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David F. Day. Letter from the Acting Secretary of the Treasury, transmitting a communication from the Secretary of the Interior relating to the reimbursement of David F. Day.

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Recommended Citation

H.R. Doc. No. 174, 54th Cong., 2nd Sess. (1897)

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DAVID F. DAY.

LETTER

FROM

THE ACTING SECRETARY OF THE TREASURY,

TRANSMITTING

A COMMUNICATION FROM THE SECRETARY OF THE INTERIOR
RELATING TO THE REIMBURSEMENT OF DAVID F. DAY.

JANUARY 12, 1897.—Referred to the Committee on Indian Affairs and ordered to be printed.

TREASURY DEPARTMENT,
January 11, 1897.

SIR: I have the honor to transmit herewith, for the consideration of Congress, copy of a communication from the Secretary of the Interior, of the 8th instant, submitting an estimate of appropriation for inclusion in the Indian appropriation bill for reimbursement to David F. Day, United States Indian agent at the Southern Ute Agency, Colo., for personal expenses incurred in defending the suit brought against him by Jose B. Lucero for damages for malicious prosecution, which suit was subsequently decided in favor of said Day, \$367.80.

Respectfully, yours,

S. WIKE, *Acting Secretary.*

THE SPEAKER OF THE HOUSE OF REPRESENTATIVES.

DEPARTMENT OF THE INTERIOR,
Washington, January 8, 1897.

SIR: I have the honor to transmit herewith a communication from the Commissioner of Indian Affairs, in which he recommends that Congress be requested to insert in the appropriation bill for the Indian service for the fiscal year 1898, an item appropriating the sum of \$367.80, reimbursement to David F. Day, United States Indian agent at the Southern Ute Agency, Colo., for personal expenses incurred in defending the suit brought against him by Jose B. Lucero for damages for malicious prosecution, which suit was subsequently decided in favor of said Day.

The recommendation of the Commissioner of Indian Affairs is approved. The request for an appropriation is respectfully forwarded through your Department for the appropriate action of Congress.

Respectfully,

D. R. FRANCIS, *Secretary.*

The SECRETARY OF THE TREASURY.

DEPARTMENT OF THE INTERIOR,
OFFICE OF INDIAN AFFAIRS,
Washington, January 6, 1897.

SIR: I have the honor to inclose herewith copy of letter from David F. Day, United States Indian Agent at Southern Ute Agency, Colo., dated December 23, 1896, transmitting report from Charles A. Johnson, attorney at law, of Durango, Colo., and his own sworn statement as to expenses incurred by him in defending the suit, for \$2,000 damages for malicious prosecution, brought against him by Jose B. Lucero, a Mexican.

From the papers in the case it appears that suit was brought in the county court of La Plata County, Colo., by said Lucero, who alleged that he had been damaged by reason of the agent causing his arrest upon a charge of trespassing on the Southern Ute Reservation and stealing the property of the Government from its wards, the Ute Indians.

Attorney Johnson, in his report on the case, states the following, viz:

In the latter part of the year 1893, when the agent (Agent Day) first took charge of the Southern Ute Agency, it was found that several of the Mexican race were staying on the reservation without leave so to do from the Government; that they were furnishing the Indians with whisky, and involving them in difficulties and disputes among themselves; and said Lucero being of this number, and the chiefs desiring Lucero, especially, removed, he with others were required by the agent to leave the reservation. Lucero failed to obey the order to remove, and was put off by the Indian police at the instance of the agent. This occurred the last of the year 1893. He (Lucero) remained away from the reservation until about the last of June, 1894, and again intruded himself upon the reservation, and on about July 1, 1894, an Indian named Davy Root came to the agency and informed the clerk of the agency that Lucero had put him out of his house, turned his stock into his alfalfa fields, and taken his rations from him and eaten them all. Root, who is a cripple, was crying at the time. The agent caused Lucero's arrest by the Indian police, and had him taken before United States Commissioner C. F. Newcomb, at Durango, on the charge complained of; but Lucero succeeded in fixing the matter up with Root before the hearing, and he (Root) left and went to the Blue Mountains of Utah, and Lucero was discharged by reason of the failure of proof against him, and afterward commenced said action.

The United States district attorney for the State of Colorado was, under date of February 16, 1895, instructed by the Department of Justice to defend Agent Day, but it appears that said United States district attorney resided at Denver, Colo., about 500 miles distant, and as the attorneys for the prosecution would bring on for hearing, every few days, various motions, and the court would fix short, inconvenient, and vexing times for hearings and for trials, Agent Day was compelled to secure local counsel in order to prevent the matters in suit from being determined against him at times when it was impossible for the United States attorney to be present, by reason of the great distance he had to come and other governmental matters requiring his attention at other places. Again, as the cause had to be tried before a local jury, and witnesses had to be looked up and their evidence ascertained in advance, the employment of local legal assistance, familiar with the case and witnesses, and bias or prejudice of jurors, became important.

