

1410 RAILROADS: DUTY TO MAINTAIN CROSSING SIGNS

A safety statute provides that every railroad corporation shall maintain a large signboard on each side of the track and near the track at every crossing of a public highway or street. The sign shall bear the words "RAILROAD CROSSING" in large letters so as to be visible to approaching traffic on the highway or street for a distance of at least 100 feet. If a railroad corporation through its employees knew or should have known that such a sign or signs were not maintained at the crossing in question and failed to erect such a sign within a reasonable time of the discovery of its absence, then it would be negligent with respect to its duty to warn users of the highway in the manner required by this statute.

COMMENT

The instruction and comment were originally published in 1967 and revised in 2005. The comment was also updated in 1980.

See Wis. Stat. § 192.29(5).

This instruction is to be used only where the crossing is not covered by an order of the Office of the Commissioner of Railroads. Since the office has exclusive jurisdiction to make rules, if the office has acted as to a certain crossing, then there is no other duty except the duty to comply with the order. Schulz v. Chicago, M. St. P. & P. Ry., 260 Wis. 541, 545, 51 N.W.2d 542 (1952).

In Schulz v. Chicago, M. St. P. & P. Ry., *supra* at 544, the court approved the principle of the following instruction though finding it inapplicable to the particular case:

In addition to the requirements made by statute for every railroad crossing, the railroad company may be required in the exercise of ordinary care to take additional precautions or erect or maintain more adequate warning devices at grade crossings over a public highway where such crossing is unusually dangerous.

While it is true that in the absence of statute, ordinance, or order, there is no duty upon the railroad to provide a flagman or other warning device at a crossing, yet a railroad may be negligent in obstructing a highway grade crossing – particularly at nighttime – where such obstruction is needless or unreasonable and incidental to operational requirements. McLaughlin v. Chicago, M. St. P. & P. Ry., 31 Wis.2d 378, 143 N.W.2d 32 (1966).

In Gamble-Skogmos v. Chicago & N.W. Transp. Co., 71 Wis.2d 767, 238 N.W.2d 744 (1976), the court distinguished between a situation where an order authorizes certain protective devices and where an order directs or requires such conduct. In the latter situation, the court concluded that a railroad is immunized against a claim that it was doing more or differently than the order directed and required. In the former situation, where the order simply authorizes or approves conduct, the immunity from the doctrines of common-law negligence is not so conferred. In Gamble-Skogmos, *supra*, the court discussed earlier case law on the issue and repeated the test for immunization first declared in Kurz v. Chicago, M. St. P. & P. R.R., 53 Wis.2d 12, 192 N.W.2d 97 (1971):

Thus, under Kurz, to immunize from liability for common-law negligence it is not enough that the public service commission have authorized or approved plans for protective devices at a grade crossing. To confer such immunity the order of the commission must be based on a review of the public safety requirements of the particular crossing, and must direct and require the installation of such crossing protection devices as will meet such established safety requirements. Such holding is not inconsistent with the decision in Verrette, where the order of the commission clearly found the protective devices installed to be "consistent with the public safety." Nor is it inconsistent with Schulz holding immunity follows where, with public safety considered, the commission "has directed a crossing to be guarded in a particular manner and the railroad has done as directed." (Emphasis supplied.) Even if the Kurz decision did not thus square with Schulz and Verrette, we would follow Kurz as the latest and controlling statement of the rule of law involved. 71 Wis.2d at 773.