

1978 WL 34708 (S.C.A.G.)

Office of the Attorney General

State of South Carolina

February 16, 1978

***1 SUBJECT: Railways, Leases**

(1) With approval of the Budget and Control Board, the Public Railways Commission is authorized by statute to make an agreement to lease cars for general railroad use.

(2) Such authority may be exercised only after common carrier railroads have declined to provide such service.

Mr. W. J. Betz
Executive Director
S. C. Public Railways Commission

QUESTIONS:

1. Does the Public Railways Commission have the statutory authority to enter into an agreement with a railroad car-leasing company to lease freight cars for general use on a profit-sharing basis?

2. Would the Commission's participation in such plan constitute a conflict of interest with private enterprise?

STATUTES & CASES:

Act. No. 456, Acts and Joint Resolutions of S.C., 1969.

Act. No. 1197, Acts and Joint Resolutions of S.C., 1974.

Act. No. 232, Acts and Joint Resolutions of S. C., 1975.

S. C. Code of Laws (1976) §§ 58-19-30, 58-19-50, and 58-19-90.

DISCUSSION:

1. You have advised that the Public Railways Commission is considering a 15-year lease of freight cars in substantial numbers from a car leasing corporation. The cars will be put into general use on the standard car hire and interchange basis with other railroads, not used only on the lines owned by the Commission. The incentives for the lease are improved availability of cars and receipt by the Commission of a share of the profits from the lessor.

As to the Commission's authority to lease the cars, the basic power is clearly provided in [§ 58-19-30, Code of Laws of South Carolina](#), 1976:

The Commission shall have the following powers and duties:

(2) To acquire by purchase or donation and to own, rent, lease, mortgage and dispose of such property, real or personal, as the Commission may deem proper to carry out the purposes and provisions of this chapter, all or any of them. * * *

In editor's notes to § 58-19-30 it is pointed out that the General Assembly, by Act. No. 232 of 1975, stated its intention to extend the operations of the Commission beyond the radius of 25 miles, which had been set by Act No. 1197 of 1974, to such extent as necessary to promote and foster economic development of the State. This extended authority is stated in [§ 58-19-50 of the 1976 Code](#):

Extension of Operations by Commission.

In addition to the powers and duties of the Commission as specified by [§ 58-19-30](#), when it shall appear that the acquisition, by purchase, construction, condemnation or donation, and operation of additional connecting, switching, terminal or other railroads are desirable in the public interest to promote and foster economic growth and development, the Commission may, with the approval of the State Budget and Control Board, extend its operations, provided the common carrier railroads operating in the State shall have declined to agree to provide such facilities within six months after having been requested to do so by the Commission and the Budget and Control Board and provide the financing for such extensions is approved by the Budget and Control Board pursuant to the provisions of this chapter.

***2** It will be noted from this section, as well as other sections of Chapter 19, title 58 of the Code, that the State Budget and Control Board must approve any 'extension of operations' by the Commission. The word 'extension' is not a term of legal art, and must, therefore, be given its ordinary and usual meaning. In this context, while extension of operations by a lease agreement is not specifically mentioned in Code [§ 58-19-50](#), such a considerable extension of the Commission's operations as lease of 100 or more freight cars which will range all over the United States is unquestionably such an extension of operations as to require Budget and Control Board approval.

This conclusion is amplified by the approval provisions of Code [§ 58-19-90](#), which also may reasonably be said to apply.

2. You have asked whether the Commission's participation in the car-leasing plan would constitute a 'conflict of interest' with private enterprise. The answer is, of course, that such a car-leasing activity would place the Commission in competition with private freight-car providers as well as common carrier railroads who provide cars for hire. However, competition or 'conflict of interest' with private industry or business almost always arises when the State undertakes an activity that may be performed by the private sector and, so long as the governmental activity is within constitutional bounds, the question of its desirability is a question for the legislature.

The General Assembly plainly recognized this competition problem when enacting [Code §§ 58-19-50](#) and [58-19-90](#). The pertinent part of the latter section is:

Necessary Findings Prior to Acquisition of Railroad and Equipment.

Prior to undertaking the acquisition of any railroad and necessary equipment, the Commission shall find: that the acquisition of the railroad and necessary equipment is desirable in the public interest to promote and foster economic growth and development; that the common carrier railroads operating in the State shall have declined to agree to provide such railroad and necessary equipment within six months after having been requested to do so by the Commission and the Budget and Control Board. (Emphasis Added)

It is the opinion of this Office that there is no impermissible 'conflict of interest' arising from the Commission's competition with other freight-car providers or railroads, provided common carrier railroads operating in the State have been given the due statutory request and declined to provide such equipment or services as are contemplated in the proposed lease. Only after these provisions are complied with, and the Budget and Control Board has given its approval may the Commission enter into the lease agreement.

CONCLUSION

1. The Public Railways Commission has the statutory authority, upon approval by the State Budget and Control Board, to enter into a long-term lease of freight cars from a car leasing corporation, such cars to be put into general use on the standard car hire and interchange basis with other railroads.

*3 2. The lease may be entered into only after request is made for such equipment or services from the common carrier railroads operating in the State and they have declined to provide same within six months after request by Commission and the Budget and Control Board.

Frank K. Sloan
Deputy Attorney General

1978 WL 34708 (S.C.A.G.)