

**OPINION
78-20**

June 27, 1978 (OPINION)

Honorable Bruce Hagen
North Dakota Public Service Commissioner
State Capitol
Bismarck, North Dakota 58505

Dear Mr. Hagen:

This is in reply to your letter of June 9, 1978, relative to Section 185 of the North Dakota Constitution. You state the following facts and questions:

"The State Intermodal Transportation Team is currently involved in planning for North Dakota's response to the threatened abandonment of certain railroad lines in North Dakota. Among several alternatives, the concept of a combined federal, state, and local government financial participation, along with private railroad user moneys, contracting for continued service on the otherwise abandonable rail line, is often discussed.

As a preliminary step in the possible preparation and introduction of permissive legislative proposals to this end, the State Intermodal Transportation Team requests your response to the questions set out below.

Pursuant to 45 USC section 744 (c), no rail service may be discontinued and no rail properties may be abandoned, if a financially responsible person (including a government entity) offers to provide a rail service continuation payment which is designed to cover the difference between the revenue attributable to such rail properties and the avoidable costs of providing rail service of such properties, together with a reasonable return on the value of such properties.

The federal government is authorized to provide financial assistance to states for rail freight assistant programs that are designed (sic) to cover (1) the cost of rail service continuation payments and (2) the cost of rehabilitating and improving rail properties on a line of railroad to the extent necessary to permit adequate and efficient rail freight service on such line. 49 USC section 1654 (f).

If the North Dakota legislature were to enact legislation which would

- (1) Authorize a state agency to apply for and administer 45 USC section 744 funds for the continuation of rail freight service on North Dakota lines otherwise to be abandoned;
- (2) Authorize a state agency to apply for and administer 45 section 744 funds for the

rehabilitating and improving rail properties in North Dakota otherwise to be abandoned;

- (3) Authorize a state agency to enter into a contract with a railroad corporation and a rail shippers' corporation, which contract would:
 - (A) Provide for the rehabilitation of properties of the railroad through the expenditure of 45 USC section 744 funds, funds appropriated by the state legislature, and funds supplied by the rail shippers' corporation;
 - (B) Provide for payment of rail service continuation payments to the railroad - the difference between the revenues attributable to such rail properties and the avoidable costs of providing rail service on such properties, together with a reasonable return on the value of such properties - through the expenditure of 45 USC section 744 funds, funds appropriated by the state legislature, and funds supplied by the rail shippers' corporation;
 - (C) Appropriate funds for the purpose outlined in A and B above, specifying that revenues attributable to any rail line which exceed the cost of providing service are to be refunded to the state and the shippers' corporation on a proportional basis,

would such legislation be unconstitutional by reason of Section 185 of the Constitution of North Dakota?

Section 185 states:

The state, any county or city may make internal improvements and may engage in any industry, enterprise or business, not prohibited by Article XX of the Constitution, but neither the state nor any political subdivision thereof shall otherwise loan or give its credit or make donations to or in aid of any individual, association or corporation except for reasonable support of the poor, nor subscribe to or become the owner of capital stock in any association or corporation.

Additionally, if the state legislature were to enact legislation permitting political subdivisions to financially participate in the railroad shippers' corporation, through an authorized tax levy, would this legislation contravene Section 185 of the North Dakota Constitution?

Your opinion on these questions will be of much assistance to the State Intermodal Transportation Team as it prepares to respond to the anticipated abandonment of certain North Dakota railroad lines."

