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The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

CHARLES MOLONY CONDON
ATTORNEY GENERAL

June 11, 1996

Rob Evans, Acting Chief
Ridgeway Police Department
P. O. Box 24
Ridgeway, South Carolina 29130

Re: Informal Opinion

Dear Chief Evans:

You have requested our opinion regarding S.C. Code Ann. Section 56-5-2710. Your inquiry centers around the fact that defendants have raised questions about certain aspects of the law and you need "some questions answered and items clarified." Specifically, you raise the following issues:

> [d]oes a railroad maintenance vehicle meet the definition of "railroad train" when that vehicle has the same wheels as a train and never leaves the tracks and also activates the warning lights and bells? Does a single locomotive meet the definition of "railroad train"? What constitutes "hazardous proximity to the crossing (section 4)? A defendant recently stated in court that after he stopped with the warning lights and bells working properly and seeing a train approaching at a distance of approximately 100 yards and at an approximate speed of 35 miles per hour that he could proceed through the crossing because the law states he could do that because he thought it was safe to do so. Please clarify when it is safe for a vehicle to proceed safely through the crossing.

Section 56-5-2710 provides as follows:

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Request Letter

> (a) Whenever any person driving a vehicle approaches a railroad grade crossing under any of the circumstances stated in this section the driver of the vehicle shall stop within fifty feet, but not less than fifteen feet, from the nearest rail of the railroad and shall not proceed until he can do so safely. The foregoing requirements shall apply when:
>
> (1) A clearly visible electric or mechanical signal device gives warning of the immediate approach of a railroad train.
>
> (2) A crossing gate is lowered or when a flagman gives or continues to give a signal of the approach or passage of a train.
>
> (3) A railroad train approaching within approximately one thousand, five hundred feet of the highway crossing emits a signal audible from such distance and the train, by reason of its speed or nearness to the crossing, is an immediate hazard.
>
> (4) An approaching railroad train is plainly visible and is in hazardous proximity to the crossing.
>
> (b) No person shall drive any vehicle through, around or under any crossing gate or barrier at a railroad crossing while the gate or barrier is closed or is being opened or closed.

Several principles of statutory construction are applicable to your questions. First and foremost, is the most fundamental rule -- that in interpreting a statute, the primary purpose is to ascertain the intent of the General Assembly. State v. Martin, 293 S.C. 46, 358 S.E.2d 697 (1987). A statutory provision should be given a reasonable and practical construction which is consistent with the purpose and policy expressed in the statute. Hay v. South Carolina Tax Comm., 273 S.C. 269, 255 S.E.2d 837 (1979). In construing a statute, the words used must be given their plain and ordinary meaning without resort to subtle or forced construction for the purpose of limiting or expanding its operation. Walton v. Walton, 282 S.C. 165, 318 S.E.2d 14 (1984). While it is the general rule that penal statutes must be strictly construed, such rule must not be applied in a way which will defeat the obvious intent of the Legislature. State v. Johnson, 16 S.C. 187 (1881).

With those principles of construction in mind, I will address each of your questions in turn.

I. Does the railroad maintenance vehicle meet the definition of "railroad train" when that vehicle has the same wheels as a train and never leaves the track and also activates the warning lights and bells?

It would be my opinion that such a vehicle would constitute a "railroad train". Generally speaking, a "train" is a continuous or connected line of cars or carriages on a railroad. Chicago, M. St. P. & P. R. Co., 103 Ind. App. 364, 7 N.E.2d 1008. However, the term "railroad train" is specifically defined in Chapter 5. Title 56 at Section 56-5-280. This Section provides that

> [a] "railroad train" is a steam engine, electric or other motor, with or without cars coupled thereto, operated upon rails, other than a streetcar.

Section 56-5-110 provides that "[f]or the purposes of this chapter the words, phrases and terms defined in this article shall have the meanings thereby attributed to them." (emphasis added). Of course, Section 56-5-2710 is included within Chapter 5. Thus, the definition of "railroad train" contained in Section -280 would be controlling.

