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STATE OF NEBRASKA
OFFICIAL
JAN 4 1994
DEPT. OF JUSTICE

DATE: December 30, 1993

SUBJECT: Legality of project under Light-Density Rail Line Assistance Act.

REQUESTED BY: Allan L. Abbott, Director-State Engineer, Nebraska Department of Roads

WRITTEN BY: Don Stenberg, Attorney General
Jeffery T. Schroeder, Assistant Attorney General

You have requested an Attorney General's opinion concerning the legality of a project under the Light-Density Rail Line Assistance Act, Neb. Rev. Stat. §§ 74-1401 to 1429 (1992 Cum. Supp.). The project involves a loan of Federal Railroad Administration funds for the repair of flood damages on a light density rail line. For the reasons stated below, we believe the project is legal.

The Project

The Nebraska Central Railroad Company (hereinafter "Nebraska Central") is a railroad company authorized to do business in Nebraska and has a 20-year lease from the Union Pacific Railroad Company (hereinafter "UP") on a 48.6 mile standard gauge light-density rail line located between Columbus and Norfolk, Nebraska. Nebraska Central does not own the real or personal property on the line, but is responsible for the maintenance and operation of the line. Another railroad, the Chicago and North Western Transportation Company, also has trackage rights over the line. Nebraska Central began operations as an interstate common carrier on June 27, 1993.

On July 9, 1993, the Nebraska Central rail line was damaged by flood waters. Nebraska Central made repairs to the damaged

line and the repairs have been inspected and meet state and federal requirements.

Nebraska Central contacted the Division of Railroads of the Nebraska Department of Roads (hereinafter "the Department"), to see whether federal funds would be available for a loan to cover the cost of repairs made to the line in accordance with the Light-Density Rail Line Assistance Act. See, Neb. Rev. Stat. §§ 74-1401 to 74-1429 (1992 Cum. Supp.). This project would involve no State funds. The Department assisted the Nebraska Railway Council in applying to the Federal Railroad Administration for approval for a loan of federal funds for this project. The FRA approved the application. On October 29, 1993, the Nebraska Railway Council also approved the loan of $279,995 federal funds for this project.

On November 12, 1993, Richard J. Dinsmore, an attorney representing the United Transportation Union, by letter to the Nebraska Railway Council, questioned the legality of this loan project. Pursuant to the Department's statutory obligation to recommend projects to the Council, you have asked whether this project is a legal project under the Light Density Rail Line Assistance Act.

Discussion

Mr. Dinsmore has four concerns about the Nebraska Central Project. Mr. Dinsmore argues (1) that a "repair" project is not allowed under the Light-Density Rail Line Assistance Act, (2) the Nebraska Central's rail line is not a qualifying Light Density Line because the line is owned by the UP, (3) the Nebraska Railway Council acted improperly in approving the project because one of its members is a management employee of the UP and that this committee member's involvement in approving this project constitutes a conflict of interest, and (4) Nebraska Central cannot comply with Neb. Rev. Stat. § 74-1415.04 which requires security for repayment of the loan by a first lien on real and personal property because the UP owns the real and personal property on the line. These concerns will be addressed below.

The first question is whether a "repair" project is allowed under the provisions of the Light-Density Rail Line Assistance Act (hereinafter "Assistance Act"). In Neb. Rev. Stat. § 74-1415.01, the legislature empowered the Nebraska Railway Council to undertake "light-density rail line acquisition, revitalization, or operation" projects. The legislature, however, defined this phrase as follows:

> Light-Density rail line acquisition, revitalization, or operation shall mean any acts taken to

restore, improve, or maintain access to transportation services provided by a light-density rail line.

Neb. Rev. Stat. § 74-1407.01 (1992 Cum. Supp.). The legislature intended to allow revitalization projects which would include "any acts taken to restore, improve or maintain access to transportation services." The legislature has granted broad powers for the Council to undertake projects to revitalize, restore, improve or maintain a light-density railroad line. We conclude that the Nebraska Central project to repair its rail facility is an eligible revitalization project.

The second question is whether the Nebraska Central Rail Line is a qualified light-density rail line because the line is owned by the UP. State law defines a light-density rail line to be any rail line classified as a light-density rail line under federal law. Neb. Rev. Stat. § 74-1407.01. Federal law requires that financial assistance to states be allowed for projects "only if the line of railroad related to the project is certified by the railroad as having carried 5 million gross ton miles of freight or less per mile during the prior year." 49 U.S.C.S. Appx. § 1654(b)(2) (1992 Supp.). You have advised us that the line now operated by Nebraska Central carried 2.3 million gross ton miles during the prior year. We are aware of no federal or state requirement that the operator of a light-density rail line must also be the owner of the rail line. You have also informed us that the federal government has approved the application for loan funds with knowledge that the line is owned by the UP. The fact that the UP owns this light-density rail line does not make Nebraska Central, the UP's lessee, ineligible for a loan of federal funds under the Assistance Act. The Department should note, however, that the agreement between the Railway Council and Nebraska Central should require immediate repayment of any outstanding loan balance in the event the Nebraska Central lease with the UP expires or is terminated.

