



STATE OF KANSAS

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December 31, 1987

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ATTORNEY GENERAL OPINION NO. 87- 191

Tom Hanna, Director
Alcoholic Beverage Control Division
700 Jackson Street
Jayhawk Tower
Topeka, Kansas 66603

Re: Intoxicating Liquors and Beverages--Licensing and
Related Provisions; City Option--Retailer's
License; Amtrack

Synopsis: Amtrack may sell alcoholic beverages in Kansas only if licensed to do so by the Director of the Division of Alcoholic Beverage Control. Any license granted by the Director is subject to continued eligibility, compliance with all relevant statutes and rules and regulations, and any required local authorization. While current law may make it impractical for Amtrack to obtain a license to sell alcoholic beverages in Kansas, the legislature may provide for temporary membership in class B clubs located on railroads such as it has for class B clubs located in hotels or municipal airports. Cited herein: K.S.A. 41-2601, as amended by L. 1987, ch. 182, §60; K.S.A. 41-2702, as amended by L. 1987, ch. 182, §98; L. 1987, ch. 182, §§87, 88, 89; Kan. Const., Art. 15, §10.

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Dear Mr. Hanna:

As Director of the Division of Alcoholic Beverage Control, you request our opinion regarding the retail sale of alcoholic

liquor on common carriers. Specifically, you inform us that the National Railroad Passenger Corporation (Amtrack) is interested in obtaining a license to sell alcoholic beverages at retail on trains while traveling through Kansas, and inquire as to your authority to grant a license to this potential applicant.

In National Railroad Passenger Corporation v. Miller, 358 F.Supp. 1321 (D. Kan. 1973) the United States District court for the District of Kansas held that, pursuant to the Twenty-First Amendment to the United States Constitution, Amtrack is subject to Kansas liquor laws and therefore cannot sell alcoholic beverages at retail without the appropriate license. This decision was affirmed by the Supreme Court of the United States, National Railroad Passenger Corporation v. Miller, 414 U.S. 948, 94 S.Ct. 285, 38 L.Ed.2d 205 (1973). See also National Railroad Corporation v. Harris, 490 F.2d 572, 573 (10th Cir. 1974). We must therefore determine Amtrack's eligibility for licensure.

A class A club is "a premises which is owned or leased by a corporation, partnership, business trust or association and which is operated thereby as a bona fide nonprofit social, fraternal or war veterans' club. . . ." K.S.A. 41-2601, as amended by L. 1987, ch. 182, §60(e). Amtrack does not fit this definition and is therefore ineligible for a class A club license.

A class B club is defined as "a premises operated for profit by a corporation, partnership or individual to which members of such club may resort for the consumption of food or alcoholic beverages and for entertainment." K.S.A. 41-2601, as amended by L. 1987, ch. 182, §60(f). While Amtrack could apply for a class B club license, it is doubtful that this would be desired under current law due to the membership requirements. Even with the ability to reciprocate with other establishments in Kansas which meet the 50% food sales requirement of K.S.A. 41-2601, as amended by L. 1987, ch. 182, §60(m) and L. 1987, ch. 182, §87, most Amtrack passengers will probably not be entitled to use of the club's facilities. Currently there is no provision in L. 1987, ch. 182, §87 allowing temporary membership for class B clubs located on railroad cars. However, should the legislature see fit to enact such a provision, Amtrack could obtain a class B club license and sell to any passenger holding a current, valid train ticket.

A drinking establishment is defined as "premises which may be open to the general public, where alcoholic liquor by the individual drink is sold." K.S.A. 41-2601, as amended by L. 1987, ch. 182, §60(h). The general statute dealing with drinking establishment licensure is L. 1987, ch. 182, §88 which provides as follows:

"(a) A license for a drinking establishment shall allow the licensee to offer for sale, sell and serve alcoholic liquor for consumption on the licensed premises which may be open to the public, but only if such premises are located in a county where the qualified electors of the county:

"(1) (A) Approved, by a majority vote of those voting thereon, the proposition to amend section 10 of article 15 of the constitution of the state of Kansas at the general election in November, 1986, or (B) have approved a proposition to allow sales of alcoholic liquor by the individual drink in public places within the county at an election pursuant to section 92; and

"(2) have not approved a proposition to prohibit such sales of alcoholic liquor in such places at a subsequent election pursuant to section 92.

"(b) A drinking establishment shall be required to derive from sales of food for consumption on the licensed premises not less than 30% of all the establishment's gross receipts from sales of food and beverages on such premises unless the licensed premises are located in a county where the qualified electors of the county:

"(1) Have approved, at an election pursuant to section 92, a proposition to allow sales of alcoholic liquor by the individual drink in public places within the county without a requirement that any portion of their gross receipts be derived from the sale of food; and

"(2) have not approved a proposition to prohibit such sales of alcoholic liquor in such places at a subsequent election pursuant to section 92.

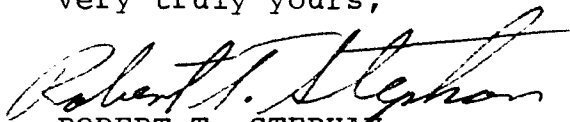
"(c) A drinking establishment shall specify in the application for a license or renewal of a license the premises to be licensed, which may include all premises which are in close proximity and are under the control of the applicant or licensee."

The language of this statute and the constitutional provision upon which it is based (Kan. Const., Art. 15, §10) poses a problem for a potential licensee such as Amtrack whose "premises" travel through several counties, some which are "wet," others which may be "dry." Article 15, section 10 of the Kansas constitution specifically prohibits the sale of intoxicating liquor by the drink in public places except on licensed premises located within counties where the qualified electors have approved such sales. The Director of the Division of Alcoholic Beverage Control is given no authority to override the wishes of the local electorate and thus a drinking establishment license will be effective only in those counties which have elected to allow the sale of liquor by the drink in public places. (Compare the provisions of K.S.A. 41-2701, as amended by L. 1987, ch. 182, §98 which essentially create a separate category for license applicants wishing to sell cereal malt beverages at retail on railway cars.) Pursuant to these provisions, a licensed drinking establishment located on a railroad car which travels through several counties in Kansas may sell alcoholic beverages only while traveling through counties which have elected to allow such sales. The provisions dealing with caterer's licenses are, for our purposes, essentially the same as those dealing with drinking establishments and thus the considerations would be identical. See L. 1987, ch. 182, §89.

In conclusion, Amtrack may sell alcoholic beverages in Kansas only if licensed to do so by the Director of the Division of Alcoholic Beverage Control. Any license granted by the Director is subject to continued eligibility,

compliance with all relevant statutes and rules and regulations, and any required local authorization.

Very truly yours,



ROBERT T. STEPHAN
Attorney General of Kansas



Julene L. Miller
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