nothing in the record indicates the truck-cranes impede traffic or need special accommodations, such as a pilot car. Some of them require permits as oversized vehicles, although the particular unit at issue here apparently does not.

By federal statute, owners of "commercial motor vehicles" may be required to pay a fee for those vehicles if they have business operations in states participating in the unified carrier registration plan. See 49 U.S.C. § 14504a (2012). Kansas and Missouri participate in the plan. Midwest Crane has a corporate office in Missouri and facilities in both states. The fee statute incorporates by reference the definition of "commercial motor

vehicle" from 49 U.S.C. § 31101, appearing in subtitle VI, part B, chapter 311. Pertinent here, the term covers any "self-propelled . . . vehicle used on the highways in commerce principally to transport passengers or cargo [and] has a . . . gross vehicle weight of at least 10,001 pounds." 49 U.S.C. § 31101(1)(a) (2012). Midwest Crane's truck-crane is self-propelled, used on a highway in commerce, and exceeds the weight set in the statute. Everybody agrees it doesn't transport more than 10 passengers—the minimum number necessary to be a commercial motor vehicle. The truck-crane, therefore, would come within the statutory scheme only if it "principally . . . transport[s] . . . cargo."

If that's correct, Midwest Crane must pay a statutory fee for the truck-crane unit and the other comparable units in its commercial fleet. It hasn't, which is why the KCC imposed the civil penalty the company challenges in this appeal.

The word "cargo" has not been specially defined in any of the governing statutes or regulations. And no court has explained what cargo entails in this statutory context. (Or more precisely, perhaps, nobody involved in this case has unearthed that definition. I am skeptical the federal regulatory swamp harbors no such critter, but it has evaded my best efforts to coax it into the open.) Absent an express statutory definition, words of a statute should be given their ordinary and common meaning. *Walters v. Metropolitan Educational Enterprises, Inc.*, 519 U.S. 202, 207, 117 S. Ct. 660, 136 L. Ed. 2d 644 (1997); *Bennett v. CMH Homes, Inc.*, 770 F.3d 511, 515 (6th Cir. 2014); *Garetson Brothers v. American Warrior, Inc.*, 51 Kan. App. 2d 370, 383, 347 P.3d 687 (2015). Regular dictionaries, of course, customarily serve as a prime source for usual word meanings. See, *e.g.*, *Walters*, 519 U.S. at 207-08; *State v. Schreiner*, 46 Kan. App. 2d 778, 783-84, 264 P.3d 1033 (2011), *rev. denied* 296 Kan. 1135 (2013).

This dictionary-reading exercise yields a definition of "cargo" as "goods or merchandise conveyed in a ship, airplane, or vehicle," thus, "freight." Merriam-Webster's Collegiate Dictionary 187 (11th ed. 2003) (definition of "cargo"). Goods and

merchandise both refer to things produced for sale. See Merriam-Webster's Collegiate Dictionary 539 (11th ed. 2003) ("goods" defined as "something manufactured or produced for sale"); Merriam-Webster's Collegiate Dictionary 776 (11th ed. 2003) ("merchandise" defined as "the commodities or goods that are bought and sold in business"). Freight means "goods to be shipped" or "cargo." Merriam-Webster's Collegiate Dictionary 500 (11th ed. 2003). Those are accepted definitions of the words. Comparable definitions reside in other dictionaries. See The American Heritage Dictionary of the English Language 282 (5th ed. 2011) (defining "cargo); 701 (defining "freight"); 757 (defining as noun "goods," sense 4); Webster's Encyclopedic Unabridged Dictionary of the English Language 223 (1996) (defining "cargo"); 566 (defining "freight"); 609 (defining "goods," sense 43).