The first trial resulted in a verdict for the defendant, but the court set aside the verdict on some slight ground, and the case was tried a second time, again resulting in favor of the defendant, Agent Day.

From the said copy of agent's sworn statement it will be observed that in order to make a proper defense it was absolutely necessary for him to expend, from his private funds, the sum of \$367.80, for counsel fees, court costs, traveling expenses of his witnesses, etc., in which sum he now asks to be reimbursed.

Believing that Agent Day incurred this expense for the best interests of the Government and the Indians under his charge, and that he should be reimbursed in the amount so expended, and as there are no funds at the disposal of this office applicable to the payment of personal expenditures of this character, I have the honor to recommend that Congress be requested to grant him relief in the premises by inserting the following paragraph in the Indian appropriation bill for the fiscal year 1898, viz:

To reimburse David F. Day, United States Indian agent at the Southern Ute Agency, Colorado, for personal expenses incurred in defending the suit brought against him by Jose B. Lucero for damages for malicious prosecution, which suit was subsequently decided in favor of said Day, three hundred and sixty-seven dollars and eighty cents.

Very respectfully,

D. M. BROWNING, *Commissioner.*

The SECRETARY OF THE INTERIOR.

SOUTHERN UTE AGENCY,
Ignacio, Colo., December 23, 1896.

SIR: I have the honor to submit inclosures for your approval, as Department is familiar with the conditions and of the justice of my claim. I have enlisted the animosity of the lower grade of the Mexican element by prosecuting and convicting some of their number for trespass and selling liquor to Indians, and regret to assert that the Mexican instrumental in visiting this expense and vexation upon me, found allies who boast of a superior grade of intelligence. My arraignment was an outrage; the trials an assault upon justice. The facts you have been previously advised as to, and I trust to secure your aid in the work of seeking compensation.

Very respectfully,

DAVID F. DAY,
United States Indian Agent.

The COMMISSIONER OF INDIAN AFFAIRS,
Washington, D. C.

STATE OF COLORADO, *County of La Plata, ss:*

In the county court.—In the matter of the suit lately pending in the said court wherein Jose B. Lucero was plaintiff and David F. Day, United States Indian agent of the Southern Ute Indians, was defendant, for \$2,000 damages for malicious prosecution.

This cause was commenced in the county court of La Plata County, Colo., on the complaint of Lucero, alleging that he had been damaged by the said agent causing his arrest upon a charge of trespassing on the Southern Ute Reservation, and stealing the property of the Government from its wards, the Ute Indians.

In the latter part of the year 1893, when the agent first took charge of the Southern Ute Agency, it was found that several of the Mexican race were staying on the reservation without leave so to do from the Government; that they were furnishing the Indians with whisky and involving them in difficulties and disputes among themselves; and said Lucero being of this number, and the chiefs desiring Lucero, especially, removed, he with others were required by the agent to leave the reservation. Lucero failed to obey the order to remove and was put off by the Indian police at the instance of the agent. This occurred the last of the year 1893. He

remained away from the reservation until about the last of June, 1894, and again intruded himself upon the reservation, and on about July 1, 1894, an Indian named Davy Root came to the agency and informed the clerk of the agency that Lucero had put him out of his house, turned his stock into his alfalfa fields, and taken his rations from him and eaten them all. Root, who is a cripple, was crying at the time. The agent caused Lucero's arrest by the Indian police and had him taken before United States Commissioner C. F. Newcomb, at Durango, on the charge complained of, but Lucero succeeded in fixing the matter up with Root before the hearing, and he (Root) left and went to the Blue Mountains, in Utah, and Lucero was discharged by reason of the failure of proof against him, and afterwards commenced said action.

The Government instructed United States District Attorney H. V. Johnson to defend the action for the agent, but he resided and had his office at Denver, 500 miles distant, and as every few days the attorneys for the prosecution would bring on for hearing various motions, and the court would fix short, inconvenient, and vexing times for hearings and for trials, the agent was compelled to secure local counsel and attorneys to prevent the matters in suit from being determined against him at times when it was impossible for the United States attorney to be present, by reason of the great distance he had to come and other governmental matters requiring his attention at other places, and as the cause had to be tried by a local jury, and witnesses had to be looked up and their evidence ascertained in advance, the employment of local legal assistance who was familiar with the case and witnesses, and bias or prejudice of jurors, became important.

The case was tried first in August, 1895, and resulted in a verdict in favor of the agent and against Lucero. The court set aside this verdict on some slight ground, and the cause was again tried in November, 1895, and again resulted in a verdict in favor of the agent and against Lucero, the jury sitting in the trial in each instance being composed of leading business men of the community.