The third question involves an alleged conflict of interest by one of the members of the Nebraska Railway Council. We understand that pursuant to Neb. Rev. Stat. § 74-1413(1)(b) (1992 Cum. Supp.), a management employee of the Union Pacific Railroad Company (UP) was appointed to be a member of the Council. The UP is the owner of the line leased to the Nebraska Central on the subject project. The Chairperson of the Council requested that the business plan of the Nebraska Central be reviewed by the UP employee and another committee member because of their knowledge and expertise with these types of issues. See, Neb. Rev. Stat. §§ 74-1415.01 and 74-1415.02. These two committee members reviewed the plans and recommended this project to the full Council. The Council then unanimously approved the project. Someone from the audience at the meeting apparently questioned

whether the UP employee on the committee had a conflict of interest as a Council member on this project. The UP employee then withdrew his vote on the project. The project was unanimously approved by the Council without the UP employee's vote.

You have asked us whether the proposed project is legal in light of this alleged conflict of interest. Please note that there is a preliminary question concerning the scope of review of this question by our office. The Nebraska Railway Council is not a State agency. Questions concerning the legality of matters occurring at Railway Council meetings should be addressed to the Council's attorney. We recognize, however, that the Department of Roads has statutory obligations to "recommend, prepare and review plans and specifications for any project to be proposed to the Council." Neb. Rev. Stat. § 74-1419.02. We also understand that the Department has an interest in the legality of Council projects because the federal funds expended are passed through the Department to the Council. Our opinion is therefore limited to the Department's interest in the legality of the project.

In the Light-Density Rail Line Assistance Act, the legislature contemplated that the Nebraska Railway Council be comprised of persons who have technical expertise concerning railroad issues. Neb. Rev. Stat. § 74-1413 (1992 Cum. Supp.). The legislature also recognized that there was the potential for conflicts of interest because the legislature provided as follows:

> Any council member shall abstain from voting on any decision or policy of the council if such decision or policy will result in any financial benefit or detriment to him or her, any member of his or her family or any business with which he or she is associated, which benefit or detriment is distinguishable from the effects of such actions on the public generally or a broad segment of the public.

Assuming that the UP employee had a conflict of interest when the Council voted on the subject property, the UP employee withdrew his vote and cured the conflict. The legislature only prohibited the committee member from voting on the project; once his vote was withdrawn, the conflict was avoided. The project is not therefore an illegal project.

The fourth question raised in Mr. Dinsmore's letter concerns the application of Neb. Rev. Stat. § 74-1415.04 (1992 Cum. Supp.) to this project. Neb. Rev. Stat. § 74-1415.04 states as follows:

> No investment in any acquiring or operating entity shall be approved unless the council's investment is secured by a first lien on real and personal property the value of which is at least one hundred twenty percent of the amount of the investment.

Mr. Dinsmore argues that Nebraska Central cannot satisfy this requirement because it only leases the railroad line from the Union Pacific Railroad Company. You have attached with your opinion request a letter from the UP pledging as collateral for this loan to Nebraska Central, the track structure located between mileposts 47.7 and 42.5, which the UP calculates is equal to the net liquidation value of the rail and other track materials in the amount of 120% of the funds to be loaned. We feel that it is essential that you verify that the value of the property proposed to serve as security actually exceeds 120% of the value of the investment as required by Neb. Rev. Stat. § 74-1415.05. We believe the question presented by these facts is whether § 74-1415.04 requires that the Council secure a first lien on <u>both</u> real and personal property before it can finance a project.

This question may be premature because it is our understanding that the project has been approved, but no contracts have been signed. Even if § 74-1415.04 requires a first lien on both real and personal property, the project can still be approved if the UP agrees to a first lien against both the real and personal property on the line.

The Nebraska Supreme Court has set out the rules of statutory interpretation as follows:

> In the absence of anything indicating to the contrary, statutory language is to be given its plain and ordinary meaning. When the words of a statute are plain, direct, and unambiguous, no interpretation is necessary or will be indulged to ascertain their meaning. *State v. Brohimer*, 238 Neb. 45, 468 N.W.2d 623 (1991).

