

Opinion No. 75-06

January 29, 1975

BY: OPINION OF TONEY ANAYA, Attorney General

TO: Honorable Vernon N. Kerr New Mexico State Representative District 43 113
Sherwood Blvd. Los Alamos, New Mexico 87544

QUESTIONS

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1. Does the operation of diesel powered passenger excursion trains by Scenic Railways, Inc. constitute a material breach of the lease agreement between Scenic Railways, Inc. and the New Mexico and Colorado Railroad Authorities?
2. Is it proper under paragraph 24 (C) of the lease agreement between Scenic Railways, Inc. and the New Mexico and Colorado Railroad Authorities for the Authorities to terminate this lease if Scenic Railways, Inc. operates diesel excursion trains?

CONCLUSIONS

1. Yes.
2. Yes.

OPINION

{*37} ANALYSIS

In interpreting contracts, one must examine the intentions of the parties at the time the contract was executed. The intentions of the parties are gathered primarily from the writing itself. **Fuller v. Crocker**, 44 N.M. 499, 105 P.2d 472 (1940). In the case of **Gallup Gomerco Coal Co. v. Irwin**, 85 N.M. 673, 515 P.2d 1277 (1973), the Supreme Court of New Mexico said:

"like any other written contract, real estate leases must be interpreted as a whole to effectuate the intention of the parties, {*38} with meaning and significance given to each part in context of the entire agreement."

See also **Waxler v. Humble Oil and Refining Co.**, 82 N.M. 8, 474 P.2d 494 (1970); **Thigpen v. Rothwell**, 81 N.M. 166, 464 P.2d 896 (1970).

Paragraph 3 (a) of the lease contract between the New Mexico and Colorado Railroad Authorities and Scenic Railways, Inc. states:

"USE OF PREMISES. (a) The basic use of the PREMISES by SCENIC shall be to operate **steam powered passenger excursion trains. . .**" (Emphasis added.)

On page 1 of the lease contract, the intent of the States of New Mexico and Colorado in acquiring the Cumbres and Toltec Scenic Railroad can be found in the following paragraph:

"Whereas, the legislatures of the State of Colorado and New Mexico have empowered the Colorado and New Mexico Railroad Authorities to acquire and operate any railroad of historical and scenic importance within the States of Colorado and New Mexico for promoting the public welfare by encouraging tourism and facilitating the use of recreational facilities . . ."

Examining the wording of the entire lease contract, especially the two provisions quoted above, it becomes obvious that the intentions of the parties upon entering into this lease contract was to operate **historical steam powered passenger excursion trains**. This lease contract makes no reference to diesel trains, nor does it authorize the lessee to operate diesel excursion trains. Paragraph 3 (a) of this lease contract, however, authorizes the lessee to operate **steam powered** passenger excursion trains, and the lessee is bound by that provision.

In answer to your first question, we must conclude that because the lease contract states that the lessee shall operate steam powered locomotives on the leased premises, and since the historical integrity of the Cumbres and Toltec Scenic Railroad will be violated if diesel trains are operated, it is a breach of the lease contract for Scenic Railways, Inc. to operate diesel powered excursion trains. However, we should mention that the New Mexico and Colorado Railroad Authorities may modify the lease to allow for the operation of diesel trains. The lease modification must be written and for good consideration. See paragraph 29 of lease.

In answering your second question, the lease provision dealing with breach must be examined. Paragraph 24 (c) states:

" **BREACH.** Subject to paragraph 6 [dealing with grievances, demands, obligations and notices] of this agreement, the AUTHORITIES may terminate this lease upon the happening of any one or more of the following conditions:

(c) If SCENIC shall use or permit the use of the PREMISES at any time for any purpose for which the use thereof at the time is not authorized by this lease."

Under paragraph 24 (c), the Railroad Authorities may terminate, subject to paragraph 6 of the lease, this lease if Scenic Railways, Inc. uses the premises to operate the diesel powered passenger excursion trains, which we have previously said are not authorized {*39} by this lease. Of course, the Authorities are not absolutely required to terminate the lease if diesel trains are operated by Scenic, but the Authorities, if they do not

modify the lease to allow for the operation of diesel trains, have the option to terminate this lease agreement.

By: Louis Druxman

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