

road becomes impassable, the general presumption that, "The law does not require impossibilities," applying.

4. Trustees of school district are expected to use business judgment in entering into contracts.

5. Trustees must not be interested in any contract made by them in their official capacity or by any body or board of which they are members.

August 18, 1937.

Miss Ruth Reardon
State Superintendent of
Public Instruction
The Capitol

My Dear Miss Reardon:

Attention of Mr. R. C. Haight,
Deputy.

In replying to your letter, will you pardon us if we go a little beyond the record in answering the questions submitted. We make this request for the reason that we are somewhat familiar with the facts and circumstances surrounding the case which you are presenting. Answering, then, the questions submitted in order, we have the following to say:

1. Can the School Board enter into a transportation contract for the transportation of school children over a private road?

Broadly speaking, Section 1010 of the Revised Codes of Montana 1935, gives the trustees of a school district the power to provide transportation. The specific statute does not relate to public or private roads, so, as far as the right of contractual relation is concerned they certainly have the right, but, naturally, the owner of the private road, if such be the case, has a right to some consideration, and you are assuming the fact to be that it is purely and distinctly a private road. This is not necessarily the case. Chapter 103, Revised Codes of Montana 1935, provides a method of obtaining the use of private roads for public uses through the right of eminent domain and Section 9934 sets out public uses, which among other things include public buildings, and grounds for the use of any county, city, town, or school district. Subdivision 6 of the said section reads:

Opinion No. 142.

Schools and School Districts—Transportation—Eminent Domain.

HELD: 1. School trustees have right to enter into transportation contracts over private roads.

2. Private roads leading to highways from residences and farms are construed private roads for public use and may be condemned under the right of Eminent Domain.

3. Trustees of school districts have right to make other provisions for maintenance of children in school when

"Private roads leading to highways from residences and farms."

The question has also been settled, in a sense, in the case of *State ex rel Butte-Los Angeles Mining Company v. District Court*, a Montana case to be found in 60 Pac. Reporter, 2d Series, at page 380, and while in this case it is not a question of a public road, but a right to a way out by a mining property, Justice Morris, writing the opinion for the court, at page 383, said the following:

"In determining the first proposition (referring to an exclusive use of the property as a roadway) it was necessary that the plaintiff establish, (a) the necessity for it to have exclusive control and use of that portion of the tunnel on the lead claim in its mining operations, and that no reasonable avenue was open or could be made accessible to the plaintiff in such operations, and (b) that the use for which plaintiff desires to subject such property of the defendant to the plaintiff's exclusive use is a more important public use than that for which the defendant could lawfully use such property."

As we understand the situation in the case you are presenting, there is practically no other way to the highway for B and C other than through B's property; that for a number of years it has been the connecting link to the highway for the people having residences and farms in that vicinity, and the only way.

Another feature of importance in the matter is that both B and C are patrons of the school district, both families have children who attend in the district conditionally that they can get this service which is necessary to bring them into school. Both of these families are extremely anxious that their rights be considered and that their children be given the benefits of school, and I am sure there would be no objection on the part of B whether the road be construed public or private in the use thereof for the purpose of transporting the children of the two families. Should the bus driver use this road, it would hardly be fair to expect B to be responsible and assume any liability because of accidents thereon, and we would suggest that using the road for such purpose becomes in

a sense a public purpose and the county commissioners, I am sure, would give some aid in keeping the road passable.

So, answering the first question, in view of the facts as we have them, we have every reason to believe that the use of the road from the highway through the property of B and up to the home of C is a matter which could be arranged without any expense, trouble, or annoyance.

2. When said private road becomes impassable and cannot be used by B and C, are B and C entitled to transportation costs or maintenance in the town where the school is situated in an amount sufficient to compensate them for the additional expense regardless of a contract let as contemplated for the school year for 1937 and 1938?

It is a general axiom of the law that "the law does not require impossibilities." This applies, I would suppose, to the bus driver, the trustees of the school and the parents of the children as far as a defense is concerned to an action by the truant officer for the failure to keep the children in school.