Speidell Monuments v. Wyuka Cemetery, 242 Neb. 134, 136, 493 N.W.2d 336, 338 (1992). Section 74-1415.04 requires that before the Council invests in a project, it secure a first lien on "real <u>and</u> personal property" in a certain amount. (Emphasis added.) The word "and" in a statute or a criminal information has been interpreted by the Nebraska Supreme Court at least three times. *See, **In Re Petition of G. Kay, Inc.***, 219 Neb. 24, 361 N.W.2d 182 (1985); ***Rapid Film Service, Inc. v. Bee Line Motor Freight***, 181 Neb. 1, 146 N.W.2d 563 (1966); ***Carlsen v. State***, 127 Neb. 11, 254 N.W. 744 (1934). The Court in ***G. Kay Inc.*** stated the following:

As stated in *Rapid Film Service, Inc. v. Bee Line Motor Freight*, 181 Neb. 1, 4-5, 146 N.W.2d 563, 565-66 (1966):

> We believe the correct interpretation of the language involved herein, in context, is that the word "and" means along with, also, or as well as. The word "and" is "A conjunction connecting words or phrases expressing the idea that the latter is to be added or taken along with the first." Black's Law Dictionary (4th Ed.), p. 112. See *Cincinnati Enquirer, Inc. v. American Sec. & Trust Co., 107 Ohio App. 526, 160 N.E.2d 392; Carter v. Keesling*, 130 Va. 655, 108 S.E. 708; *Porter v. Moores*, 4 Heisk. (Tenn.) 16. Although there is a diversity of authority on this subject, the word "or" may be substituted for the word "and" depending upon the context of the language. See *Carlsen v. State*, 127 Neb. 11, 254 N.W. 744.

In Re Petition of G. Kay, Inc., 219 Neb. at 26, 361 N.W.2d at 184. (Emphasis added.) These cases indicate that the plain and ordinary meaning of the word "and" may depend upon the context in which it is used. A search of the voluminous legislative history of the Assistance Act does not disclose any guidance concerning the meaning of the word "and" in this section. In this case, there is an indication that the legislature did not intend "and" to be given its plain and ordinary meaning based on a reading of the Assistance Act.

The context of § 74-1415.04 does suggest that the legislature may not have intended to require a first lien on both real and personal property. The obvious thrust of this section is to require that Railway Council investments be secured and protected by a first lien on property "the value of which is at least one hundred twenty percent of the amount of the investment." The legislature clearly intended that Railway Council investments be protected for repayment by a lien on assets valued at more than the investment. In this way the legislature is reasonably sure that the Council will recoup its investment. To strengthen this requirement, § 74-1415.05 requires that the value of property to be used as security for repayment be valued by an "independent certified appraiser" to ensure that the property value is sufficient to guarantee repayment.

The question arises as to how a requirement that the first lien be had against both real and personal property would further

the legislature's concern for full repayment of funds loaned or invested. We believe that a first lien on both real and personal property would do nothing to further protect the funds loaned. The Assistance Act Contemplates investments of various types in light-density rail lines and contemplates that this assistance may be provided to railroads, shippers and even public entities in various forms. Nationally, short line railroads are becoming more common. It is not unusual for major railroads to sell or lease short line segments to entities created to respond to the needs of the public on these short lines. The Assistance Act is broad enough to include projects on rail lines owned by one entity and leased to another entity. The legislative findings set out in § 74-1401 are broad enough to show an intent to assist rail companies who do not own the rail line on which they operate. A project on this type of line would not be eligible for funding if the owner of the line was unable to subordinate its interest or its mortgagees interest to give the Railway Council a first lien against the rail and the property. We can find no legislative intent to exclude this class of light-density rail companies from participation in the benefits of this act. It is also not unusual to find that the rail and other track materials are the most valuable part of the rail line. The loan contemplated in this project is to finance the repair of the personal property on the line. Logically, the first lien should be related to the personal property repaired with federal funds, assuming that the personal property is worth at least one hundred and twenty percent of the funds invested.

Based on the context of § 74-1415.04 and the reasoning from ***In Re Petition of G. Kay, Inc.*** set out above, that the word "or" may sometimes be substituted in for the word "and," depending on the context in which "and" is used, we conclude that the legislature did not intend to use the word "and" as conjunctive, but instead meant "and/or." We read section 74-1415.04 to allow a first lien against real property, personal property, or both, depending on what is needed to assure enough security to repay the loan in the event of default. This reading is consistent with the intent of the legislature in passing the Light Density Rail Line Assistance Act. Our conclusion does not, however, mean that the Council should not work diligently to provide adequate security for repayment of loaned funds. We would also note that the Department should require that the first lien be granted by both the lessor and the lessee to ensure that the Council is able to collect repayment of the funds invested in this project.

Conclusion

For the reasons set out above, we believe that the Department can legally recommend the proposed Nebraska Central project to the Nebraska Railway Council.

Sincerely,

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Attorney General

Jeffery T. Schroeder

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Approved:

Attorney General