While the term "engine" is not further defined therein, the word has been held to include a self-propelled vehicle used to switch cars. New York Cent. R. Co v. Public Utilities Comm., 121 Ohio St. 383, 169 N.E. 299, 300. In view of the fact that the vehicle you describe is apparently self-propelled, I assume equipped with some form of motor, and probably propelled by an electrical engine, I would read the statute broadly in this circumstance. A broad reading is particularly warranted in light of the fact that the railroad warning devices are set into motion in the same way as a train. Moreover, Section 56-5-2710 has a remedial purpose, the protection of public safety.

II. Does a single locomotive meet the definition of "railroad train"?

Yes, Again, reference is made to the definition contained in Section 56-5-280 which defines a "railroad train" as a "steam engine, electric or motor, with or without cars coupled thereto." A single locomotive which activates the warning signals would fall within this definition.

III. What constitutes "hazardous proximity to the crossing" as contained in subsection (4) of Section 56-5-2710?

To my knowledge, this phrase has not been defined by our courts and I find no statutory definition thereto. However, Section 56-5-2710 is a very common statute with similar language contained in like statutes throughout the United States. A leading case which has construed the meaning of a similar law is Missouri-Kansas-Texas Railroad Co. v. McFerrin, 291 S.W.2d 931 (Tex. 1956). McFerrin, involved a death at a railroad crossing. The issue was whether the plaintiff was contributorily negligent as a matter of law.

The Court's analysis consisted of dividing the statute into its disparate parts. At the outset, the Court stated that

> [a]s we analyze the statute it imposes two duties on a motorist approaching a grade crossing: (1) a duty to stop the vehicle within fifty but not less than fifteen feet from the nearest rail, and (2) a duty on one having thus stopped not to proceed until he can do so safely. The two duties cannot both be violated on the same occasion. The duty not to proceed comes into existence only if the duty to stop has been obeyed. The statute thus furnishes to a railroad-defendant two independent and alternative grounds of defense based on a violation by a motorist-plaintiff of the duties thereby imposed, and a defendant relying on a violation of the statute as a defense to liability should plead specifically which duty was violated by the plaintiff, or should plead violation of both duties in the alternative.

291 S.W.2d at 935 (emphasis added). Continuing, the Court recognized that

> ... it appears obvious that the duties imposed on the motorist are not absolute but are conditional. Neither duty comes into existence unless and until these three conditions exist: (1) A train must be "approaching" the crossing; (2) the approaching train must be "plainly visible", and (3) the train must be "in hazardous proximity" to the crossing. Before either duty can be said to have been absolute in a particular case so as to form the basis of an instructed verdict all three conditions must be conclusively established by the evidence.

Id. (emphasis added). Next, the Court "confronted ... the ... problem of deciding which test is to be used in determining whether, in a given case, an approaching train was

'plainly visible' and in 'hazardous proximity' to a crossing so as to give rise to the statutory duty to stop." The Court rejected the argument that the statute operated as "a rule of evidence and foreclosed against the motorist the question of 'hazardous proximity' in all crossing cases by mere proof of the happening of the collision." Instead, said the Court,

> ... whether a train was "in hazardous proximity" to a crossing, so as to impose on an approaching motorist a duty to stop, must be determined by the court from the evidence of the facts and circumstances existing at the time the motorist was compelled to make a decision, and should not be determined by or from the happening of subsequent events.

(emphasis added). The test for the determination, concluded the Court, is as follows:

> [i]f there is a duty on the motorist to act it arises as he approaches and comes within the statutory stopping area. It is at that time that he must determine whether he is under a statutory duty to stop. As heretofore pointed out, the existence of the duty is not absolute but is conditioned on the existence at the time of a certain state of facts. It seems to us that in determining whether the fact situations is such as to call the statutory duty into existence, we should not hold the motorist to greater wisdom or better judgment than a reasonably prudent person, similarly situated, would exercise. Accordingly, we apply the objective common-law test of the reasonably prudent man and hold that before it can be said in a given case that an approaching train was "plainly visible" as a matter of law, it must appear, as a matter of law, that a reasonably prudent person, situated as was the motorist and exercising ordinary care for his own safety should have seen it. We further hold that it will not be said that a train was "in hazardous proximity" to a crossing, as a matter of law, unless under all the attendant facts and circumstances it can be said, as a matter of law, that by reason of the speed and nearness of the train a reasonably prudent person should have known that an attempt to proceed over the crossing ahead of the train, was hazardous.

