

## Opinion No. 60-36

March 2, 1960

**BY:** OPINION of HILTON A. DICKSON, JR., Attorney General

**TO:** Mr. Albert O. Lebeck, Jr. City Attorney Town of Gallup P. O. Box 1111 Gallup, New Mexico

### QUESTION

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Does the Town of Gallup have the authority to enact a "lookout ordinance" such as the one submitted for consideration?

#### CONCLUSION

No.

### OPINION

#### {\*388} ANALYSIS

A copy of the ordinance which you have submitted to this office provides, in essence, that all trains, which includes unattached locomotives, must have a crew of at least two when passing within fifty feet of a public street or crossing a public way. It is a criminal ordinance since a penalty of up to \$ 100.00 is provided for violation.

The first question to be resolved is whether the city has the power to enact an ordinance such as this under the grant of power found in its charter. It is elementary law that municipalities have only that power specifically granted to them under legislative enactment. The legislative enactment which is relevant in this instance is § 14-21-5, subsection XX, which reads as follows:

"To require railroad companies to keep flagmen at railroad crossings of streets, and provide protection against injury to persons and property in the use of such railroads."

{\*389} We are convinced that this section does not grant to a municipality the power to enact an ordinance setting the number of crewmen required on a locomotive. The Court, in **Louisville & N. R. Co. v. City of Hazard, et al.**, 304 Ky. 370, 200 S.W. 2d 917, had this to say about such power:

". . . there can be no doubt that the circuit court correctly declared invalid the portion of the ordinance requiring railroad companies to keep certain crewmen on all engines and trains which are operating over and across any street, alley or public way of the City.

There is no provision in the Statutes relating to cities of the fourth class which confers such power on the legislative body of a city. KRS 96.070 provides that the legislative body of any city of the fourth class may compel any railroad company to erect and maintain gates at street crossings and prevent railroads from obstructing public ways of the city, but nowhere is the city given authority to compel a railroad to employ additional crewmen on its engines or trains. A municipality possesses only such powers as are expressly granted to it, those which are necessarily implied in or incident to the powers expressly granted, and those which are essential to the accomplishment of the declared objects and purposes of the corporation."

This case is but an indication of the cases which have construed the powers of municipalities operating under the so-called general welfare charters such as ours as opposed to the so-called home rule charters. The powers of municipalities operating under the general welfare charters are strictly construed. **City of Winchester v. Redmond**, 93 Va. 711, 25 S.E. 1001. On this basis, we are constrained to hold that under the powers granted municipalities in § 14-21-5, supra, and § 14-25-1, N.M.S.A., 1953 Compilation, a municipality does not have the power to enact an ordinance such as the one in question.

We do not rely solely upon the absence of power in the municipality in holding this sort of ordinance void. We are further of the opinion that such ordinance is unconstitutional under our State Constitution since it is an unreasonable and arbitrary restriction and has no relation to the purposes for which the ordinance was enacted. As was said in the recent case of **Northern Pacific Railroad Co. v. Weinberg**, 53 Fed. Supp. 133, which case involved the same type of ordinance:

". . . The only basis for the validity of this ordinance must be its relationship to the safety of the public and the employees. Not only is there an absence of a showing that the contemplated switch movement cannot be safely made with an engineer and three switchmen but a fair appraisal of the entire situation strongly suggests that not only would such an operation with an engineer in the cab be entirely safe under all normal circumstances but that the switching could be carried on with substantially the same degree of practicability and expedition as with two men manning the diesel."

and further at page 139:

". . . For instance, an automobile which passes another on the highway always incurs some dangers in this movement and many accidents happen during such passing, but to prohibit by statute or ordinance any car to pass another car on the street or highway at any time or under any circumstances would of course be highly unreasonable. The law recognizes therefore that passing may be permitted when conditions are such that it may be carried on with reasonable safety. At times perhaps it might be conducive to safety to have a second person {\*390} seated with the driver of the automobile on our highways to aid in observing the road on snowy or foggy days or nights, but for that reason to require a second person in the front seat of an automobile at all times would be most unreasonable."

Courts holding as above have held these ordinances invalid on the ground that they are unconstitutional in that, since they are unreasonable restrictions, they violate the due process clause of the state's constitution as a taking of property without due process of law. It is not known exactly what the expense to the railroad companies would be but we are convinced that the cost to them would be all out of proportion and unreasonable in view of the gain by this ordinance. See **Pennsylvania Railroad Co. v. Driscoll**, (Pa.), 9 A. 2d 621. While admittedly there is a split of authority in this area of the law, we are impressed with the reasoning of the courts which have adopted the view we have set forth and we feel if our Supreme Court were to have this question before it, it would hold as we do here.

Some courts have raised an objection to these statutes on the basis of the commerce clause of the United States Constitution. However, since we hold that the municipality does not have the power to enact such a statute and that under our State Constitution such an ordinance is prohibited, we do not need to consider here that problem.

By: Boston E. Witt

Assistant Attorney General