Cargo, then, refers to salable items or similar things being moved from one place to another by truck, train, or other conveyance. The objects are placed on the conveyance, transported, and then removed. They are separate from the means of conveyance. And the conveyance may move with or without particular cargo or any cargo.[1]

[1]The items need not be for sale immediately before shipping or upon arrival to be cargo. For example, a person could load his or her own furniture on a truck to move the pieces from a permanent residence to a summer place for the season. The furniture would not then be intended for sale, but it would be cargo. More generally, however, furniture would be goods or merchandise, *i.e.*, a product commonly manufactured for sale. The basic idea of cargo entails moveable commodities or things. That is, the items themselves can be picked up and moved, not that they move because they have been permanently incorporated into and become part of a means of transportation.

Conversely, something that is affixed to a motor vehicle or other conveyance and intended to be used continuously with the vehicle is not cargo by any common understanding. For example, a camper top attached to a pickup truck wouldn't be cargo in any conventional sense. But three or four of those tops tied down and shipped from the manufacturer to a dealer on a flatbed truck would be. The majority's approach in defining

Midwest Crane's truck-crane as cargo ignores the difference. The crane is affixed to and never leaves the truck chassis. That's not cargo.

The majority's reasoning necessarily invites other strange conclusions. Many cargo ships have cranes attached to their decks to load and unload freight. Those cranes could not reasonably be considered cargo. They constitute an operational part of the freighters just like engines and anchors. I presume the majority, if asked, would have to say that the gun in the turret of a tank constitutes cargo. Maybe not. But I don't see how it would be logically distinguished from the crane atop the truck chassis.

And I offer a final illustration relying on an entirely more prosaic means of conveyance: a pair of cargo pants. The pants, of course, are so named because they typically have four or more large pockets with closeable flaps. The stuff the wearer puts in the pockets would be his or her cargo. But the pockets themselves or the belt loops—permanently affixed to the pants—aren't cargo. Nor would be the troop insignia a Boy Scout (or more likely his mother) sews on one of the pockets.

The majority cites the common definitions of cargo, goods, and freight and then promptly ignores them. The opinion never explains just how the truck-crane fits any of those definitions in later outlining the bases for its holding.

Before more closely examining the gaps in those bases, I mention another aspect of the federal statutory scheme the majority discusses. Midwest Crane's truck-cranes are subject to federal driver safety statutes and regulations under Title 49, subtitle VI, part B, chapter 313. See *Midwest Crane and Rigging, Inc. v. Federal Motor Carrier Safety Administration*, 603 F.3d 837, 841 (10th Cir. 2010). Chapter 313 uses a different definition of "commercial motor vehicle" that includes vehicles transporting "property" (rather than cargo) or at least 16 passengers (rather than 10). 49 U.S.C. § 31301(4) (2012). In the *Midwest Crane* case, the Tenth Circuit found one of the company's cranes

to be "property" within the meaning of the safety statutes even after it had been mounted on a truck chassis. *Midwest Crane*, 603 F.3d at 841. Although the safety rules and their application to Midwest Crane are interesting, they really have nothing to do with the statutory question before us.

As the majority correctly concludes "property," as used in 49 U.S.C. § 31301(4), is not synonymous or interchangeable with "cargo," as used in 49 U.S.C. § 31101(1)(a), appearing in a related but separate chapter of Title 49. Typically, courts presume a particular word or phrase carries the same meaning throughout a statute and, conversely, different words or phrases convey different meanings. See *Law v. Siegel*, 571 U.S. ___, 134 S. Ct. 1188, 1195, 188 L. Ed. 2d 146 (2014) (applying """normal rule of statutory construction""" recognizing that "words repeated in different parts of the same statute generally have the same meaning"); *Russello v. United States*, 464 U.S. 16, 23, 104 S. Ct. 296, 78 L. Ed. 2d 17 (1983) (use of different terms within a statute demonstrates legislative intent to convey different meanings); *Jane Doe No. 1 v. Backpage.com*, 817 F.3d 12, 23 (1st Cir. 2016) ("The normal presumption is that the employment of different words within the same statutory scheme is deliberate, so the terms ordinarily should be given differing meanings."). Courts should deviate from those presumptions only if the legislature clearly expresses a contrary intent, as it has with the dual and differing definitions for the term "commercial motor vehicle."

