STATE OF TENNESSEE
OFFICE OF THE
ATTORNEY GENERAL
POST OFFICE BOX 20207
NASHVILLE, TENNESSEE 37202

September 30, 2009

Opinion No. 09-161

Duty of Train Operator to Blow Whistle Before Crossing Private Drive

QUESTION

Does a train engine operator have a statutory duty pursuant to Tenn. Code Ann. § 65-12-108 to blow a train's whistle or horn before crossing a private drive?

OPINION

It is the opinion of this office that Tenn. Code Ann. § 65-12-108 does not require a train engine operator to blow a train's whistle or horn before crossing a private drive. Tenn. Code Ann. § 65-12-108 only requires that a train engine operator blow a whistle or horn at public railway crossings.

ANALYSIS

Tennessee Code Annotated § 65-12-108 states the following regarding a train engine operator's blowing the train's whistle or horn at railroad crossings:

> In order to prevent accidents upon railroads, the following precautions shall be observed:
>
> (1) The officials having jurisdiction over every public road crossed by a railroad shall place at each crossing a sign, marked as provided by § 65-11-105. The county legislative body shall appropriate money to defray the expenses of the signs. The failure of any engine driver to blow the whistle or ring the bell at any public crossing so designated by either the railroad company or the public official shall constitute negligence with the effect and all as set forth in § 65-12-109;
>
> (2) On approaching every crossing so distinguished, the whistle or bell of the locomotive shall be sounded at the distance of one fourth (1/4) of a mile from the crossing, and at short intervals until the train has passed the crossing

Tenn. Code Ann. § 65-12-108 (2009).

In *Artrip v. Norfolk Southern Railway Company*, No. 2:08-CV-200, 2009 WL 152482 (E.D. Tenn. Jan. 22, 2009), the United States District Court for the Eastern District of Tennessee relied on Tennessee state law in holding that there is no requirement for a train engineer to sound a whistle when approaching a private railroad crossing. In *Artrip*, the plaintiff brought a claim against Norfolk Southern Railway Company after the decedent was struck and killed at a private railroad crossing in Sullivan County, Tennessee. *Id*. at *1. The plaintiff alleged that the train operator's failure to sound a whistle warning before crossing the private drive was an act of negligence. *Id*. at *3. However, the District Court found no merit in plaintiff's allegations of negligence, concluding that "although the locomotive did not blow its whistle, there was no requirement that it do so at a private crossing." *Id*. at *13 (*citing* 49 C.F.R. § 222.25 and Tenn. Code Ann. § 65-12-108(1)). Summary judgment was granted in favor of the train operator, and the plaintiff's claims were dismissed. *Id*. at *15.

Tennessee's state railroad statutes are largely pre-empted by the Federal Railroad Safety Act ("FRSA"). *See* 49 U.S.C. § 20106. Audible warnings at public highway-rail grade crossings are addressed in the FRSA at 49 U.S.C. § 20153. This section mandates that the Secretary of Transportation *shall* prescribe regulations requiring that a locomotive horn be sounded when nearing a public railroad crossing. *Id*. at (b); *see also* 49 C.F.R. § 222.21. Conversely, 49 U.S.C.A § 20153(f)(1) does not require the Secretary of Transportation to prescribe regulations for the sounding of a locomotive horn at private railroad crossings:

> (f) Specific rules. The Secretary *may*, by regulation, provide that the following crossings over railroads lines shall be subject, in whole or in part, to the regulations required under this section:
>
> (1) *Private highway-rail grade crossings.*

See also 49 C.F.R. § 222.7(c) ("except as provided in §§ 222.25 and 222.27, this part does not preempt any State law, rule, regulation, or order governing the sounding of locomotive horns at private highway-rail grade crossings or pedestrian crossings").

Additionally Chapter 49, Section 222.25 of the Code of Federal Regulations states that "this rule *does not require* the routine sounding of locomotive horns at private highway-rail grade crossings. However, *where State law requires* the sounding of a locomotive horn at private highway-rail grade crossings, the locomotive horn shall be sounded in accordance with § 222.21 of this part." (Emphasis supplied). As stated above, Tenn. Code Ann. § 65-12-108 addresses public railway crossings and does not require a train engine operator to blow a train's whistle or horn before crossing a private drive.

ROBERT E. COOPER, JR.
Attorney General and Reporter

MICHAEL E. MOORE
Solicitor General

ALLISON C. JENNINGS
Assistant Attorney General

Requested by:

The Honorable Jason E. Mumpower
State Representative, District 3
103 War Memorial Building
Nashville, Tennessee 37243-0103