

**LETTER OPINION  
2002-L-12**

February 22, 2002

Honorable Aaron Krauter  
State Senator  
HC1, Box 27  
Regent, ND 58650-9721

Dear Senator Krauter:

Thank you for your letter requesting my opinion on whether a luncheon fundraising event held on a dining car owned by a railroad corporation violated the North Dakota corporate campaign contribution law. You enclosed a copy of an invitation for a fundraising event held in April of 2001 for the benefit of the Governor. Invitations to the event stated it was to be held on a railroad dining car in a Mandan location. Section 16.1-08.1-03.3(1), N.D.C.C., provides, in part:

1. A corporation, cooperative corporation, limited liability company, or association may not make a direct contribution:  
  
    . . . .
  - c. To aid any candidate for political office or for nomination to political office.
  - d. For any political purpose . . . .

The statute provides criminal penalties and civil liability for violation of these provisions. N.D.C.C. § 16.1-08.1-03.3(6-8).

Certain pertinent terms in the statute are defined in N.D.C.C. ch. 16.1-08.1. Section 16.1-08.1-01(2), N.D.C.C., defines "candidate" as "an individual who seeks nomination for election or election to public office." "Contribution" is defined in N.D.C.C. § 16.1-08.1-01(3) as meaning:

. . . a gift, subscription, loan, advance, or deposit of money, made for the purpose of influencing the nomination for election, or election, of any

person to public office or aiding or opposing the circulation or passage of a statewide initiative or referendum petition or measure. The term also means a contract, promise, or agreement, express or implied, whether or not legally enforceable, to make a contribution for any of the above purposes. The term includes funds received by a candidate for public office or a political party or committee which are transferred or signed over to that candidate, party, or committee from another candidate, party, or political committee or other source except as provided in subdivision d. The term does not include:

- a. A loan of money from a bank or other lending institution made in the regular course of business.
- b. Time spent by volunteer campaign or political party workers.
- c. Money spent by a candidate on the candidate's own behalf.
- d. Any money received by a candidate for legislative office which is immediately transferred or signed over to a district committee of a political party within thirty days of the candidate receiving the money. The district committee of the political party shall report a transfer of this kind as a contribution according to section 16.1-08.1-03 and shall show the origin of the contribution to the legislative candidate.

(Emphasis supplied.)

"Political purpose" is defined as meaning "any activity undertaken in support of or in opposition to the election or nomination of a candidate to public office whether the activity is undertaken by a candidate, a political committee, a political party, or any person. The term does not include activities undertaken in the performance of a duty of a state office." N.D.C.C. § 16.1-08.1-01(10) (emphasis supplied).

Applying N.D.C.C. § 16.1-08.1-03.3(1) and the related statutory definitions to the situation you present in your letter raises several issues which I will discuss below. Generally, provisions in state law preventing corporations from using corporate funds<sup>1</sup> in support of or in opposition to a candidate for state elective office have been upheld by the courts against

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<sup>1</sup> However, such laws do permit some corporate political campaign contributions through the use of separate segregated funds, commonly known as PACs. See, e.g., N.D.C.C. § 16.1-08.1-03.3(2).

First Amendment and other constitutional challenges. See, e.g., Austin v. Michigan Chamber of Commerce, 494 U.S. 652 (1990). Such statutes generally are justified on the basis that they are supported by a compelling governmental interest in preventing political corruption in connection with corporate concentrations of wealth. Id. at 659. The Supreme Court of Michigan in Advisory Opinion on Constitutionality of 1975 PA 227, 242 N.W.2d 3 (Mich. 1976), in construing a provision similar to North Dakota law, noted the following:

Large aggregations of capital controlled by a few persons could have a significant impact upon the nomination or election of a candidate. The possibility of misuse of corporate assets by persons acting on behalf of uninformed or unwilling shareholders and the attempts at influence or importunity which might be exerted upon a successfully elected candidate by a contributing corporation represent abuses which the passage of the corrupt practices act sought to eliminate.

The state's interest in preserving the integrity of the elective process must be balanced against the assumed right to free expression of an artificial entity (i.e., a corporation) regarding the candidacy of persons seeking election to public office.

The railroad in question here, The Burlington Northern and Santa Fe Railway Company, is a Delaware corporation authorized to conduct business in the state of North Dakota, according to the records of the North Dakota Secretary of State's Office. The first issue that arises is whether the use of a railroad car for the purpose of holding a fundraising luncheon for the Governor constituted a direct corporate "contribution" within the meaning of N.D.C.C. § 16.1-08.1-03.3. As quoted above, "contribution" is defined to mean a "gift, subscription, loan, advance, or deposit of money, made for the purpose of influencing the nomination for election, or election, of any person to public office . . . ." When the bill containing this definition was originally introduced into the Legislature in 1981, "contribution" also included the phrase "or anything of value." See House Bill No. 1218, 47th Legislative Assembly of North Dakota. In a hearing before the House Judiciary Committee on February 4, 1981, Representative Rosie Black, the sponsor of House Bill No. 1218, was asked whether the bill limited the definition of "contribution" to cash contributions or whether it included in-kind contributions. Representative Black testified that the definition included everything except "a loan or volunteer work." She indicated it covered everything that could be a contribution. Hearing on H.B. 1218 Before the House Comm. on the Judiciary, 1981 N.D. Leg. (Feb. 4) (Testimony of Rep. Black). However, the words "or anything of value" were ultimately deleted from the definition of "contribution." See Hearing on H.B. 1218 Before the House Comm. on the Judiciary, 1981 N.D. Leg. (Feb. 16).

