

Passes—County Attorneys—Railroads—Claims.

The county attorney who, while making a railroad trip on county business, uses a pass issued to him as attorney for a railroad company is not entitled to collect from the county railroad fare for the trip.

Mr. Frank T. Hooks,
County Attorney,
Townsend, Montana.

September 5, 1931.

My dear Mr. Hooks:

You have requested an opinion of this office as to whether you are entitled to charge the county actual railroad fare when traveling on county business, the transportation being upon a railroad and by the use of a pass which the railroad gives you as a retainer on account of the relationship of attorney and client existing between you and the railroad, and in consideration of which you render certain services for the railroad as its attorney.

The consideration for the pass is services rendered or to be rendered by you as attorney for the railroad company. The pass entitles you to ride upon its trains without the payment of fare. This privilege may or may not be exercised by you. The real consideration, therefore, for your services is the privilege to ride upon its trains without the payment of fare as distinguished from the exercise of that privilege. The exercise of the privilege in no way adds to the cost of its procurement.

If in making the trip in question as county attorney you had not used the pass but had paid fare instead the cost to you (the value of your services) of obtaining the pass would have been the same as if you had used it in making the trip. The value of the pass to you depends upon the number of times you make free use of the railroad's trains—the more frequently used the greater the value and the fewer times used the smaller the value.

If the value of this pass, arising out of its use on this official trip made by you, was to be taxed to the county it would seem to follow that the business of the county which necessitated the trip was the means of adding to your compensation as attorney for the railroad, which, of course, cannot be. You are allowed actual traveling expenses only and they must be expenses actually incurred in connection with the particular trip. When you used the pass it is my opinion that you incurred no actual expenses for railroad fare in connection with that trip. The cost of the pass to you would have been the same had it not been used and you had paid fare instead. To charge the county with fare which you did not actually spend would be to convert your pass privilege or the compensation for all or part of your services to the railroad company into cash paid out of the county treasury.

When you made this trip you did so in your official capacity as county attorney. No expense was incurred by you officially for railroad transportation on account of this trip. It is only your expenses as county attorney that may be paid by the county. If an amount equal to the railroad fare, which you otherwise would have paid had you not used the pass, is now to be charged to the county, instead of this representing official expenses, it would represent a private profit to you by reason of converting your personal privilege or property into cash paid from the county treasury. This, of course, is in no sense an item of expense incurred by you as county attorney in making the trip.

Furthermore, section 6572 and section 6573, as amended by chapter 113 of the laws of 1929, prohibit the issuing of passes by railroad companies to all persons except those mentioned therein and in chapter 9 of said laws of 1929. The only officials to whom railroad passes may be issued are the members of the railroad commission, the state fire marshal, and their employees, for use when on official business. It is therefore the policy of the law to prohibit railroad companies from issuing passes to the county attorneys as such. Under these statutes the company may issue passes to its attorneys but in those cases where its attorney is also a county attorney the pass issued to such a person must be held to be issued to him as the attorney for the railroad and not as the attorney for the county.

It could not have been the intention of yourself or the railroad company that the pass issued to you would confer the privilege of free transportation upon you as an individual and also as a public official, for the railroad company is prohibited from conferring such privilege upon you as a public officer. Therefore, in order to give the transportation in question any legal aspect it would have to be said that the transportation was of you in your personal capacity in which event, if there

was any cost to you in procuring the pass, it was purely a cost of personal transportation and not of official transportation. The cost of personal as distinguished from official transportation cannot in any sense be deemed expenses that you incur in your official capacity. If it be said that you procured free transportation as an officer of the county then such free transportation was forbidden under the sections above mentioned, and aside from that fact there was no cost or expenses to you as county attorney in procuring such transportation.

If there was any cost to you at all in procuring this pass it was the value of your services rendered as attorney for the railroad company. These services cannot under the law be a legal consideration for the transportation by the railroad of you as county attorney as under said sections any ticket, pass or contract issued for a consideration other than "money paid in the usual way, at the rate, fare or charge open to all who desire to purchase" is a "free ticket," "free pass," or "free transportation," which may not be issued to you as county attorney.

Therefore, it cannot be successfully contended that the railroad furnished the county attorney transportation in consideration of these services as that would be to admit that free transportation was furnished the county attorney in violation of the law. An illegal consideration is no consideration.

For the several reasons hereinbefore stated it is my opinion that you are not entitled to charge the county railroad fare for the trip which you made by the use of the pass.

Very truly yours,
L. A. FOOT,
Attorney General.