

**July 12, 2011 Advisory Letter--- Free Passes For Legislators on Burlington
Northern Santa Fe Railway**

July 8, 2011

Raúl E. Burciaga
Legislative Council Service
411 State Capitol
Santa Fe, NM 87501

Re: Opinion Request – Free Passes For Legislators on Burlington Northern Santa Fe Railway

Dear Mr. Burciaga:

You have requested our advice regarding the constitutionality of legislators and other public officers accepting an invitation to travel on the newly constructed Abo Canyon rail line in one of Burlington Northern Santa Fe Railway's ("BNSFR's") trains. Your request indicates that this is a one-time offer to inspect the new railway and that BNSFR does not provide passenger services in New Mexico. Based on our examination of the relevant constitutional, statutory, judicial and other legal authorities from New Mexico and other states, and on the information available to us at this time, we conclude that the New Mexico constitution probably does not preclude legislators and other public officers from accepting BNSFR's one-time offer to ride the train at no cost for the purpose of inspecting or touring the newly constructed Abo Canyon rail line.

Article IV, Section 37 and Article XX, Section 14 of the New Mexico Constitution prohibit legislators and certain other public officers from obtaining a free pass for transportation over any railroad upon terms not open to the general public. Article IV, Section 37 states:

It shall not be lawful for a member of the legislature to use a pass, or to purchase or receive transportation over any railroad upon terms not open to the general public; and the violation of this section shall work a forfeiture of the office.

Article XX, Section 14 states:

It shall not be lawful for the governor, any member of the state board of equalization, any member of the corporation commission [public regulation commission], any judge of the supreme or district court, any district attorney, any county commissioner or any county assessor, during his term of office to accept, hold or use any free pass; or purchase, receive or accept transportation over any railroad within this state for himself or his family upon terms not open to the general public; and any person violating the provisions hereof shall, upon conviction in a court of a competent jurisdiction, be punished as provided in

Sections Thirty-Seven and Forty of the article on Legislative Department in this constitution.

Article XX, Section 14 references the penalties described in Article IV, Section 37, which, as quoted above, requires forfeiture of office and Article IV, Section 40, which provides that a conviction of Section 37 (and of Section 39, which defines the crimes of bribery and solicitation of bribery) is a felony punishable by a fine of up to \$1,000 or imprisonment for between one and five years.

New Mexico courts generally follow the plain meaning rule of statutory construction. See Brown v. Bowling, 56 N.M. 96, 100, 240 P.2d 846, 849 (1952). When a statute is penal in nature, it should be strictly construed. See State v. Alexander, 46 N.M. 156, 123 P.2d 724 (N.M. 1942); United States v. Santistevan, 1 N.M. 583 (1874). However, legislative intent is to be given effect by adopting a construction that will not render the statute's application absurd or unreasonable and will not lead to injustice or contradiction. See State v. Nance, 77 N.M. 39, 419 P.2d 242 (1966), cert. denied, 386 U.S. 1039 (1967). "A statute should be interpreted to mean what the Legislature intended it to mean, and to accomplish the ends sought to be accomplished by it." State ex rel. Newsome v. Alarid, 90 N.M. 790, 794, 568 P.2d 1236, 1240 (1977). Even when a statute is arguably unambiguous, "it must be interpreted through the vehicle of legislative intent" and "the court will not be bound by a literal interpretation of the words if such strict interpretation would defeat the intended object of the legislature." State ex rel. Stratton v. Roswell Indep. Sch., 111 N.M. 495, 499-501, 806 P.2d 1085, 1089-91 (Ct. App. 1991). Furthermore, the court may consider the history and background of the statute, in addition to the language, in order to determine the legislature's intent. See State ex rel. Kline v. Blackhurst, 106 N.M. 732, 749 P.2d 1111 (1988).

Courts have approached constitutional construction in the same manner as it has statutory construction and has stated that the "rules of statutory construction... apply equally to constitutional construction." State ex rel. Richardson v. Fifth Judicial Dist. Nominating Comm'n, 141 N.M. 657, 662 (N.M. 2007). Indeed, although the drafters of the constitution "are presumed to give the words their plain, natural and usual significance," City of Farmington v. Fawcett, 114 N.M. 537, 544, 843 P.2d 839 (Ct. App.), cert. quashed, 114 N.M. 532, 843 P.2d 375 (1992), "the fundamental principle of constitutional construction is to give effect to the intent of the framers of the organic law and of the people adopting it." Greene v. Esquibel, 58 N.M. 429, 440, 272 P.2d 330, 337 (1954). New Mexico courts will not adopt a technical or strained construction of the constitution because a "[c]onstitution, unlike a statute, is intended not merely to meet existing conditions, but to govern the future," and is therefore "progressive and not static." Flaska v. State, 51 N.M. 13, 22-23, 177 P.2d 174, 180 (1946). See also Territory ex rel. Curran v. Gutierrez, 12 N.M. 254, 269, 78 P. 139, 143 (1904).