Id. at 936 (emphasis added).

The Court further stated that application of the "common law test of the reasonably prudent man in determining whether, under the statute, a train was 'plainly visible' and 'in hazardous proximity' to a crossing" did not undermine the statute. Said the Court,

> [t]hat holding does not render the statute nugatory or futile. The transposition of this and other common law rules of conduct into statutory rules makes their violation, if unexcused, negligence per se and subjects one who violates them to criminal penalties not theretofore imposed.

In McFerrin, the Court held, based upon the foregoing test and all the evidence, that the driver of the vehicle had not violated the railroad statute. All the facts and circumstances present demonstrated that

> [t]he only way the deceased could have seen the train at all, while traveling north, was by turning to look to his rear and it is not at all clear in this record that the train could have been seen even then. We cannot hold, as a matter of law, that a train is "plainly visible", within the meaning of the statute, if an approaching motorist has no warning of the approach of the train and must look to his rear in order to discover its presence.

Even so, the Court found that there was expert testimony that, after the driver came within fifty feet of the track, (in other words, in the "stopping zone"), he "could have seen the train if he had looked to his right." Held the Court,

> [t]here is in the record expert testimony from a surveyor which clearly tends to establish that after the deceased made his turn toward the track and at all times after he came within fifty feet thereof he could have seen the train if he had looked to his right. Ordinary care for his own safety required that he look to his right before passing through the stopping zone. We therefore hold, as a matter of law, that the train was "plainly visible when the deceased entered, or at least while he was within the statutory stopping area. There is no evidence that it was "plainly visible" at any greater distance than fifty feet from the track. There is no direct evidence of the distance of the train from the crossing at the time the deceased came within fifty feet thereof, but testimony

> as to the respective speeds of the automobile and the train establishes, rather clearly we think, that at such time the train must have been within 200 to 300 feet of the crossing. We hold, as a matter of law, under the facts and circumstances of this case, that a reasonably prudent person, situated as was the deceased, should have known that an attempt to proceed over the crossing ahead of the train, was hazardous. We accordingly hold, as a matter of law, that at the time the train became "plainly visible" it was "in hazardous proximity" to the crossing.

Id. at 940 (emphasis added). Based upon the evidence presented, however, the Court found that it was not conclusive that the decedent failed to stop in this instance. The Court, for other reasons relating to the admission of certain evidence, remanded the case for a new trial.

As noted, there is no definitive case in South Carolina interpreting Section 56-5-2710 or applying the statute to a situation such as is referenced by you. Obviously, whether a train is "plainly visible" or in "hazardous proximity to a crossing" when a car enters the "stopping zone", thus requiring the driver to stop and "not proceed until he can do so safely" will, of course, depend upon all the facts and circumstances.

While we have no case law in South Carolina to serve as a guide, it would appear that the McFerrin case is recognized as a leading authority in defining these words. The test laid out in McFerrin applies the hypothetical "prudent man" test to both these terms. Thus, it is likely that our courts will find that an approaching train is "plainly visible" as a matter of law if "a reasonably prudent person situated in the same position as the motorist in question and exercising ordinary care for his safety "should have seen it." An approaching train will be deemed in "hazardous proximity" to a crossing as a matter of law where, based upon all the facts and circumstances," by reason of the speed and nearness of the train a reasonably prudent person should have known that an attempt to proceed over the crossing ahead of the train, was hazardous." The Court makes it clear that this standard would be applicable both in civil lawsuits as well as criminal prosecutions.

I realize that the foregoing legal standard may appear nebulous and nonspecific. However, it represents the general legal test applied in the courtroom every day to determine if a particular individual acted negligently. Such appears to be the standard applicable to Section 56-5-2710. The courts apply a common sense test to an individual's behavior in a given case: the question asked is whether, based upon all the facts and

circumstances present at the time, the individual in question acted as a reasonably prudent person would have acted?

