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MUNICIPALITY — OFFICIALS OF MUNICIPALLY OWNED TRANSIT SYSTEM — MAY AUTHORIZE PUBLICATION AND DISTRIBUTION OF MONTHLY MAGAZINE — COST — LEGITIMATE PART OF OPERATING EXPENSE — CLEVELAND RAILWAY COMPANY.

SYLLABUS:

When, in the judgment of the officials charged with the operation of a municipally owned transit system, publication of a monthly magazine and distribution thereof among the employes of such system is deemed essential to the efficient operation thereof, the cost of such publication and distribution is a legitimate part of the operating expense of such transit system.

Columbus, Ohio, October 30, 1942.

Bureau of Inspection and Supervision of Public Offices,
Columbus, Ohio.

Gentlemen:

I have before me your request for opinion, reading as follows:

> "We are enclosing herewith correspondence from our City of Cleveland Chief Examiner, and Mr. W. J. McC., Commissioner of Municipal Transportation, together with a copy of 'Cleveland Railway News,' a monthly publication that has been distributed to employes by the Cleveland Railway Company.
>
> In this connection inquiry is made if the publication of said magazine, under the name of 'City Transit News,' may be continued now that the Transportation System has been acquired by the City of Cleveland and is operated as a municipal utility in a proprietary capacity.
>
> May we respectfully request that you examine the inclosures and give us your opinion as to the legality of continuing said publication at the expense of the City Transit System?"

Section 4 of Article XVIII of the Constitution gives municipalities the right to own and operate public utilities. That section reads as follows:

> "Any municipality may acquire, construct, own, lease and operate within or without its corporate limits, any public utility the products or service of which is or is to be supplied to the

> municipality or its inhabitants, and may contract with others for any such product or service. The acquisition of any such public utility may be by condemnation or otherwise, and a municipality may acquire thereby the use of, or full title to, the property and franchise of any company or person supplying to the municipality or its inhabitants the service or product of any such utility."

It is quite evident that a municipal street railway or transit system is a public utility within the scope of the section of the Constitution above quoted. It is well settled that in the acquisition, maintenance and operation by a municipality of a public utility, the product or service of which is or is to be supplied to the municipality or its inhabitants, the municipality is engaged in the exercise of proprietary powers.

28 Ohio Jurisprudence, pp. 100, 104.

Butler v. Karb, 96 O.S. 472.

Insurance Company v. Wadsworth, 109 O.S. 440.

State ex rel. v. Cleveland, 125 O.S. 230.

It is stated in 28 O.J. 104:

> "When acting in its proprietary capacity, a municipality may ordinarily exercise its powers in the same manner as would a private corporation, in the absence of any statutory prohibition."

The cases above listed are cited in support of that proposition.

In the case of Butler v. Karb, supra, it was held:

> "Municipalities of the state are authorized to establish, maintain and operate lighting, power and heating plants and furnish the municipality and the inhabitants thereof light, power and heat. The powers thus conferred are proprietary in their character and in the management and operation of such plant municipal officials are permitted wide discretion, Courts are without authority to interfere therewith upon complaint merely that the capacity of the plant is overtaxed and streets of the municipality are insufficiently lighted by reason of furnishing current to private consumers, and that the rates charged for current are inadequate to meet the cost of production and transmission thereof."

The court in that case had under consideration certain sections of the General Code applying specifically to the ownership and operation

of electric light plants, which statutes granted broad and general powers of management to a municipality. The court, in emphasizing the proposition that very large discretion is to be left to the municipal authorities in the operation of such plant, quoted (Opinion, p. 482) from Pond on Public Utilities, section 11, as follows:

> "In its private commercial capacity while acting primarily as a business concern, the powers conferred on a municipal corporation are for its own special benefit and advantage. * * * Recognizing this to be the principal object in the creation of such corporations and the sole purpose of endowing them with such commercial and proprietary powers as permit them and their citizens to enjoy the benefits of municipal public utilities, the courts permit and favor the exercise of the fullest discretion in the enjoyment and administration of such powers which are consistent with the general object of their grant and the best interests of all parties concerned who are intended to be benefited by such advantages.
>
> The discretion of municipal corporations in the exercise of their powers is as wide as that enjoyed by the general government and is to be exercised in accordance with the judgment of the authorities in charge of the municipal corporation as to the necessity or expediency of each particular subject when it arises."

The court further stated:

> "We think it must be conceded that the city, acting in a proprietary capacity, may exercise its powers as would an individual or private corporation. It may be that for a time the business will not be remunerative at the rates charged, yet with proper management the business may develop to a point where it will even yield a profit to the city and therefore result to 'its own special benefit and advantage.'"

The case of Insurance Company v. Wadsworth, supra, also involved a municipally owned light and power plant, but I think that the principles there laid down and the elaborate discussion by the court are equally applicable to the operation of a transit system owned by a municipality. The syllabus of that case is as follows:

> "1. The board of trustees of public affairs of a village, which under authority granted by the Constitution and general law operates an electric light and power plant and lines, has power within Sections 4361 and 3961, General Code, to contract for an insurance policy of indemnity against liability for the operation of the said property."

2. The power to establish, maintain, and operate a municipal light and power plant, under the Constitution and statutes aforesaid, is a proprietary power, and in the absence of specific prohibition, the city acting in a proprietary capacity may exercise its powers as would an individual or private corporation."

Judge Allen, speaking for a unanimous court, refers with approval to the case of Butler v. Karb, and cites a large number of authorities in support of the proposition that "when a municipality is engaged in operating a municipal plant, under an authority granted by the general law, it acts in a business capacity, and stands upon the same footing as a private individual or business corporation similarly situated."

In State ex rel v. Cleveland, 125 O.S. 230, the court held:

"A municipality, in so far as it acts in a proprietary capacity, possesses the same rights and powers and is subject to the same restrictions and regulations as other like proprietors."

This case related to the Cleveland public auditorium, and the court held that while such auditorium was not a public utility, nevertheless it was an enterprise that was owned and operated by the city in its proprietary capacity. The court said at page 233 of the opinion:

"The Cleveland auditorium was built by funds derived from bond issues authorized by vote of the electors of that city, and is under the complete control of the city, through its duly designated officers, to whom such duties are delegated. The city in this respect is acting in a proprietary capacity and has the same duties, obligations and responsibilities, and also the same rights and powers, as other like proprietors. Travelers Ins. Co. v. Village of Wadsworth, 109 Ohio St., 440, * * *."

My understanding is that the utility in question was purchased by the issuance of mortgage revenue bonds, and the question might be raised as to whether that fact would have any bearing on the question under consideration. It is my opinion that in the absence of any stipulation in the mortgage securing these bonds, restricting or prohibiting the city, in the operation of this utility, from publishing and issuing the magazine, the fact that the purchase of the utility was so financed would not in any way affect or limit the discretion of the city officials.

It seems to me clear, in the light of the above authorities, that the discretion as to the details of operation of a city owned transit system is

committed by law to the municipal authorities in charge of such operation, and that the determination as to the method of management is left entirely to such officials.

Therefore, if such officials should in their judgment deem the publication of a monthly magazine and the distribution thereof among the employes of such system essential to the efficient operation thereof, it would appear, and it is consequently my opinion, that the cost of such publication and distribution would be a legitimate part of the operating expense of such system.

Respectfully,

THOMAS J. HERBERT
Attorney General.