Article XX, Section 14 and Article IV, Section 37 of the New Mexico Constitution were adopted to combat bribery of public officials. See N.M. Att'y Gen. Op. No. 603 (1933). A 1944 Attorney General Opinion found that provisions similar to Article XX, Section 14 and Article IV, Section 37 could be found at that time in Article 12, Section 244,

Constitution of Alabama; Article 4(ii), Section 23, Constitution of Arizona; Article 27, Section 7, Constitution of Arkansas; Article 12, Section 19, Constitution of California; Article 16, Section 31, Constitution of Florida; Article 19, Section 15, Constitution of Louisiana; Article 12, Section 24, Constitution of Missouri; Article 7, Section 188, Constitution of Mississippi; Article 13, Section 5, Constitution of New York; Article 15, Section 1, Constitution of Oklahoma; Article 12, Section 161, Constitution of Virginia; Article 2, Section 39 and Article 12, Section 20, Constitution of Washington; Article 13, Section 11, Constitution of Wisconsin. See N.M. Att’y Gen. Op. No. 4455 (1944).

At the time that these constitutional amendments were adopted, the completion of the transcontinental railroad enabled extremely wealthy railroad conglomerates to wield enormous social power and political influence. See Cal. Att’y Gen. Op. 08-309 (2010). The western states in particular felt the impact of the railroad companies’ abuse of power and improper influence over politicians. Id.

Free railroad passes given to politicians were at first a subtle form of bribery. However, the general public saw free passes grow into a system of bribery and corruption that influenced every facet of the political process. This was due not only to politicians’ reliance on free railroad transportation to run effective campaigns and get elected, but also to pay for first-class travel accommodations for politicians’ family and friends, as well as transportation for goods and livestock from these politicians’ personal businesses. Once elected or reelected, the railroad conglomerates of the time used the free pass system to influence and sometimes control the actions of those elected officials. See George W. Berge, The Free Pass Bribery System: Showing How the Railroads, Through the Free Pass Bribery System, Procure the Government Away from the People (The Independent Publishing Company 1905).

The constitutional amendments mentioned above, as well as Article XX, Section 14 and Article IV, Section 37 of the New Mexico Constitution, were adopted to remove the improper influence that railroad companies exercised over elected officials through the penalty of removal of office for holding such a free pass. See N.M. Att’y Gen. Op. No. 603 (1933) (Art. IV, § 37 “was adopted for the primary purpose of eliminating graft upon the part of members of the legislature and to relieve such members of any feeling of obligation toward a railroad company by virtue of the possession of a free pass”).

Past opinions of this office have clarified certain aspects of Article XX, Section 14 and Article IV, Section 37 but none specifically addresses the question you presented. This office has stated that: railroad companies can issue free transportation to any person not listed in Article XX, Section 14, N.M. Att’y Gen. Op. No. 877 (1912); a sheriff or deputy sheriff may hold a free railroad pass since neither is listed in Article XX, Section 14, N.M. Att’y Gen. Op. No. 158 (1929-1930); and a person who obtained a free railroad pass as compensation during employment with a railroad company or as a spouse of a railroad employee, and who later becomes an elected official, may continue to hold and use such a pass, N.M. Att’y Gen. Op. No. 603 (1933), N.M. Att’y Gen. Op. No. 1545 (1937), N.M. Att’y Gen. Op. No. 3098 (1939) and N.M. Att’y Gen. Op. No. 4455 (1944).

Several attorneys general from other states have issued opinions regarding situations more akin to the question you have presented. The California Attorney General stated that members of the board of directors of a public transit agency could accept free transportation passes on the agency's own buses in order to perform their official duties. See Cal. Att'y Gen. Op. 01-802 (2002). In 1939, the Oregon Attorney General stated that state tax commissioners and the commission's employees could accept free or reduced rate passes from a railroad for the purpose of determining taxation valuations of the railroad's property. See Ore. Att'y Gen. Op. 39-526 (1939). While the Oregon Constitution at that time allowed railroad companies to issue free or reduced rate passes to certain public officials in the performance of official duties, Oregon had a prohibition against a member or employee of the state tax commission receiving a free pass for personal use. Oregon Code, §§ 62-104, 62-107 and 69-446 (1930). The Oregon Attorney General reasoned that since neither the commissioners nor the employees of the state tax commission would be personally benefited by a free pass while conducting inspections in accordance with its official duties, acceptance of such a pass was authorized by law.

