

MAINE STATE LEGISLATURE

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ATTORNEY GENERAL

STATE OF MAINE
DEPARTMENT OF THE ATTORNEY GENERAL
STATE HOUSE STATION 6
AUGUSTA, MAINE 04333

February 3, 1988

Honorable John L. Martin
Speaker of the House
House of Representatives
State House Station #2
Augusta, Maine 04333

Dear Speaker Martin:

You have inquired of this Department whether there is generally any constitutional impediment to the enactment by the Maine Legislature of legislation authorizing the condemnation of rail lines when such lines are not being operated safely, reliably, or efficiently, and the transfer of those lines to other rail operators.

The question which you pose involves two separate clauses of the United States Constitution. First, the condemnation statute would have to be found not to have been "preempted" by any act of Congress, and thus unconstitutional under the Supremacy Clause of Article VI of the United States Constitution. Second, any statute authorizing the condemnation of private property would have to comply with the requirement of the "Taking" Clause of the Fifth Amendment of the United States Constitution that the condemnation be for a "public use."

With regard to the preemption question, there does not appear to be any specific provision, either of the Interstate Commerce Act, 49 U.S.C. § 10101, et seq., or of the provisions of the United States Code relating to railroad safety, 45 U.S.C. § 421, et seq., which prohibits state or local governments from condemning railroads. Those statutes, which generally are concerned with rates charged by railroads and the safe operation of railroads, respectively, do have extensive provisions relating to state regulatory activities in these areas, but they do not appear to prohibit state ownership, by

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acquisition or otherwise, of railroads. Indeed, the condemnation of private railroads by public authorities is not without precedent. See, e.g., Chicago and Northwestern Transportation Co. v. United States, 678 F.2d 665 (7th Cir. 1982); Port Authority Trans-Hudson Corp. v. Hudson Rapid Tubes Corp., 231 N.E.2d 734 (N.Y. 1967).

With regard to the "Taking" Clause, while there clearly would be no difficulty with the state condemning a railroad and operating it itself, a question does arise as to whether the immediate transfer of the railroad to another private party would constitute a "public use" within the meaning of the Clause. In view of this question, this Department would suggest that if legislation authorizing condemnation were proposed, such legislation contain provisions for the retention of ownership of the railroad in question by the state and its operation, by a contract, lease or otherwise, by another private party. In this manner, the public aspect of the transaction would be preserved, and any concern that the statute violated the "public use" component of the "Taking" Clause would be minimized.

In view of the limited time available to research your question, the advice contained in this letter is necessarily general. This Department remains available, however, to work with you and the Legislature in developing the details of the legislation in order to avoid any constitutional difficulties.

Sincerely,



CABANNE HOWARD
Deputy Attorney General

CH/ec