The Government of the United States, the State of Montana, and I might say every hamlet and town, have gone to quite some length in the matter of education. We pride ourselves in having the best public school system of the world; properties have been set aside for school purposes; large appropriations are continually being made to see that our children may have the advantage of our public school system. The trustees of the school districts have been empowered to arrange for the care and maintenance of children when transportation facilities were either not available or were not the best solution. The amount of expenditures to see that the child is properly cared for is not limited nor curtailed by statute and about all that is requested of a board of trustees is conscientious consideration and good business management. Section 1010 makes provision for transportation and provides a schedule, but does not limit the trustees to the schedule, and one can well see where it might be entirely out of the question to limit, in certain districts, the board to the use of the schedule. Quoting from Section 1010, we read as follows:

"The board of trustees, with the approval of the county superintendent, may alter this schedule if they deem it for the best interests of the children and the taxpayers of the district."

So, in answering your second question, we say it comes within the province of the board of trustees to use their best judgment, and if transportation facilities are not available, to see that the children are maintained otherwise in school. Let your mind refer back to the period of 1889, when thousands of the youth of our land were frozen to death, returning from schools, by reason of the blizzards in the northwestern states. So we say it is unfair to make it incumbent upon the parents of these children to see that they come to the highway and stay and wait for the bus. Far better be it that the board of trustees maintain the five children of the district in the village than to lose the life of one by such practice. If they feel that transportation is the proper system, see that the transportation is provided to the homes of the children and that they are returned. In the case you mention we cannot see the necessity of maintaining the children of B and C in town and then using the bus service for the children of A who lives on the highway. Far better be it to pay A within reason to transport his own children. In fact, before the bus was put on, the respective families were paid twenty-five dollars per month, and all kept their children in school, peace and harmony prevailed, and it was so until the board of trustees saw the interest of saving two dollars, and put on bus transportation, as we have the facts.

3. Can the school board enter into a contract to serve three families, when two of them can't use the bus satisfactorily, and only one family is being served at an expense which would approximately, if no contract were made and such expense divided between the three families, amount to in the neighborhood of from \$23.00 to \$25.00 a family?

We would say that the school board can enter into such a contract as set out in your question, but if they did I think action should be brought against the members of the school board because it surely does not show good

business policy, particularly in the case at bar when it can be arranged to take care of all of the children, five in number, along the route without bus service. Another feature to be considered, if the children of the families of B and C cannot get to school by reason of insufficient means of transportation, and no assistance otherwise from the board of trustees, they could hardly be considered school-children within the district. Then you would have but the children of the family of A, being two, for whose benefit the trustees would be paying transportation service which last year amounted to \$73.00 per month. This surely would be inconsistent with good business policy.

4. Can trustees of a school district hire themselves or any one of their members to render services for and on behalf of the school district even though the contract for services is less than \$250.00 a month without first advertising, or at all?

Section 1016 answers your fourth question, and plainly states that the trustees shall not be interested in the letting of contracts or furnishing supplies. The board of trustees of a school district stand in the relation of a trust to the patrons of the district and act in a fiduciary capacity. Their relation to the school district might be said to be the same as the relation of the county commissioners to the county, city officers to the city, and township officers to the township. Assuming that to be true, Section 444, Revised Codes of Montana, 1935, reads as follows:

"Certain officers not to be interested in contracts. Members of the legislative assembly, state, county, city, town, or township officers, must not be interested in any contract made by them in their official capacity, or by any body or board of which they are members."

Section 445 reads:

"Nor in certain sales. State, county, town, township, and city officers must not be purchasers at any sale, nor vendors at any purchase made by them, in their official capacity."

The reason for this is quite apparent. It might be said that public policy demands that a public officer cannot

be permitted to place himself in a position where his personal interest will conflict with the faithful performance of his duties. It matters not how fair a contract may be, the law will not suffer him to occupy a position so equivocal and so fraught with temptation. (*Power v. May* (Cal.), 46 Pac. 6; *Berka v. Woodward* (Cal.), 57 Pac. 777.)

Trusting that this answers your inquiry and that your office may so prevail upon the county superintendent and the board of trustees of District No. 13, that all personal feelings as may exist between the board and some of the patrons of the district may be set aside and the interest of the children be taken wholly into consideration, we are