Section 185 of the North Dakota Constitution prohibits the State or any of its political subdivisions from loaning or giving its credit or making donations to or in aid of any individual association or corporation, except for reasonable support of the poor, or when engaged in making internal improvements or when engaged in any industry, enterprise or business not prohibited by the Constitution. See *Northwestern Bell Telephone Co. v. Wentz*, 103 N.W.2d. 245 (ND 1960). *Gripentrog v. City of Wahpeton*, 126 N.W.2d. 230 (ND 1964). The provision does not prohibit the State from contracting to pay for services received by the State. There is an obvious difference between a donation and a loan for which nothing is received in return and a contract in which the State or its political subdivisions agree to pay for services or property received by the State. Thus if the State or its political subdivisions were to agree to pay for railroad services which would not otherwise be available to them, and where the railroads in return to agree to provide services which would not otherwise be available, we do not believe such an agreement would violate Section 185 of the North Dakota Constitution. The State and its political subdivisions would be receiving a service that would not otherwise be available to them and payment for such services would not be a donation, loan or grant of credit. If, on the other hand, the State or its political subdivisions were to make payments with no contractual obligation on the part of the railroad corporation to provide any services, such payment would, in our opinion, be in violation of the provisions of Section 185 of the North Dakota Constitution. We note the statement in *Patterson v. City of Bismarck*, 212 N.W.2d. 374 (ND 1973) at page 389:

"Did the purchase of the plans and specifications . . . and the subsequent leasing of the commercial space to this corporation constitute spending public money in aid of a private corporation?"

"Although the trial court found that the action of the City Commission in this respect amounted to spending city funds in aid of a private corporation, we cannot agree. We have reviewed the testimony in the record and the evidence does not substantiate such a finding. The purchase of the plans and specifications was consummated only after their value had been carefully ascertained by a competent appraisal. Not only was an appraised value placed upon the plans and specifications by an independent consulting firm, but as has been pointed out previously, this firm recommended that upon certain modifications the plans be purchased at the appraised value."

This statement of the North Dakota Supreme Court clearly indicates that a purchase of goods or services does not violate Section 185 of the North Dakota Constitution. In addition we note the contracts would be authorized by Federal legislation. While the State does not necessarily receive a grant of power from authorizing Federal legislation to perform an act otherwise prohibited by State law, we nevertheless realize the agreements would be executed pursuant to Federal legislation and presumably governed by the provisions thereof.

While we have not examined the detailed terms of any specific

proposals under this program at this time, we conclude that if the legislation were to authorize the State or its political subdivisions to enter into a contract with the railroad corporation and a rail shippers' association which would give to the State railroad service which would not otherwise be available or which would be abandoned but for such agreement, the continuation payments would not contravene Section 185 of the North Dakota Constitution.

With regard to your second question, we note the statements of the North Dakota Supreme Court in *Gripentrog v. City of Wahpeton*, 126 N.W.2d. 230 (ND 1964) at page 237:

"Section 185 does not prohibit the making of loans or giving of credit or making donations in connection with a city's engaging in any industry, enterprise, or business except engaging in liquor traffic. What it does prohibit is for a city 'otherwise' to make loans or give its credit or making donations. In other words, making loans or giving credit may be done in connection with the city's engaging in any permissible industry, enterprise, or business, but not otherwise.

"As we said in *Northwestern Bell Telephone Co. v. Wentz* (N.D.), 103 N.W.2d. 245, it is common knowledge that no one can successfully engage in any industry, enterprise, or business without in some manner being involved in lending, the giving of credit, or making of donations. Surely the framers of Section 185 of our Constitution would not have granted to the State and to any county or city the power to engage in industry, enterprise, or business and then have denied them the right to make loan or give credit in connection with the operation of such industry, enterprise, or business."

In the *Northwestern Bell Telephone Co. v. Wentz* decision, *supra*, the Supreme Court stated, at page 253:

"It is common knowledge that a state or anyone else cannot successfully engage in an industry, an enterprise or a business without in some manner being involved in a loan, the giving of its credit, or making of donations, and that in some circumstances it might be advisable to become the owner of capital stock in an association or corporation."

While the form which the financial participation of the political subdivisions in a railroad shippers' corporation has not been explained at this time, such financial participation would apparently be permissible under the statements of the North Dakota Supreme Court quoted above.

Sincerely,

ALLEN I. OLSON

Attorney General