Our Supreme Court has best expressed the inherent difficulty in defining the legal standard of due care in Thomas v. Atlantic Greyhound Corp., 204 S.C. 247, 29 S.E.2d 196 (1944). There, the Court summarized as follows:

> [n]egligence is the want of due care; and due care means commensurate care under all the circumstances. The lack of diligence or want of due care may consist in doing the wrong thing at the time and place in question, or it may arise from inaction when something should have been done. The rule is constant, while the degree of care which a reasonably prudent man exercises, varies with the exigencies of the occasion.

204 S.C. at 253 (emphasis added). As the Court recognized in Lundy v. Telephone Co., 90 S.C. 25, 72 S.E. 558 (1911), "[n]egligence is a mixed question of law and fact. It is the duty of the court to define negligence, but it is the province of the jury to determine, whether it exists in a particular case." 90 S.C. at 39.

The statute plainly states that if an approaching train is "plainly visible" and "in hazardous proximity" to the crossing when the driver is "within fifty feet, but not less than fifteen feet from the crossing, the driver must stop and "shall not proceed until he can do so safely." With respect to your specific question regarding a motorist who stops between 15 and 50 feet from the rail because an approaching train is "plainly visible" and in "hazardous proximity", but then proceeds ahead because it is "safe to do so", I would advise that, generally, but not always, once such conditions apply, it would typically not be safe to proceed.

Courts interpreting similar statutes have found that a driver acted in violation of the law when he did not stop and wait once the conditions of either subsections (c) or (d) became applicable. For example, it was stated in Lackey v. Gulf, C. & S. F. Ry. Co., 225 S.W.2d 630, 632 (Tex. Civ. App. 1949), that "... appellant's failure to stop not less than 15 feet from the nearest rail of the track being used by the engine and his failure to wait until he could safely proceed was a proximate cause of the collision and its consequences." (emphasis added).

Moreover, in New York Cent. R.R. Co. v. Glad, 179 N.E.2d 571 (1962), the Indiana Supreme Court addressed this issue. While the court recognized that it will not

be presumed that the statute was violated merely because a collision with a train had occurred and that the issue was one for the jury, nevertheless in the case before it

> ... the evidence is undisputed that appellee could not see down the tracks to the west because "the dump body of the truck obstructed the view", and that he proceeded onto the crossing when an approaching train was "plainly visible and in hazardous proximity to such crossing" and when he could not do so safely." Here only one reasonable inference can be drawn from the evidence in the record, and there is no room for reasonable minds to differ upon consideration of the facts, and under such circumstances whether appellee-Glad's violation of the statute was negligence is a question for the court.

Further, in Hamilton v. Allen, 852 P.2d 697 (Okl. 1993), the Supreme Court of Oklahoma stated:

> [i]t is uncontested that the flasher warning of the approaching train was on and that the crossing gate was lowered. It is also uncontested that Hamilton stopped only briefly and did not wait to proceed until he could do so safely. Hamilton violated Section 11-701 and this violation caused Hamilton's injuries. Hamilton was within a class intended to be protected by the statute, that is a motorist, and his injury was the type intended to be prevented by the statute. Therefore, Hamilton was negligent per se. (emphasis added).

However, I must also advise that some courts have concluded, in certain circumstances, that the driver did not violate the statute by proceeding across the tracks even where there was a duty to stop for an approaching train because the train was "plainly visible" and "in hazardous proximity to the crossing". In So. Pacific Co. v. Castro, 473 S.W.2d 577 (Tex. Cir. App. 1971), the Court held that where the driver could not by the exercise of ordinary care have stopped his vehicle within fifty feet, but not less than fifteen feet from the nearest rail and that the inability to stop was not caused by his negligence, such constituted an excuse to a violation of the statute.

