

Post Office Department  
Solicitor  
Opinion of June 22, 1918  
6 Ops. Sol. POD 619 (pub. 1928)

JUNE 22, 1918

SIR: I am in receipt of your letter of the 19th instant, in which you ask an expression of my opinion on several questions of law set out below which have arisen in connection with prosecution of the Western Union Telegraph Company for the establishment of a private express between New York and Washington and New York and Boston and the transmission of messages thereby. You ask—

"(1) Does the conduct of the company and its officers in establishing this system of private mail, constitute a single offense, or may a prosecution be had for each occasion upon which a messenger is dispatched with such mail? It is assumed that messengers are dispatched over these routes nightly in accordance with a regular system.

"(2) May a prosecution be had for each post route over which such illicit mail is carried; and if so, do the various stages between New York and Washington and New York and Boston for which railroad contracts are made constitute separate post routes?

"(3) May section 183 of the United States Criminal Code be applied to the telegraph company?

"(4) Are there any grounds, statutory or otherwise, upon which the Government may maintain a civil action for postage?

"(5) If not, does a cause of action lie for the infringement of the Government's monopoly?

"[Sic] Section 181 of the Criminal Code reads as follows:

"Whoever shall establish any private express for the conveyance of letters or packets or in any manner cause or provide for the conveyance of the same by regular trips or at stated intervals over any post route which is or may be established by law, or from any city, town, or place, to any other city, town, or place, between which [**6 Ops. Sol. POD 620**] the mail is regularly carried, or whoever shall aid or assist therein shall be fined not more than five hundred dollars, or imprisoned not more than six months, or both: *Provided*, That nothing

contained in this section shall be construed as prohibiting any person from receiving and delivering to the nearest post office, postal car or other authorized depository for mail matter, any mail matter properly stamped."

Section 183 of the Criminal Code is as follows:

"Whoever shall transmit by private express or other unlawful means, or deliver to any agent thereof, or deposit or cause to be deposited at any appointed place, for the purpose of being- so transmitted, any letter or packet, shall be fined not more than fifty dollars."

Assuming the facts to show that the Western Union Telegraph Company or its officers or agents have set up a private express and have been transmitting messages thereby in violation of law, I answer your questions as follows:

(1) A reading of the statute shows that, under section 181, the establishment or providing of the private express is the act denounced. Its continuance or maintenance is not covered. An indictment under this section must therefore, in my opinion be confined to the establishment of the private express, which in the nature of things is a single offense with respect to each route so established. Section 183, however, providing for the punishment of anyone who "shall transmit by private express \* \* \* any letter or packet," makes each transmission in the prescribed manner a separate and distinct indictable offense.

(2) A prosecution is authorized for each act of establishing or providing a private express under section 181, and section 183, as noted above, makes punishable the transmission of each letter or packet in this manner.

The question of what constitutes a post route is dealt with at some length in *U. S. v. Easson*, (18 Fed. R., 590), in *Blackham v. Gresham* (16 Fed. R., 609), and in 14 Opinions Attorney General, 152. See also *United States v. Kochersperger* (9 Am. L. Reg., 145, 26 Fed. Cas., No. 15541), and *Railway Mail Service cases* (13 Ct. Cl., 199). In the Court of Claims decision cited it was stated that there is ground for holding that the term "post route" ordinarily signifies a post road, or definite portion thereof, 'over which mails are usually transported by contract." All of these cases will probably be of value to you in the proposed prosecution. I do not find, however, that the question has ever definitely been decided. It is my opinion, however, that the position could probably be maintained that the routes originally established by contract with **[6 Ops. Sol. POD 621]** the various railroad companies are distinct and separate post routes and that the setting up of a private express over each of them is a distinct and separate offense.

I would suggest, however, that to preclude any question arising on this score, and in view of the fact that there is no doubt but that the routes between the cities named taken as a whole are post routes, the logical thing to do would be to define the offense according to the termini of the service,

i.e., the cities of deposit and delivery as established by the company and shown by the evidence.

(3) As you will note from the above, it is my opinion that section 183 of the Criminal Code is applicable to the offense of the Telegraph Company. That, under the assumed state of the facts, the company has been engaged in "transmitting, by private express" letters admits of no doubt. While this section is undoubtedly aimed at individuals who adopt a private express for the transmission of messages which should properly be a source of revenue to the Government, its terms include every individual or concern who actually does send a message in this manner. Once the service is established the sending of a message by means thereof forms a new offense, and whether the sender is the writer of the message, his agent, or the company which has established the private express is immaterial. To reason otherwise, with particular reference to the facts in this case, would be a, *reductio ad absurdum*; for, while letters have been transmitted by private express, the writers were not aware of the fact, and the only one who could have committed the offense would be either the company or some one acting for it.

(4) This question seems to be answered by the old opinion of Attorney General Nelson (in 4 Ops. A.G. 349), in which it was held that letters transported by private carriers can not be charged with postage and that "all that the department is competent to do is to enforce the penalties to which all unauthorized carriers of letters on the mail routes are by law subjected." The Attorney General proceeds: "This is the remedy, and the only remedy, provided by law; and, however inefficient it may prove in practice, it is not competent to the Executive to pursue any other."

I know of no change in the law since Attorney General Nelson rendered this opinion which would change the conclusion expressed by him. As a matter of fact, all of the cases of this character which have been before the department in which a recovery was had were prosecuted under the criminal provisions. Many of them have been compromised by the payment of sums of money approximating this postage lost by the United States, but this does not alter the fact that the sum paid was a penalty and not civil damages.

(5) I think this is answered above. The only procedure I know of is under the statutes cited. **[6 Ops. Sol. POD 622]**

For your general information in this matter I am citing below the cases dealing with the subject which have come to my attention: *U. S. v. Erie R. R.* (235 U. S. 513) ; cases cited in Annotated Criminal Code at page 154 (21 A. G. Ops. 394) ; *Williams v. Wells Fargo & Co. Express* (177 Fed. R. 352, 33 L. R. A., N. S. 1034; 28 Ops. A. G. 537). The opinion of this office inclosed herewith in connection with the answer to your letter of the 21st instant should also be of value.

If I can be of any further service in this matter, please command me.

Respectfully,

W.H. LAMAR.

HON. FRANCIS G. CAFFEY,  
*United States Attorney,*  
*New York, N.Y.*