Applying those canons of construction here, cargo is property. But not all property is cargo. The majority's approach, however, casts the difference aside. If the crane is cargo, I have a hard time seeing when a commercial motor vehicle would transport property that's not cargo.

Had Congress intended to impose the fee payment requirement so broadly it would have incorporated by reference the definition for commercial motor vehicles used in the safety statutes, 49 U.S.C. § 31301(4), that relies on the transportation of "property,"

rather than the definition in 49 U.S.C. § 31101(1)(a) that relies on the transportation of "cargo." By treating the crane as cargo (even though it isn't), the majority effectively ignores that congressional choice and extends the payment of fees to commercial motor vehicles transporting property. The KCC relied on the same false equivalence of property and cargo and similarly erased any meaningful distinction between the statutes defining commercial motor vehicles using those different words.

To explain its rationale, the opinion first returns to the Tenth Circuit's decision in *Midwest Crane* and an earlier federal district court case on which the appellate court relied in finding the crane to be property. Here, of course, nobody disputes that the truck-crane is property or that the driver safety regulations apply. But, as I have suggested, those cases have nothing to do with the crane as cargo, triggering the obligation to pay fees.

The majority then pronounces itself "persuaded" the truck-crane transports "cargo" and, therefore, satisfies the definition for vehicles required to pay fees. The majority simply identifies the crane as cargo without any additional explanation. Voila! The majority goes on to say the truck-crane also transports equipment to be used with the crane and those accouterments have to be cargo. Those things very well could be cargo. But the definitional statute requires the vehicle be used "*principally* to transport . . . cargo." (Emphasis added.) 49 U.S.C. § 31101(1)(a). The truck-crane's principal (and only) use depends upon the permanently attached crane. The related items would not be transported if there were no crane. So they neither satisfy the statute nor make the majority's case.

The majority next mistakenly suggests whether the truck-crane carries cargo and, thus, fits the statutory definition somehow presents an issue of fact rather than a question of law. It doesn't. The relevant facts—primarily the physical configuration of the truck-crane and what the vehicle carries to and from jobs—are undisputed, and the answer to

the question turns on whether the crane constitutes "cargo" within the meaning of 49 U.S.C. § 31101(1)(a). See *State v. Turner*, 293 Kan. 1085, 1086, 272 P.3d 19 (2012) (interpretation of statute presents question of law); *State v. Arnett*, 290 Kan. 41, 47, 223 P.3d 780 (2010) (same); *Estate of Belden v. Brown County*, 46 Kan. App. 2d 247, 258-59, 261 P.3d 943 (2011) (when controlling facts undisputed, issue presents question of law). Moreover, the majority submits substantial evidence supports the KCC's determination the permanently affixed crane constitutes cargo—the standard for reviewing an agency's finding of fact, not a conclusion of law. *Redd v. Kansas Truck Center*, 291 Kan. 176, 187-88, 239 P.3d 66 (2010) (In deciding questions of law under the Kansas Judicial Review Act, K.S.A. 77-601 *et seq.*, appellate courts owe no particular deference to the agency's interpretation of governing law.). The majority's characterization of the controlling point as one of fact rather than law amounts to a misdirection.

This substantial evidence includes the testimony of the Kansas Highway Patrol trooper issuing the citation. The trooper accurately described the vehicle during the administrative hearing, and the description was corroborated by photographs he took during the stop. Although the testimony may factually establish what the truck-crane looked like—something Midwest Crane never disputed—it doesn't answer the governing legal question of what "cargo" means in 49 U.S.C. § 31101(1)(a) .