And, in Texas & Pacific Ry. Co. v. Husting, 282 S.W.2d 758 (1955), the Court opined:

> [i]t has been vigorously urged that this case should be reversed and rendered on the ground that Mrs. Hasting was guilty of negligence as a matter of law in proceeding across the tracks after an immediate hazard was created, and could therefore not recover. We cannot believe that a rigid enforcement of the statute was ever intended so as to preclude the possibility of a person safely crossing a railroad intersection after the facts creating an immediate hazard had come into being. The engineer's testimony, as well as the testimony of Mrs. Hasting are both clear in stating that she could have proceeded safely across had her motor not died in the middle of the track. Then too, in answer to Special Issue No. 16 the jury declined to find that she had attempted to cross this St. Mary's Street crossing without using ordinary care -- in other words saying in effect that she had not failed to use ordinary care. It therefore seems clear that this case should be reversed and remanded for a new trial, and that upon such, and inclusion of the proper issues, it could be determined whether or not she could have or did proceed in safety after she had gotten to the crossing at a time defined by the statute as being one of immediate hazard. Had Special Issue (c) of Requested Issue 13 been submitted perhaps the result would have been more clear, but it does not seem to this writer that this statute should or could be interpreted and enforced in such a manner that when a person finds himself at a railroad crossing when and where an immediate hazard exists, that he can never thereafter again proceed with safety while such hazard exists. Why should the statute use the words 'proceed with safety' if it were not contemplated that such is possible? It would have been easy to have stated in the statute that the driver could not proceed until the hazard had ended, but the statute does not so state. The statute merely requires a person in Mrs. Hasting's position to determine if it is safe to further proceed; it does not forbid her ever making the attempt. ... We do not believe that the statute requires anything more than it says, and that is that she can proceed when safe, which in our opinion requires a specific finding to determine that fact.

272 S.W.2d at 760-61 (emphasis added).

While our Supreme Court or Court of Appeals has apparently not yet interpreted Section 56-5-2710, our courts have often commented in considerable detail upon the common law standards with respect to a motorist approaching and crossing a railroad crossing where a train is approaching the crossing. These standards appear entirely consistent with the case law in other jurisdictions which has interpreted statutes similar to Section 56-5-2710.

For example, in Bramlett v. So. Ry. Co., 234 S.C. 283, 288, 108 S.E.2d 91 (1959), the Court concluded that a motorist who was hit by a train at a crossing was guilty of gross contributory negligence and recklessness as a matter of law under the particular circumstances where the accident occurred on a clear day and the train was "in close proximity to the crossing when decedent approached it "because he "could have heard the whistle and bell if he had listened" and "seen the signal lights flashing if he had looked." And in Truett v. At. Coast Line R. Co., 206 S.C. 134, 33 S.E.2d 396 (1945) the Court commented that a train a quarter of a mile away when the motorists truck stalled on the tracks constituted "imminent danger from the approaching train." The Court noted that

> [i]t is 'well settled in this State that when one undertakes to go over a crossing in front of an immediately approaching train, he is guilty of gross contributory negligence as a matter of law.'" [quoting Howell v. So. Railroad Co., 192 S.C. 152, 51 S.E.2d 860, 861.]

Moreover, in Jones v. So. Ry. Co., 238 S.C. 27, 36, 118 S.E. 880 (1961), the Court stressed that no two crossing cases were the same. Emphasizing that each situation is inherently unique as to its facts, the Court expressed this view as follows:

> [t]here have been many cases before this court arising out of collisions between motor vehicles and trains at railroad crossings. Except where they have arisen out of the same accident, in no two of them have the circumstances been so similar that one might be said to be controlling of the other. Essentially, in each case of this kind the issues of negligence and contributory negligence must be decided on its own factual situation.

Arnold v. Charleston and Western Carolina R. Co., 213 S.C. 413, 49 S.E.2d 725 (1948) echoed this same recognition in a somewhat different way when the Court noted that "[i]f the testimony be conflicting or the conclusion reached therefrom be doubtful or uncertain,

the Courts will not decide this question as one of law, but it then becomes a question of fact for the jury."

