

In my opinion, an attempted classification for the purpose of licensing founded upon the mode of compensation only is not “* * * just and reasonable, and based upon substantial distinctions germane to the subject matter and the object to be obtained.” See *McErlain, Tr. v. Taylor*, 207 Ind. 240, at page 242.

PUBLIC INSTRUCTION: May privately owned school busses be condemned for public use?

February 9, 1943.

Dr. Clement T. Malan,
Superintendent of Public Instruction,
State House,
Indianapolis, Indiana.

Dear Dr. Malan:

In answer to your inquiry concerning state acquisition of privately-owned school busses or of the use of such busses, legislation therefor must be consistent with Section 21 of Article 1 of the Constitution of Indiana which reads:

“No man’s particular services shall be demanded, without just compensation. No man’s property shall be taken by law, without just compensation; nor, except in case of the State, without such compensation first assessed and tendered.”

and must also be consistent with the 14th amendment of the Federal Constitution. Naturally, such acquisition would have to be under the State’s power of eminent domain, of which the Indiana Courts have repeatedly said:

“* * * The power of eminent domain is an attribute of sovereignty and inures in every independent state.
* * * It is superior to all property rights, and extends to all property within the jurisdiction of the state.
* * *” *So. Ind. Gas & Elect. Co. v. City of Boonville* (1939) 215 Ind. 552.

To conform to constitutional provisions the first of the minimum requirements for eminent domain legislation is

that the property condemned or taken must be taken for "public use." An excellent discussion of "public use" is found in *Fountain Park Co. v. Hensler* (1926), 199 Ind. 95, in which the Court says on page 111:

"The test whether a use is public or not is whether a public trust is imposed upon the property, whether the public has a legal right to the use, which cannot be gainsaid, or denied, or withdrawn, at the pleasure of the owner. *Market Co. v. Railroad Co.* (1891), 142 Pa. 580."

and on page 116,

"As stated *supra*, the matter of what degree of public good or utility is necessary to constitute a 'public use' is governed by questions of public policy and this is a matter which may vary at different times and places."

Under existing conditions and under the assumption that purchase of school busses is now impossible, the acquisition of privately-owned busses would seem to be a "public use."

The other requirements of eminent domain legislation are that the owner of the property must be given adequate notice, an opportunity to be heard, and receive full compensation for his property taken. The fulfillment of these requirements is well illustrated by our present Eminent Domain Act; Chap. 48 of the Acts of 1905 as amended by Chap. 76 of the Acts of 1935 of the Indiana General Assembly.

The validity of a proceeding under that Act by a municipality to acquire a privately-owned utility was challenged in *City of Lebanon v. Public Service Company of Indiana* (1938), 214 Ind. 295. Chap. 190, Sec. 18 (b) of the Acts of 1933, provides that the acquisition of such a utility "shall proceed as now provided by law for the taking of property under the power of eminent domain." Accordingly, the municipality used the eminent domain act in the condemnation of the utility. In speaking of the two acts together the Court said:

"The 1933 Act has the effect to broaden the Eminent Domain Act of 1905 and provides an orderly method of condemnation where a court of law has a final voice

as to what is just compensation for the property taken. It is evident that the Legislature considered that the method adopted in 1933 was fair and just, and that the court would consider evidence to determine the question of just compensation. The court is authorized to require additional investments and expenditures to be included in the compensation. Full and ample provisions are made to enable the appellee to present, and to be heard upon, all proper questions. Notice is required and every facility furnished to appellee to be protected in its property rights. No reason appears to hold that the due process clause of the Fourteenth Amendment of the Federal Constitution is violated, or that the law transgresses any state or Federal constitutional provision."

That the property involved in your inquiry is not real estate presents no insurmountable obstacles, since fundamentally the right of eminent domain extends to personal as well as real property.

It will be noted that the Eminent Domain Act provides for the acquisition of "land or other property or right." Of that part of the Act the Court in *City of Lebanon v. Public Service Co. of Indiana*, *supra*, said:

"The trial court is given full authority by the statute to hear evidence and to grant full, true, and just compensation for all property taken. The taking includes not only the real estate, but 'other interest therein or other property or right.'"

My conclusion is that appropriate legislation for the condemnation of privately-owned school busses, provided it complies with the constitutional requirements of eminent domain, is feasible.