

**1403 RAILROADS: DUTY TO BLOW TRAIN WHISTLE WITHIN MUNICIPALITY**

## INSTRUCTION WITHDRAWN.

## COMMENT

The instruction and comment were originally published in 1967 and withdrawn by the committee in 2006. The withdrawn instruction and comment read:

There is no safety statute, ordinance, or regulation that requires the blowing of a whistle as a train approaches a public highway within a municipality; there may arise situations where the blowing of the whistle is required in the exercise of ordinary care as a reasonable precaution to prevent a collision.

If you find that (the engineer) (a member of the train crew) observed the approach of the automobile, and from the observations, knew or should have known that the (driver) (occupant) of the automobile (was) (were) unaware of the train's approach, and, if a whistle warning would have been effective timely to alert (him) (her) (them) to the dangers of a collision, then it became the duty of the (engineer) (member of the train crew) to blow the whistle.

## COMMENT

See Wis. Stat. § 192.29(4); Devine v. McGowan, 15 Wis.2d 534, 113 N.W.2d 162 (1962); Webster v. Roth, 246 Wis. 535, 18 N.W.2d 1 (1945).

The train crew is entitled to rely on the assumption that a traveler on a highway "will look and will listen and not go onto the track into danger when it is apparent that a train is approaching, and to continue this assumption until the contrary becomes apparent or he does something to indicate a contrary intention on his part." Keegan v. Chicago, M. St. P. & P. Ry., 251 Wis. 7, 27 N.W.2d 739 (1947). See also Wis JI-Civil 1030, Right to Assume Due Care by Highway Users.

For a case involving a failure to sound a train's whistle at a crossing, see also Krolikowski v. Chicago & N.W. Transp. Co., 89 Wis.2d 573, 577n, 278 N.W.2d 865 (1979), where the jury was instructed on negligence in an emergency situation as follows:

Railroad engineers of a railroad train who are suddenly confronted by an emergency, not brought about or contributed by their own negligence and who are compelled to act instantly to avoid collision or injury are not guilty of negligence if they make such choice of action or inaction as an ordinarily prudent person might make if placed in the same position, even though it should afterwards appear not to have been the best or safest course.

You will bear in mind, however, that the rule just stated does not apply to any person whose negligence wholly or in part created the emergency. One is not entitled to the benefit of the emergency rule unless he is without fault in the creation of the emergency.