



Jinger
Attorney General
STATE CAPITOL
Phoenix, Arizona 85007

Robert H. Corbin

January 5, 1981

INTERAGENCY

Mr. Charles W. Rider
Assistant Director
Transportation Planning Division
Arizona Department of Transportation
206 South 17th Avenue
Phoenix, AZ 85007

Re: I81-003 (R79-266)

Dear Mr. Rider:

This letter is in response to your request for an opinion regarding whether state funds or facilities may properly be used to subsidize rail passenger service through the Amtrak system between Phoenix and Tucson in conjunction with a federal matching program. For the reasons discussed below, it is our opinion that state funds or subsidies may be so used.

The Amtrak Reorganization Act of 1979 amended Section 403.b of the Rail Passenger Act, codified as 45 U.S.C. § 563.b.1/ This statutory provision permits Amtrak to operate jointly-funded additional service in conjunction with state, regional or local agencies.

In considering whether the State of Arizona may participate in the 403.b Program, it is necessary to consult two provisions of the Arizona Constitution, specifically Article 9, § 7 and Article 9, § 10. These constitutional provisions were clearly intended to prevent the Legislature from appropriating money for the assistance of certain enterprises. The question is whether they prohibit the use of state funds or facilities to

1. Inasmuch as the state assistance provision amends § 403.b of the Rail Passenger Act, the program is referred to as "The 403.b Program".

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subsidize rail passenger service through Amtrak, which is a federally-operated non-profit organization.^{2/}

I

Article 9, § 7 of the Arizona Constitution reads:

Neither the State nor any county, city, town, municipality, or other subdivision of the State shall ever give or loan its credit in aid of, or make any donation or grant, by subsidy, or otherwise, to any individual, association, or corporation, or become a subscriber to, or a shareholder in, any company or corporation, or become a joint owner with any person, company, or corporation, except as to such ownerships as may accrue to the State by operation or provision of law.

There are no Arizona cases concerning whether or not a subsidy to a corporation which was organized by the federal government would fall under the prohibition of Article 9, § 7. Therefore, we must refer to the general interpretation of this constitutional provision by our courts.

In State v. Northwestern Mutual Insurance Company, 86 Ariz. 50, 340 P.2d 200, the Arizona Supreme Court stated the purpose for the inclusion of Article 9, § 7, in our Constitution, quoting from Thaabum v. Bynum Irr. Dist., 72 Mont. 221, 232 P. 523:^{3/}

2. The National Rail Passenger Corporation was created by federal statute, the Rail Passenger Service Act, 45 U.S.C., § 501, et seq. From examination of the Act, it is clear that Amtrak is an instrumentality of the federal government which, for the purpose of this inquiry, acts as a conduit for the provision of matching funds to the states for the purpose of encouraging and developing a rail passenger system. It is not a profit making enterprise.

3. This particular constitutional provision was taken from the Montana Constitution, Article 13, § 1. Therefore, decisions of the Montana Supreme Court interpreting its provisions are persuasive in interpreting the Arizona article. Industrial Development Authority of County of Pinal v. Nelson, 109 Ariz. 368, 509 P.2d 705 (1973).

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It represents the reaction of public opinion to the orgies of extravagant dissipation of public funds by counties, townships, cities, and towns in aid of the construction of railways, canals, and other like undertakings during the half-century preceding 1880, and it was designed primarily to prevent the use of public funds raised by general taxation in aid of enterprises apparently devoted to quasi-public purposes, but actually engaged in private business.

From the above quotation, it is apparent that the purpose of the constitutional prohibition was to prevent the use of state funds to aid private business. As noted above, Amtrak is not a private business, nor is it a profit-making business. However, even if it were found to be so, our high court has also held that, even though some private organization may derive a special benefit from a state expenditure, the "loan of credit" or "donation" is not prohibited if the loan or donation was made for a public purpose.^{4/} In this connection, it should be noted that in the case of the Amtrak system, which is under consideration herein, the provision of rail transportation to the public is the major purpose of The 403.b Program, and any benefit to the Amtrak system is incidental to that purpose.

For these reasons, it is our opinion that, where the public purpose is the primary object of an appropriation and the benefit to any corporation is incidental, the constitutional prohibition of Article 9, § 7, does not apply.

II

Article 9, § 10, of the Arizona Constitution reads:

No tax shall be laid or appropriation of public money made in aid of any church, or private or sectarian school, or any public service corporation.

The term "public service corporation" is defined in Article 15, § 2, of the Constitution, as follows:

4. See Industrial Development, reference fn. 3, supra, citing Fickes v. Missoula County, 155 Mont. 258, 470 P.2d 287 (1970); and also Heiner v. City of Mesa, 21 Ariz.App. 58, 515 P.2d 355 (1974). But compare City of Tempe v. Pilot Properties, Inc., 22 Ariz.App. 356, 527 P.2d 515 (1974).