The Wisconsin Attorney General's Office issued an opinion answering a question very similar to yours. See Wis. Att'y Gen. Op. 90-137 (1990). Wisconsin's Committee on Senate Organization asked whether a public officer could accept a ride on a train for the purpose of inspecting specific rail activities "such as the progress of a rehabilitation project for the installation of a new rail relay system or simply to tour railroad facilities." Wisconsin's "Free Pass Amendment," Article XIII, Section 11 of the Wisconsin Constitution, is similar to our constitutional prohibitions against free railroad passes and "prohibits the giving of any free pass, frank or privilege involving traveling accommodations, or transportation of any person or property... to state and local officials and employe[e]s, candidates for state or local offices, political committees, or any member or employe[e] of a political committee." Id.

The Wisconsin Attorney General stated that acceptance of a free pass to inspect or tour a railroad would not violate its Constitution because "[a] tour of a railroad's facilities, or a trip by railcar to inspect certain railroad improvements, does not involve transportation for which the railroad usually would charge a fare." Id. The opinion went on to say that the railroad was not in the business of providing tours and that

the intent of the prohibition was to prohibit bribery of public officials through gifts of transportation and traveling accommodation services. Nothing in the section's language or history suggests that it was intended to prohibit bona fide tours of railroad facilities conducted by rail.

The Wisconsin Attorney General reasoned that a special privilege for purposes of the constitutional prohibition was anything of value not available to the general public and that, although a tour was not available to the general public, the tour of the railroad facilities was not something of value and had no intrinsic value. Id. Because a free pass for the purpose of an inspection or tour was not a covert attempt of bribery, and because the free pass had no intrinsic value, acceptance of the free pass by a public

officer did not violate Wisconsin's Constitution. Id. See also Wis. Att'y Gen. Op. 88-237 (1988) (stating that Article XIII, Section 11 of Wisconsin's Constitution does not prohibit a public official from accepting transportation for which the carrier does not usually charge because it does not constitute bribery of a public official).

Considering the question you have presented in light of the legislative intent behind Article XX, Section 14 and Article IV, Section 37 and New Mexico and other states' attorneys general opinions, our office believes that the acceptance of a free pass from BNSFR to inspect or tour the newly constructed Abo Canyon rail line from a railcar does not violate the constitution. While this invitation is not available to the general public, BNSFR does not provide passenger services or have passenger cars on its trains in New Mexico. The invitation appears to be for a bona fide and limited tour of the railroad line and does not involve transportation for which the railroad would usually charge a fare. This is not the type of free transportation that the constitution is intended to prohibit. Instead it is a one-time free pass to a predetermined destination that is not for the public official's personal benefit. To find that the acceptance of a free pass for the ceremonial purpose of inspecting or taking a tour of the newly constructed railway violates Article XX, Section 14 and Article IV, Section 37 of the New Mexico Constitution would "enlarge the terms of the [constitutional provisions] both as to words and meaning." State ex rel. Stratton v. Roswell Indep. Sch., 111 N.M. 495, 500-501, 806 P.2d 1085, 1089-91 (Ct. App. 1991).

As noted above, New Mexico courts have not had occasion to consider the precise issue raised by your request and we cannot predict for certain how a New Mexico court would rule on this issue. Nevertheless, considering the factual situation presented, available legal authority and the evils addressed by the constitutional prohibitions, we believe it likely that a court reviewing the matter would conclude that Article XX, Section 14 and Article IV, Section 37 does not bar legislators and other public officials covered by those provisions from accepting BNSFR's invitation to participate in an inspection tour of the new Abo Canyon track.

You have requested a formal opinion on the matter discussed above. Please note that such an opinion is a public document available to the general public. Although we are providing you with legal advice in the form of an advisory letter instead of an Attorney General's Opinion, our office believes this letter is also a public document, not subject to the attorney-client privilege. Therefore, our office may provide copies of this letter to the general public. If we may be of further assistance, or if you have any questions regarding this opinion, please let us know.

Sincerely,

JUSTIN R. WOOLF
Assistant Attorney General