When the above suit was first commenced, the attorneys for Agent Day moved the court to require Lucero to give security for such costs as might accrue, but the court refused so to do, and the agent was compelled to pay the costs of the court for his necessary defense from his own pocket, amounting to about \$60. In the early part of the present year a new judge came upon the bench, and the attorneys for Agent Day then renewed their motion for a cost bond from Lucero, and the court allowed the same, and ordered Lucero to file such bond, which he failed to do, and the case was then dismissed, and as Lucero is without property from which these costs can be made by execution, they have never been repaid the Indian agent. Besides his expenditures for costs paid into court, as shown by certificate of the judge of our county court, attached hereto, Agent Day was compelled to pay a considerable sum for the expenses of board and transportation of seven witnesses, which were necessary for his proper defense, and who had to be brought from Ignacio to Durango, a distance of 25 miles, and kept here for the purposes of the two trials had in his case, in all, about five days each.

The course followed by the agent in the matter is very generally approved by all good citizens here, and was certainly in harmony with the policy of the Indian Department, as it is most thoroughly consonant with that of preserving peace and good order among the Indians, and between the Indians and the whites who live around them. And upon the basis that the agent was strictly following the path of duty in expelling Lucero from the reservation, and in subsequently causing his arrest upon his return and interference with the Indians, the injustice of casting the burden of making a necessary defense in the premises upon the agent is manifest; would entail upon officers of Government, while in the proper and efficient discharge of their duties, a most grievous burden.

CHARLES A. JOHNSON,
Of counsel for Agent Day in premises of said suit.

DURANGO, COLO., January 1, 1896.

David F. Day, United States Indian agent Southern Ute Indians, to Charles A. Johnson, attorney at law, Dr.

To attorney's fees for defending action for damages for \$2,000 in county court, La Plata County, Colo., of Jose Blas Lucero versus David F. Day, for malicious prosecution in causing arrest of said Lucero for interfering with Southern Ute Indians..... \$200.00
Received payment.

CHARLES A. JOHNSON.

STATE OF COLORADO, *County of La Plata, ss:*

In the county court. Jose Blas Lucero, plaintiff, v. David F. Day, defendant. Certificate of costs.

I, Chauncey T. Morgan, county judge of the county court in and for La Plata County, Colo., and ex officio clerk thereof, do now hereby certify that David F. Day, the above-named defendant, has heretofore paid all of the costs heretofore taxed against him, David F. Day, the said defendant, in the said sum of \$53.50, as the sum appears of record in said cause.

I hereby further certify that on, to wit, the 6th day of July, 1896, the said above-entitled cause was dismissed by said county court, on motion of the defendant, by reason of failure of the plaintiff to file a bond for costs herein upon the order of the said court so to do.

Witness Chauncey T. Morgan, judge of said court, and the seal thereof, at Durango, Colo., this 9th day of December, 1896.

[SEAL.]

CHAUNCEY T. MORGAN,
County Judge and ex officio Clerk.

STATE OF COLORADO, *County of La Plata, ss:*

In the county court. Jose Blas Lucero, plaintiff, v. David F. Day, defendant. Certified affidavit.

Comes now David F. Day, the defendant in the above-entitled caused named, and being duly sworn touching the matters and things in the premises of the said above-entitled cause, deposes and says: That there were two trials had in the said cause in the said county court in La Plata County, Colo., and in each of which it became and was necessary for him, in order that his proper and reasonable defense to the matters and things alleged against him in plaintiff's complaint therein, that he employ counsel at Durango, Colo., aside from the counsel furnished him by the Government in the person of the district attorney of the district of Colorado, and that he did employ and pay Charles A. Johnson in the said premises the sum of \$200, and that the same was necessary; and that, further, he was obliged to, and did, bring seven witnesses from Ignacio, Colo., to Durango, Colo., to testify in the matter of his said defense, namely, Max Brachvogel, George Krauss, Stanley Day, Luis Apodaca, John Taylor, and two Ute Indians, and was compelled to pay their railroad fare from Ignacio, Colo., to Durango, Colo., a distance of 25 miles, and as well their return fare to Ignacio, amounting to \$2.70 each in each of the two said trials, or \$5.40 each in all; and as well paid the hotel bills for each of said witnesses during the time they remained here, to wit, two days each upon the occasion of the first trial, and three days each upon the occasion of the second trial, amounting in all (which he paid out and expended) to the sum of \$367.80; and that the bringing and procuring of said witnesses and producing them upon each of the said trials of the said cause was necessary in the premises of his necessary and proper defense therein; and further affiant saith not.

DAVID F. DAY.

Subscribed and sworn to before me this 9th day of December, 1896.

[SEAL.]

CYRUS F. NEWCOMB,
United States Commissioner.

Item.

To reimburse David F. Day, United States Indian agent at the Southern Ute Agency, Colorado, for personal expenses incurred in defending the suit brought against him by Jose B. Lucero, for damages for malicious prosecution, which suit was subsequently decided in favor of said Day, three hundred and sixty-seven dollars and eighty cents.