All corporations other than municipal engaged in carrying persons or property for hire; or in furnishing gas, oil, or electricity for light, fuel, or power; or in furnishing water for irrigation, fire protection, or other public purposes; or in furnishing, for profit, hot or cold air or steam for heating or cooling purposes; or engaged in collecting, transporting, treating, purifying and disposing of sewage through a system, for profit; or in transmitting messages or furnishing public telegraph or telephone service, and all corporations other than municipal, operating as common carriers, shall be deemed public service corporations.

Under the terms of Article 15, § 10, of the Constitution, railroads are specifically included as common carriers.^{5/} Thus, the term "public service corporation" includes all corporations operating as common carriers, such as railroads. Therefore, Article 9, § 10, of the Arizona Constitution prohibits the use of state funds "in aid of" a railroad, and thus will prohibit the use of state funds to subsidize Amtrak unless the utilization of the federal program as herein described would not result in a "tax or appropriation in aid of" the railroad.

Article 9, § 10, of the Constitution was construed in Community Council v. Jordan, 102 Ariz. 448, 432 P.2d 460 (1967). In Community Council, the state had entered into a contract whereby the Department of Welfare agreed to put up 40% of the money spent by the Salvation Army for the purpose of emergency assistance to people in need. The court held that, although the funds constitute an "appropriation", it was not made "in aid of" the religious organization, because the grants

5. Article 15, § 10, provides:

Railways heretofore constructed, or that may hereafter be constructed, in this State, are hereby declared public highways, and all railroad, car, express, electric transmission, telegraph, telephone, or pipeline corporations, for the transportation of persons, or of electricity, messages, water, oil, or other property for profit, are declared to be common carriers and subject to control by law.

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were not conditioned on any participation in the religious activity, and there was a public interest to be served in the grant of aid to destitute individuals and families.

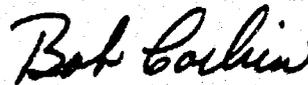
By analogy, it is clear that the public purpose of Amtrak, i.e., providing mass transit to the potential passengers of the railroad system, is the sole reason for its existence.

Furthermore, any subsidy would not be "in aid of" a public service corporation within the meaning of the constitutional provisions. Article 9, § 10, was meant as a prohibition against the use of state funds to benefit certain private organizations and their objectives, or to prevent profit-making public service corporations from receiving state funds for their own private purposes. This interpretation is consistent with and supported by the fact that "municipal" corporations are excepted from the definition of "public service corporations."6/

CONCLUSION

Based on the foregoing discussion, it is our opinion that use of state funds or facilities to subsidize rail passenger service through the Amtrak system is not prohibited by the Arizona Constitution. The major purpose of The 403.b Program is to provide transportation for the public through a federally-controlled corporation. Any benefit to the Amtrak system itself is purely incidental and does not constitutionally invalidate the State's participation in the program.

Sincerely,



BOB CORBIN
Attorney General

BC:lfc

6. In this regard, Amtrak is more akin to a "municipal" corporation than a public service corporation as defined by the Constitution.



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January 6, 1988

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Mr. Charles W. Rider
Assistant Director
Transportation Planning Division
Arizona Department of Transportation
206 South 17th Avenue
Phoenix, Arizona 85007

Re: Addendum I81-003

Dear Mr. Rider:

We wish to point out that the above referenced opinion, on page 4, quotes the language of Article 15, § 2 and 10 of the Arizona Constitution as it existed prior to the 1980 amendments. Those provisions now read as follows:

§ 2. "Public service corporations" defined

Section 2. All corporations other than municipal engaged in furnishing gas, oil, or electricity for light, fuel, or power; or in furnishing water for irrigation, fire protection, or other public purposes; or in furnishing, for profit, hot or cold air or steam for heating or cooling purposes; or engaged in collecting, transporting, treating, purifying and disposing of sewage through a system, for profit; or in transmitting messages or furnishing public telegraph or telephone service, and all corporations other than municipal, operating as common carriers, shall be deemed public service corporations.

§ 10. Railways as public highways; other corporations as common carriers

Section 10. Railways heretofore constructed, or that may hereafter be constructed, in this State, are hereby

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declared public highways and all railroads are declared to be common carriers and subject to control by law. All electric, transmission, telegraph, telephone, or pipeline corporations, for the transportation of electricity, messages, water, oil, or other property for profit, are declared to be common carriers and subject to control by law.

The amendments do not in any way change the substance of the opinion.

Sincerely,



BOB CORBIN
Attorney General

BC:cp