

Opinion No. 31-212

July 18, 1931

BY: E. K. Neumann, Attorney General

TO: Mr. Hugh H. Williams, State Corporation Commissioner, Santa Fe, New Mexico.

{*86} Reference is made to your letter of July 13th together with letter {*87} from Dr. H. L. Kent, letter from Mr. W. R. Hornbaker and copy of letter from Dr. Kent to Mr. Hornbaker.

Each of the four foregoing is in regard to rebates made by cotton ginner to certain customers apparently based upon the amount of business done.

It is desired that this office give an opinion upon the legality of such rebates after having given consideration to Chapter 101 Laws of 1927, which is now cited as Section 134-1125 of the 1929 Code.

The above cited Sections and Sections following are applicable to cotton gins and Section 134-1126 provides that the State Corporation Commission shall have the power and be charged with the duty of fixing, determining, supervising, regulating and controlling all considerations, charges or fees of all public utilities defined in section 1 of said act, in the same manner and to the same extent that they are authorized to fix, determine, supervise and control charges and rates of transportation and transmission companies and common carriers in section 7, article XI of the Constitution of New Mexico.

Section 134-1127 provides that the owner or owners, lessees, operators or managers of these public utilities shall within thirty days after the effective date of the act file with the Commission a complete schedule of all of its consideration, rates, charges and fees and it is further provided that no other charge shall be made for any service rendered, except charges included in such schedule. Also a copy of the schedule must be posted in a conspicuous place at the plant of any such utility.

Most of the cases which have come to our attention regarding the validity of rebates have been railroad cases and which have been decided upon the ground that such rebates were in violation of the various railroad transportation acts, and particularly the Elkins Act, which in part prohibits the granting of any concession in respect to transportation of property:

"Whereby any such property shall, by any device whatever, be transported at a less rate than that named in the tariffs published and filed."

These cases have held that such rebates and concessions of a similar nature were illegal and that the carrier had no right under the law to make same to various classes of shippers merely because of the volume of business done.

tirely upon the question of rebates

Of course, our statute is silent and concessions, and in all probability the case would turn upon the question as to whether there was or was not such a discrimination against the patrons of the public utilities involved or to render such discrimination inconsistent with the public duties of the corporation.

The development of the law against discrimination as applied to shippers was forced or caused by the necessity of preventing discrimination between shippers who were competitors in business, and this rule has been extended now to protect all who are being served by the Corporation, regardless of the question of competition.

In the matter under consideration we, of course, can have no way of determining in advance how our Supreme Court would hold, but believe in all probability that the question of discrimination would be a strong clue that such rebates were illegal. factor in leading the court to con-

It was certainly the intention of the Legislature to provide for a schedule of rates to be charged by these companies and that such companies must follow their published schedules.

To allow a rebate to be made to any customer based upon the volume of business would certainly be a discrimination as against the little customer who business is, so far as he is concerned, worth just as much and is just as important as is the business of the larger customer.

There is a strong probability that the Courts would look upon this method of doing business as an evasion of the law which was intended to fix and regulate these rates, to have them published and to require that no changes be made in same without first obtaining the consent and approval of the Corporation Commission.

As a matter of fact, the giving of such rebates or concessions modifies and changes the published rates.

{*88} If it is desired to test this matter, it is suggested that a formal complaint be filed before the State Corporation Commission by or on behalf of some interested customer and perhaps an appeal taken to the district court, although the law is not clear or specific as to matters of this nature.

The above and foregoing opinion is of necessity merely advisory and is intended only as a guide by which you may be governed in the premises, but as heretofore suggested

there is a strong probability that if this matter should be taken into the Courts that our contention would be sustained.

By Frank H. Patton,

Asst. Attorney General