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STATE OF NEBRASKA
OFFICIAL
MAR 5 1991
DEPT. OF JUSTICE

DATE: March 4, 1991

SUBJECT: Constitutionality of LB 783, First Session, Ninety-Second Legislature, dealing with revitalizing, acquiring and operating light-density railroad lines by the State of Nebraska.

REQUESTED BY: Senator Howard A. Lamb
Nebraska State Legislature

WRITTEN BY: Don Stenberg, Attorney General
Warren D. Lichty, Assistant Attorney General

You have inquired as to the constitutionality of LB 783 and also whether any other problems are apparent with this proposed legislation (the "Bill"). The Bill deals with the three functions of acquiring, operating and revitalizing rail lines. Generally, we believe all three functions are possible of accomplishment under the Constitution of the State of Nebraska.

As to the first function, acquisition, there would appear to be no doubt that the State can be authorized to acquire a railroad right-of-way, its appurtenances, and even rolling stock. There are some problems in connection therewith, however.

First, Neb.Rev.Stat. §74-424 (Reissue 1990) limits the power of State agencies to acquire railroad right-of-way. The second problem has to do with acquisition of abandoned railroad right-of-way, as authorized in section 11, page 8, lines 24-26 of the bill. Once a railroad abandons the use of its right-of-way for railroad purposes, any easement it is occupying terminates and the

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unencumbered fee title to the property reverts to the adjoining landowner or owners. This is true whether the railroad had originally acquired its right-of-way by right of eminent domain, as held in Lillich v. Lowery, 211 Neb. 757, 320 N.W.2d 463 (1982), or whether it acquired it by right-of-way deed, as in George v. Pracheil, 92 Neb. 81, 137 N.W. 880 (1912). Also, many railroad acquisitions were similar to the one addressed in Bode v. Flobert, 197 Neb. 488, 249 N.W.2d 750 (1977), in which the railroad acquired the property by warranty deed for railroad purposes, which deed included reverter upon abandonment language. Thus, there are practical problems in connection with railroad right-of-way that has been abandoned, and it is likely, in such cases, that the railroad would have no title to give and that the State would have to acquire right-of-way from the abutting landowners.

As to the second function, operating a railroad, the Constitution of the State of Nebraska, Article X, section 4, provides that railroads are declared public highways and are open to all. It should therefore be possible to authorize the State to operate railroads for the benefit of the public. See, Oxnard Beet Sugar Co. v. State, 73 Neb. 66, 105 N.W. 715 (1905). Again, the principal problems in connection therewith seem to be practical ones. Would the State's operation of the railroad be conducted by public employees? If not, what bidding procedures would be used in connection with acquiring a contractor to operate the railroad for the State? How often would such a contract need to be rebid?

An analysis of the third function of the Bill, which is revitalization of light-density railroad lines, involves the review of two provisions of the constitution of the State of Nebraska.

The first such provision is Article XI, section 1, which provides:

> No city, county, town, precinct, municipality, or other sub-division of the state, shall ever become a subscriber to the capital stock, or owner of such stock, or any portion or interest therein of any railroad, or private corporation, or association.

Neb.Const. art. XI, §1 (emphasis added). In Nebraska League of Savings and Loan Associations v. Mathes, 201 Neb. 122, 266 N.W.2d 720 (1978), the defendant was the state investment officer of the State of Nebraska. Pursuant to the provisions of Neb.Rev.Stat. §72-1243 (Reissue 1990), the State investment officer is to invest money in all State funds. Thus, it could be argued Mathes supports the proposition that the phrase "sub-division of the state" in Article XI, section 1, of the Constitution, applies to departments and agencies of the State, as well as cities and counties.

However, it is our opinion the phrase "sub-division of the state" should be read in pari materia with the foregoing terms "city", "county", etc. Therefore, despite Mathes it would appear that the State of Nebraska, or a department thereof, does not constitute a "sub-division" for purposes of Article XI, section 1, and the prohibition against stock ownership does not affect the validity of the Bill.