Thus, it is apparent that by rejecting the phrase “or anything of value,” the Legislature intended to restrict the definition of “contribution” to contributions of money, rather than including other property or services having a monetary value such as in-kind contributions. There was no indication either in your letter or in the subsequent press reports that I have reviewed that the railroad corporation actually contributed money to this fundraiser. What it reportedly did provide was the use of the railroad dining car or cars, the food that was served, and serving staff. While it may be reasonably argued that valuable in-kind contributions are essentially the same as contributions of cash and such contributions violate the spirit of the corporate contribution statutes, nevertheless, the letter of the law is not to be disregarded under the pretext of pursuing its spirit. N.D.C.C. § 1-02-05.

To establish a violation of N.D.C.C. § 16.1-08.1-03.3(1) it must be shown that an act was a contribution as defined in N.D.C.C. § 16.1-08.1-01(3). To be a “contribution” it must first be established that a corporate contribution was also made “for the purpose” of influencing an election or nomination for elected public office. Such a determination would have to be made by a trier of fact, however, and is beyond the scope of legal opinions issued by this office.

A second requirement that must be established to bring an act within the definition of a contribution is that the goods and services were provided by the railroad to “influence the nomination for election, or election, of any person to elective office.” Therefore, to constitute a violation of the statute the corporate act of providing use of its dining car must have aided a “candidate” for nomination or election to political office or must have been provided for a “political purpose.” According to a copy of an invitation you submitted with your letter, the event took place April 10, 2001. At that time, the Governor had been in office for about four months and, thus, the fundraiser occurred at least three years from the next primary and general election for the office of Governor. The definition of “candidate” as noted above means an individual who seeks nomination for election or election to public office. N.D.C.C. § 16.1-08.1-01(2).<sup>2</sup> Notwithstanding the

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<sup>2</sup> Prior to 1995, the definition of “candidate” contained in former N.D.C.C. § 16.1-08-01(2) provided a little more detailed guidance. That former definition stated that a candidate “means a person whose name is presented for nomination to public office at any primary election or convention, whether the person is actually nominated or not; a person whose name is printed as a candidate on an official ballot used at any election; or a person who seeks election through write-in votes.” This definition was shortened in 1995 when N.D.C.C. chs. 16.1-08, pertaining to campaign contributions, and 16.1-08.1, pertaining to campaign contribution statements, were combined for purposes of “statutory efficiency” and to merge the two definition portions of each chapter. See Hearing on S.B. 2420 Before the House Comm. on Political Subdivisions

opinion expressed by some that political officeholders are continuously running for reelection, it could not reasonably be said that at a point three years before the nomination process and three and a half years before the actual election an individual could be considered a candidate for nomination or election to office within the meaning of N.D.C.C. ch. 16.1-08.1. See N.D.C.C. §§ 16.1-11-01 and 16.1-13-01.<sup>3</sup> This is especially true since becoming a candidate for nomination or election to state office requires the completion of a number of procedural steps and filings, including the filing of a nominating petition or a certificate of endorsement, an affidavit of candidacy, and a statement of interests, not to mention the political custom of publicly announcing one's candidacy for nomination or election. See N.D.C.C. §§ 16.1-11-06, 16.1-11-10, 16.1-09-02. None of these steps required by North Dakota election law could have occurred at the point the fundraiser in question was held.

Similarly, "political purpose" is defined in N.D.C.C. § 16.1-08.1-03(10) as "any activity undertaken in support of or in opposition to the election or nomination of a candidate to public office whether the activity is undertaken by a candidate, a political committee, a political party, or any person." Again, because of the time between the event and the nomination and election processes, the event could not reasonably be deemed to be a political purpose within the meaning of N.D.C.C. ch. 16.1-08.1. Until such point as a putative candidate for state office files a nominating petition or certificate of endorsement, together with the affidavit of candidacy and statement of interests with the Secretary of State, such an individual is not legally a candidate who could be nominated in a primary election or elected in a general election.

Based on the foregoing, it is my opinion that a non-cash contribution of goods or services by a corporation to a fundraiser to benefit a state officeholder who is not at the time of the fundraiser a candidate for nomination or election within the meaning of N.D.C.C. ch.

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1995 N.D. Leg. (Mar. 2) (Statement of Secretary of State Al Jaeger). ("This section merges the two definition portions of each chapter. There are a few wording adjustments to certain definitions to make them applicable to the surviving chapter.") Id. It does not appear that the shortening of this definition was intended to make any substantive change in the law. This more detailed definition of "candidate" contained in the predecessor statute is instructive in the present case. At the time of the April 2001 fundraiser, it would be three years or more from the time any candidate's name could be presented for nomination for the office of Governor at a convention or primary election and more than three years from the time a person could have his name printed on the ballot at the November 2004 general election for the office of Governor.

<sup>3</sup> Primary elections are held on the second Tuesday in June of every general election year for state officers; general elections are held on the first Tuesday after the first Monday in November of each even-numbered year. Id.

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16.1-08.1 does not constitute an illegal corporate campaign contribution under N.D.C.C. § 16.1-08.1-03.3(1)(c) or (d). For the same reasons outlined above, it is also my opinion that receipt of such non-cash goods or services by a state officeholder under the circumstances present here does not constitute the receipt of an illegal corporate campaign contribution in violation of N.D.C.C. § 16.1-08.1-03.3(1)(c) or (d).

Sincerely,

Wayne Stenehjem  
Attorney General

jjf/pg