As additional substantial evidence, the majority cites the testimony of KCC Director of Transportation Mike Hoeme at the administrative hearing that the crane should be "considered cargo or property" because he "believe[s] they are one and the same." Hoeme's opinion that cargo and property are the same either generally or for purposes of the controlling federal statutes is irrelevant. *United States v. Lupton*, 620 F.3d 790, 799-800 (7th Cir. 2010) ("[T]he meaning of statutes, regulations, and contract terms is 'a subject for the court, not for testimonial experts.'") (quoting *United States v. Caputo*, 517 F.3d 935, 942 [7th Cir. 2008]); *Birnholz v. 44 Wall Street Fund, Inc.*, 880 F.2d 335, 341 n.8 (11th Cir. 1989); *LID Associates v. Dolan*, 324 Ill. App. 3d 1047, 1058, 756

N.E.2d 866 (2001) ("An expert witness, however, is not competent to give testimony amounting to statutory interpretation.")[2]

[2]The majority mentions the hearing testimony of William Miller, a Midwest Crane executive, about what he considers cargo and then pooh-poohs his assessment because, I guess, it disrupts the magic trick. Miller offered a definition that sounds a lot like the conventional one. But Miller's personal take on the meaning of statutory language is no more relevant than Hoeme's.

Finally, the majority relies on an MCS-150 form Midwest Crane filed with the United States Department of Transportation in May 2013 apprising the agency of its current contact information and operating status. Motor vehicle carriers with USDOT identification numbers—a group that includes carriers subject to the safety regulations—are required to submit the reporting form every 2 years. The instructions for the 1-page, check-the-box form state that a company must file "if the property or passengers being transported will ever. . . [c]ross State lines." See Instructions for Completing the Motor Carrier Identification Report (MCS-150), at 3, www.fmcsa.dot.gov/sites/fmcsa.dot.gov/files/docs/MCS-150-Instructions-and-Form.pdf (accessed July 7, 2016) (a copy of this document has been filed with the Clerk of the Appellate Courts). Midwest Crane comes within that directive.

One of the 29 boxes on the MCS-150 form bears the printed title "Cargo Classifications" and has a series of short descriptive phrases for the filer to check. The Midwest Crane executive completing the form in 2013 indicated the descriptor of "machinery, large objects." That box doesn't distinguish between property and cargo, and there is no particular option for so indicating on the form. By way of explanation, the instructions say only that the box "[r]efers to the types of materials the company transports or ships (offers for transport)." Instructions, at 5. The last cargo classification is an undesignated "other" with a place for the filer to insert a description. According to the instructions, the filer making that selection should then "enter the name of the

commodity." Instructions, at 5. I suppose Midwest Crane could have used that classification and indicated "none" or something similar.

Midwest Crane's completed form hardly seems a stunning admission that the company's truck-crane units meet the statutory requirements for paying fees. Although the MCS-150s are used, in part, to assess registration fees, the form's boilerplate ought not be given weight in an administrative or judicial proceeding focusing on the meaning of "cargo" as used in the governing statutes. Nor do the instructions shed any light on the appropriate definition. Even assuming the completed form reflects an evidentiary admission of Midwest Crane, it presents no more than an opinion of the company executive that the truck-crane units are or carry "cargo" under some sense of the word. In that context, the admission would be no more determinative of the legal question before us and, hence, the proper interpretation of the statutory language than the opinion testimony of Hoeme or any other witness at the administrative hearing. See *Oleksy v. Farmers Ins. Exchange*, 410 S.W.3d 378, 383 (Tex. App. 2013) (appellate court "not bound to accept the parties' agreed but mistaken interpretation of law"); *cf. State v. Weber*, 297 Kan. 805, 814, 304 P.3d 1262 (2013) (appellate courts "do not permit parties to stipulate" to legal conclusions to be drawn from admitted facts); *Urban Renewal Agency v. Reed*, 211 Kan. 705, 712, 508 P.2d 1227 (1973) (same).

I am left to ponder both how the majority escapes the common meaning of the word "cargo" and, then, what turns a crane permanently attached to a truck into cargo. The finale seems more magical than legal. I respectfully dissent and would reverse the rulings of the KCC and the district court.[3]

[3]Because I would reverse the civil penalty assessed against Midwest Crane on statutory grounds, I would not, then, need to address the company's argument based on the claimed violation of its rights under the Fourth Amendment to the United States Constitution. The constitutional challenge presents some knotty issues that I prefer not to debate, since my comments would amount to dicta. By the same token, however, I do not

join in or otherwise express any opinion about how the majority has framed and resolved those issues.