

Opinion No. 37-1761

September 16, 1937

BY: FRANK H. PATTON, Attorney General

TO: Mr. Robert Valdez, Commissioner State Corporation Commission Motor Transportation Department Santa Fe, New Mexico

{*160} In your request of September 15, 1937, you say:

"We respectfully request an opinion from you as to whether or not common or contract carriers operating for hire upon the public highways of this State are required to transport any State employee or any other person without receiving compensation, unless it is established to the satisfaction of the operator that such transportation is strictly official business."

No carrier is required to transport any state employee or any other person free of charge whether traveling on official business or not.

The correspondence enclosed with your letter indicates that an employee of the state presented and used a pass and that such pass was issued by the Bureau of Revenue, and that other departments also issue such passes. The correspondence does not indicate how or under what circumstances such pass was issued, but it does indicate that it was not issued with the knowledge or acquiescence of the carrier.

It may be that the pass was intended to be in the nature of an order for transportation of an employee of the Bureau traveling on official business, to be paid by the Bureau upon the furnishing of the service and demand for payment, (though the correspondence indicates an absence of any such arrangement or understanding with the carrier). The department ordering the service would of course be liable therefor.

Neither the Bureau of Revenue nor any other department having to do directly or indirectly with the regulations of motor carriers, have any right to demand carriage of any person or thing free of charge; and if any employee or official of any such department, or of any other department, demands such privileges, the matter should be reported to the head of the department or to the Governor, in order that such conduct should not be tolerated.

Not only is it most reprehensible for any state department, official or employee, to demand free transportation from carriers regulated by the state, but in my opinion it is unlawful for any such carrier to grant to them such passes whether traveling on official business or not. Coercion on the part of state departments, officials or employes, especially those in charge of regulating the service of carriers, is utterly beneath and repugnant to the dignity of a democratic state, except in such cases where the service is specifically required by the legislature under its police power.

No such free service is required by our statutes. The policy of the state as evidenced by its constitution is against the issuance of free passes to officials who may be in position to grant favor or impose reprisals against carriers. Article IV, Section 37; Article 20, Section 14.

As to motor carriers, it is my opinion that the motor carrier act, Chapter 154, Laws of 1933 as amended, prohibits the issuance of gratuitous passes, and makes the carrier as well as the person accepting *{*161}* and using a gratuitous pass subject to a fine or imprisonment, or both. See Section 23 and 47 of the act.

Section 23 provides: "Every contract motor carrier is hereby forbidden to give or cause any undue or unreasonable advantage or preference to those whom he serves as compared with the patrons of any common motor carrier, as that term is used in this act, or the patrons of any other common carrier, **or to subject the patrons of any such common carriers to any undue or unreasonable discrimination or disadvantage; . . .**"

Section 47 of the Act as amended by Chapter 224 of the Laws of 1937, provides: "Every carrier to which this act applies, **and every person who violates or who procures, aids or abets in the violating of any provisions of this act.** . . . shall be deemed guilty of a misdemeanor, and upon conviction shall be punished by a fine of not less than twenty-five dollars (\$ 25.00) nor more than one hundred dollars (\$ 100.00), or by imprisonment for not more than 180 days, or by both such fine and imprisonment."

Under statutes making, in substance, the same prohibition against discrimination, several state courts and the Interstate Commerce Commission, as well as one federal district court have held that a gratuitous pass is thereby prohibited. I find no authorities to the contrary.

In re Charge to the Grand Jury, 66 Fed. 146, the district court in a charge to the grand jury quoted from the holdings of the Interstate Commerce Commission as follows:

"The fundamental and pervading purpose of the law is equality of treatment. It assumes that the railroads are engaged in a public service, and requires that service to be impartially rendered. It asserts the right of every citizen to use the agencies which the carrier provides on equal terms with all his fellows, and finds an invasion of that right in every unauthorized exemption from charges commonly imposed. No form of favoritism and no species of partiality seems more odious or indefensible than that which accords to personal influence or public station privileges not enjoyed by the community at large. The free carriage of certain persons merely because they occupy official positions, or have acquired some measure of distinction, offends the rudest conception of equality, and contravenes alike the policy and the provisions of the statute. The practices complained of in this proceeding are illegal, and must receive our condemnation."

In *Bailey v. Bartlett*, (Sup. Ct. W. Va.) 163 S. E. 615, the court said:

"We think it quite clear that the pass in question, being issued in the face of the statutory inhibitions against discrimination, and the consequent penalty attached thereto, renders it void and of no effect."

In *State v. Southern Railroad Company (N. C.)*, 30 S. E. 133, 41 L. R. A. 246, the Supreme Court of that state said:

"Can it be supposed for a moment that the general assembly of North Carolina would enact a law -- a law purporting to protect the great body of the people against inequality and unjust discrimination on the part of railroad companies -- based on such class distinctions? This contention of the defendant, if it could be maintained, would simply divide the people of the state, not into the sheep and the goats, the good and the bad, and reward or punish them by giving to one and withholding from the others free passes, but into those whose influence {**162*} is considered valuable to the corporation, on the one part, and the remainder of the people, on the other, and then giving to the first-named class the privilege of using the public franchise free, while it extorts from the latter the full rates allowed by law; the extortion consisting in making those least able to bear it pay the cost of transporting the well-to-do and influential. That position of the defendant cannot be maintained."

It is my opinion therefore that the use by state employes or officials of gratuitous passes on motor carriers is prohibited. This opinion is limited to intrastate motor carriers. Railroads, of course, are governed by the Hepburn Act, 49 U. S. C. A., Sec. 1, which makes certain exemptions.

By: A. M. FERNANDEZ,

Asst. Atty. Gen.