The second provision which should be considered is Article XIII, section 3, of the Constitution of Nebraska, which provides: "The credit of the state shall never be given or loaned in aid of any individual, association, or corporation. . . ." This provision not only prevents making loans to private corporations and persons, but is generally interpreted to prohibit the expenditure of public funds for a private purpose.

Whether the revitalization of light-density rail lines, in accordance with the provisions of the Bill, constitutes a "public purpose" is the type of determination which is made on a case by case basis and for which no hard set rules exist. As the Nebraska Supreme Court has noted, "The notion of what is public use changes from time to time." State ex rel. Douglas v. Nebraska Mortgage Finance Fund, 204 Neb. 445, 457, 283 N.W.2d 12 (1979) (quoting Minnesota Housing Finance Agency v. Hatfield, 297 Minn. 155, 210 N.W.2d 298).

In our Opinion No. 209, dated January 23, 1980, concerning the constitutionality of LB 507 (the source of the Agriculture and Industrial Branch Rail Line Revitalization Act), we discussed the concept of "public purpose" at length.

> What is a public purpose is primarily for the Legislature to determine. A public purpose has for its objective the promotion of the public health, safety, morals, security, prosperity, contentment, and the general welfare of all the inhabitants. No hard and fast rule can be laid down for determining whether a proposed expenditure of public funds is valid as devoted to a public use or purpose. Each case must be decided with reference to the object sought to be accomplished and to the degree and manner in which that object affects the public welfare. . . It is the province of the Legislature to determine matters of policy and appropriate the public funds. If there is reason for doubt or argument as to whether the purpose for which the appropriation is made is a public or a private purpose, and reasonable men might differ in regard to it, it is essentially held that the matter is for the Legislature. . . .

1979-80 Report of the Nebraska Attorney General No. 209 (January 23, 1980) (quoting Douglas v. Nebraska Mortgage Finance Fund, 204 Neb. 445, 283 N.W.2d 12 (1979)).

> The principles which must guide [a] court in the determination of whether the act contemplates a public purpose are these: It is for the Legislature to decide in the first instance what is and what is not a public purpose, but its determination is not conclusive on the courts. However, to justify a court in declaring a tax invalid because it is not for a public purpose, the absence of public purpose must be so clear and palpable as to be immediately perceptible to the reasonable mind.

Id. (quoting State ex rel. Douglas v. Thone, 204 Neb. 836, 286 N.W.2d 249 (1979)).

> Competition with private industry does not in and of itself make the expenditure one for a private purpose. The fact that the plants and facilities may be managed by private corporations or individuals under management contracts does not make the purpose private.

Id.

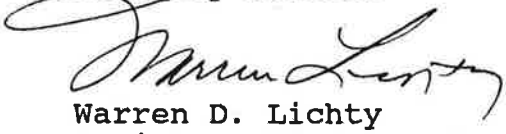
Thus, while a legislative declaration of public purpose, as set forth in section 1(2) of the Bill, carries with it certain presumptions of validity, such a declaration is not conclusive on a court. State ex rel. Douglas v. Thone, 204 Neb. 836, 843, 286 N.W.2d 249 (1979). Nonetheless, in light of the findings in State ex rel. Douglas v. Thone, it is our opinion a court would uphold the legislative determination of public purpose contained in the Bill.

We note that while the Bill is likely constitutional, the use of state funds under provisions of the Bill such as section 19(4), which authorizes the division of railroads to invest in the revitalization or acquisition of light-density rail lines, and section 19(6), which authorizes the division of railroads to grant or lend money, must be applied carefully in a manner consistent

with constitutional restrictions on expenditure of public funds for private purposes.

Sincerely yours,

DON STENBERG
Attorney General



Warren D. Lichty
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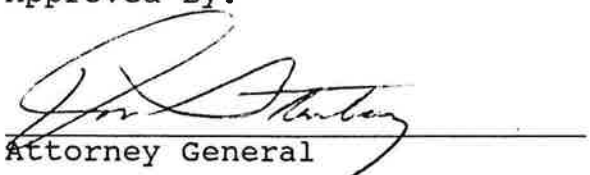

Attorney General

cc: Patrick J. O'Donnell
Clerk of the Legislature

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