

3311.

INSURANCE—TO INDEMNIFY COUNTY FOR LOSS TO BUILDINGS THROUGH OPERATION OF STEAM BOILERS COMMISSIONERS MAY INSURE BUT NOT FOR PUBLIC LIABILITY AND PROPERTY DAMAGE.

SYLLABUS:

1. *A board of county commissioners may legally enter into a contract of insurance which would indemnify the county for loss or damage to county owned buildings which might result as an incident to the operation of steam boilers in such county buildings.*

2. *A board of county commissioners cannot legally enter into a contract of insurance which would purport to indemnify the county for "public liability" and "property damage" resulting from the operating of steam boilers in county owned buildings.*

COLUMBUS, OHIO, October 16, 1934.

HON. GEORGE L. LAFFERTY, *Prosecuting Attorney, Lisbon, Ohio.*

DEAR SIR:—This will acknowledge receipt of your request for my opinion, which reads as follows:

"I enclose a sample form of steam boiler insurance policy. May the County Commissioners enter into that part of this contract of insurance which provides for indemnifying the County for any loss that they may sustain to their own building and property?"

We are of the opinion that the way the policy reads the premium is based upon damage to third persons or property of third persons, and would therefore be unauthorized inasmuch as there could be no liability to third persons or the property of third persons in the event of damage when the premium is based upon a loss which the County cannot legally indemnify against.

We feel that the policy should not be entered into as payment of some portion of the premium would be unlawful."

In the first part of your request for my opinion, you inquire as to the authority of a board of county commissioners to insure against loss to county buildings that might result from a steam boiler in such buildings. In this connection, I call your attention to section 2402, General Code, which reads as follows:

"Special sessions of the board may be held as often as the commissioners deem it necessary. At a regular or special session, the board may make any necessary order or contract in relation to the building, furnishing, repairing or *insuring* the public buildings or bridges, the employment of janitors, the improvement or inclosure of public grounds, the maintenance or support of idiots or lunatics, the expenditure of any fund, or provide for the reconstruction or repair of any bridge destroyed by fire, flood, or otherwise, and do any other official act not, by law, restricted to a particular regular session." (Italics the writer's.)

However, I do not believe you are so much concerned with the above question as you are with the right of a county to enter into a contract for boiler or explosion insurance, where such a contract not only indemnifies the county against loss to its own property but also consists of "public liability" or "property damage" insurance. The following excerpts from the proposed contract of insurance which you have inclosed certainly make it evident that the contract of insurance includes "public liability" and "property damage" insurance:

"To PAY, to the extent of any indemnity remaining after payment of all loss under Sections I and II, such amounts as the Assured shall become obligated to pay by reason of the liability of the Assured for loss on the property of others directly damaged by such accident, including liability for loss of use of such damaged property of others; * * *"

"To PAY, to the extent of any indemnity remaining after payment of all loss under Sections I, II and III, if loss under Section IV is stated above as included but not otherwise, such amounts as the Assured shall become obligated to pay by reason of the liability of the Assured for damages on account of bodily injuries (including death at any time resulting therefrom) sustained by any person not employed by the Assured, * * *"

The question of whether or not the county could take out such insurance would depend on whether or not the county could be liable for such injuries to third persons. The law in Ohio is well settled that a county is not liable in tort in the absence of an express statute creating such liability. In the case of *Weiher vs. Phillips, et al.*, 103 O. S. 249, it was held as disclosed by the first branch of the syllabus:

"A board of county commissioners is not liable in its official capacity for damages for negligent discharge of its official duties except in so far as such liability is created by statute, and such liability shall not be extended beyond the clear import of the terms of the statutes."

In the case of *Riley vs. McNicol, et al.*, 109 O. S. 29, Jones, J., at page 33, stated the rule as follows:

"This court has on various occasions announced the principle that these county boards are not liable in their official capacity for negligent discharge of official duties, unless such liability is created by statute, and that 'such liability shall not be extended beyond the clear import of the terms of the statutes.' *Weiher vs. Phillips*, 103 O. S. 249, 133 N. E. 67."

In an Opinion to be found in Opinions of the Attorney General for 1932, Volume II, page 1098, it was held as disclosed by the syllabus:

"1. The expenditure of public funds by a board of county commissioners to pay the premium on a policy of insurance purported to indemnify the said commissioners and the county which they represent, for public liability and property damage growing out of accidents which may occur as an incident to the operation of steam boilers used for the heating of a court house or a county home is unwarranted and unauthorized.

2. Neither a board of county commissioners, nor the county which it represents, is liable in damages for injuries to third persons caused by the explosion or the use of steam boilers operated for heating a county court house or the buildings of a county home."

Obviously, if third persons could not secure a judgment from the county for injuries received through the operation of a county owned steam boiler, there would be no liability against the insurance company. See Section 9510-4, General Code; also Opinion of the Attorney General No. 2976, rendered July 31, 1934.

Without unduly prolonging this discussion, it is my opinion in specific answer to your questions that:

1. A board of county commissioners may legally enter into a contract of insurance which would indemnify the county for loss or damage to county owned buildings which might result as an incident to the operation of steam boilers in such county buildings.

2. A board of county commissioners cannot legally enter into a contract of insurance which would purport to indemnify the county for "public liability" and "property damage" resulting from the operating of steam boilers in county owned buildings.

Respectfully,

JOHN W. BRIGGER,

Attorney General.

3312.

PRIVATE MOTOR CARRIER'S LAW—CERTAIN SPECIFIC PRACTICES NOT "FOR HIRE" WITHIN MEANING OF SECTIONS 614-103, ET SEQ. G. C.

SYLLABUS:

The applicability of Section 614-103, et seq., General Code, to certain specific practices considered.

COLUMBUS, OHIO, October 16, 1934.

The Public Utilities Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—My opinion has been requested by your Superintendent of Motor Transportation as to whether or not the so-called private motor carrier law enacted by the 90th General Assembly and contained in Section 614-103, et seq., General Code, is applicable to certain practices set forth in three hypothetical cases described as follows:

"1. A owns a car and is employed at a mine some distance from his residence. He carries B, C, D and E, men who are working at the same mine, with him. A, B, C, D, and E share the cost of operation while going to work; namely, gas, oil, repairs, tires and license plates. Does this constitute 'for hire' under the Private Motor Carrier Act?

2. A owns a car; works at a mine some distance from his home and he carries with him B, C, D and E who work at the same place. B, C, D and E each own cars of their own. A operates his the first