

OPINION
75-14

February 28, 1975 (OPINION)

The Honorable Wayne G. Sanstead
Lieutenant Governor
Office of the Lieutenant Governor
State Capitol
Bismarck, ND 58505

Dear Lieutenant Governor Sanstead:

This is in response to your letter of 26 February 1975 requesting an opinion of this office in regard to the constitutional validity of House Bill 1606, 1975 Session.

The bill provides that any railroad corporation failing to furnish suitable cars for grain loading within the time agreed upon shall be allowed an additional forty-eight hours without penalty to comply with the agreement after which time the corporation or agent thereof shall pay fifty dollars for each subsequent twenty-four hour period during which it fails to furnish suitable cars. It further provides that upon receipt of adequate proof of a violation, the Public Service Commission shall commence a court action to secure payments of such penalty and shall remit the recovery to the entity with whom the agreement was made. It further provides that the railroad can be excused from performance by strikes, public calamity, accidents or any cause not within the power of the railroad to prevent.

Our attention has been called to the decisions of the United States Supreme Court in *Cornwell v. Davis*, 1923, 44 S.Ct. 410, 264 U.S. 560, 68 L.Ed 848, and *Chicago, R.I. & P Ry Co. v. Hardwick Farmers Elevator Co.*, 1913, 33 S.Ct. 174, 226 U.S. 426, 57 L.Ed 284, 46 L.R.A., N.S. 203.

Article 1, Section 7 of the United States Constitution provides in part:

"The Congress shall have Power * * * * To regulate Commerce * * * * among the several States, * * * *" (Deletions by us).

49 U.S.C.A., Section 1, par (10) provides:

"'CAR SERVICE' DEFINED. The term 'car service' in this chapter shall include the use, control, supply, movement, distribution, exchange, interchange, and return of locomotives, cars and other vehicles used in the transportation of property, including special types of equipment, and the supply of trains, by any carrier by railroad subject to this chapter."

49 U.S.C.A., Section 1, par (11) provides:

"DUTY TO FURNISH CAR SERVICE: RULES AND REGULATION. It shall be the duty of every carrier by railroad subject to this chapter to furnish safe and adequate car service and to

establish, observe, and enforce just and reasonable rules, regulations, and practices with respect to car service; and every unjust and unreasonable rule, regulation, and practice with respect to car service is prohibited and declared to be unlawful."

49 U.S.C.A., Section 1, par (14) provides:

"(a) The Commission may, after hearing, on a complaint or upon its own initiative without complaint, establish reasonable rules, regulations and practices with respect to car service by common carriers by railroad subject to this chapter, including the compensation to be paid and other terms of any contract, agreement, or arrangement for the use of any locomotive, car, or other vehicle not owned by the carrier using it (and whether or not owned by another carrier), and the penalties or other sanctions for nonobservance of such rules, regulations, or practices, in fixing such compensation to be paid for the use of any type of freight car, the Commission shall give consideration to the national level of ownership of such type of freight car and to other factors affecting the adequacy of the national freight car supply, and shall, on the basis of such consideration, determine whether compensation should be computed solely on the basis of elements of ownership expense involved in owning and maintaining such type of freight car, including a fair return on value, or whether such compensation should be increased by such incentive element or elements of compensation as in the Commission's judgment will provide just and reasonable compensation to freight car owners, contribute to sound car service practices (including efficient utilization and distribution of cars) and encourage the acquisition and maintenance of a car supply adequate to meet the needs of commerce and the national defense. The Commission shall not make any incentive element applicable to any type of freight car the supply of which the Commission finds to be adequate and may exempt from the compensation to be paid by any group of carriers, such incentive element or elements if the Commission finds it to be in the national interest."

In the Cornwell case cited supra, the action had been brought for damages for breach of the express contract to furnish cars as of a given date promised by the agent. The United States Supreme Court in that case pointed out that it was not necessary to prove that a preference to the contracting shipper resulted to invalidate the agreement, but that actually the assumption by the carrier of the additional obligation of an agreement was necessarily a preference of itself not authorized by the filed and published tariff of the carrier.

Looking to House Bill 1606, not only does it purport to in effect authorize agreements for car service not in accordance with the filed and published tariffs rather than providing for payment of actual damages, it provides for an amount to be computed on a per diem basis without regard to the actual value and extent of damage.

In the Chicago, R. I. and Pac Ry case cited supra, the state statute concerned provided for a recovery of \$1 per day for every day on

which the carrier failed to furnish cars to plaintiff for the movement of grain from a point in Minnesota to other points in Minnesota and to points in other states excusing the furnishing of cars where caused by strikes, public calamities, accident or any cause not within the power of the railroad company to prevent, etc. The United States Supreme Court in that decision pointed out the federal legislation then existent in regard to car service. As there stated: " * * * * the power of the state over the subject-matter ceased to exist from the moment that Congress exerted its paramount and all-embracing authority over the subject. We say this because the elementary and long-settled doctrine is that there can be no divided authority over interstate commerce, and that the regulations of Congress on that subject are supreme."

We would thus conclude that House Bill 1606, 1975 Session, would probably be held to be in violation of the Commerce Clause of the Federal Constitution if a court test developed. We also mention that there can be serious problems as to the nature of the penalty therein considered. The penalty does not seem to be related in any manner to the shipper's actual damage but appears to be purely designed to be a penalty for the violation of a state law. Section 154 of the North Dakota Constitution requires that "fines" for violation of state laws be put into the common school fund. In addition, the action involved appears to be at the expense of the state. Section 185 of the North Dakota Constitution prohibits the making of donations by the state except for the reasonable support of the poor.

We hope the within and foregoing will be sufficient for your purposes.

Sincerely,

ALLEN I. OLSON

Attorney General