Moreover, in Robison v. At. Coast Line Ry. Co., 179 S.C. 493, 184 S.E. 96, 100, the Court noted that, typically, the motorist has the duty to stop and wait for an immediately approaching train. There, the Court stated:

> [s]ubject to applicable qualifications and limitations, where a traveler about to enter upon a crossing has an opportunity, by exercising his sense of hearing or sight, to discover an approaching train in time to stop in a place of safety, it is his duty under such circumstances to look and listen, and if he fails to do so, or fails or neglects, as he approaches the crossing, which the evidence shows he could or must have discovered, in the exercise of ordinary care, had he looked or listened, such failure to look or listen amounts not only to negligence, but to gross negligence.

And in Arnold v. Chas. & West. Car. Ry. Co., supra, the Court noted that the motorist was held to the "prudent man" standard, discussed above. Said the Court,

> [a] traveler crossing railroad tracks is not bound to see or hear the approaching train, but is bound to make all reasonable effort to see and hear, that an ordinarily prudent man would make under like circumstances.

Judge Hemphill, in Wessinger v. Southern Ry. Co. Inc., 438 F.Supp. 1256 (D.S.C. 1977), summarized the common law duty of the motorist in South Carolina this way:

> [i]t has never been held in this state that one about to cross a railroad track at a public highway or street crossing is under an absolute duty to stop, look and listen, before going on said track, unless the exercise of ordinary care and prudence, under all the surrounding facts and circumstances, requires the adoption of such a course, and it is ordinarily a question for the jury to determine, in the application of the standard of due care, whether the attempt of a traveler to cross without looking or listening effectively was excusable or culpable. (Citations omitted.) Clark v. Southern Railway Company, 243 S.C. 27, 131 S.E.2d 844, 846-47 (1963). Accord: Seaboard

> Coastline Railroad Co. v. Owen Steel, D.C. 348 F.Supp. 1363 (1972).

Additionally,

> ... [A] traveler when reaching a railroad crossing and before attempting to cross the track or tracks must use his senses of sight and hearing to the best of his ability under the existing circumstances, and must look and listen in both directions for approaching trains, if not prevented from doing so by the railroad's fault and, to the extent the matter is under his control, he must look and listen at a place and in a manner that will make the use of his senses effective. (Emphasis added). Connelly v. Southern Railway Company, 249 S.C. 363, 154 S.E.2d 569, 571 (1967).

438 F.Supp. at 1259-1260. It would appear, therefore, that the common law with respect to a railroad crossing is entirely consistent with the interpretation by the courts of statutes similar to Section 56-5-2710: the "prudent man" standard is applicable; each situation depends upon the facts and circumstances, and while, typically, where a train is in "immediate proximity" to the crossing, the motorist is required to stop and wait before crossing, such duty is ultimately dependent upon all the facts and circumstances.

CONCLUSION

In summary, I believe that both a railroad maintenance vehicle and a single locomotive would be deemed a "railroad train" for purposes of Section 56-5-2710.

In addition, it is my opinion that a court would conclude that the phrase "plainly visible" and "in hazardous proximity" to the crossing would be construed pursuant to the "prudent man" standard: in other words, an approaching train is "plainly visible" as a matter of law if "a reasonably prudent person situated in the same position as the motorist in question and exercising ordinary care for his safety, "should have seen it." An approaching train will be deemed in "hazardous proximity" to a crossing as a matter of law where, based upon all the facts and circumstances, "by reason of the speed and nearness of the train a reasonably prudent person should have known that an attempt to proceed over the crossing ahead of the train, was hazardous."

In the typical circumstance, where an approaching train is "plainly visible" and in "hazardous proximity" to the crossing when the motorist enters the "stopping zone"

[between 15 and 50 feet of the rail], the motorist is required, pursuant to this standard, to stop and not to proceed across the track until the train has cleared. However, you should also be advised that courts have held that such is not the case in every such situation. Some courts have held depending upon the circumstances, that a motorist may not have violated the statute by proceeding across the tracks rather than stopping and waiting for the train to pass. In short, it is almost always a jury issue whether the motorist could have "proceeded safely through the crossing" in the particular circumstances. While our courts have not had the occasion to interpret Section 56-5-2710 specifically, it would appear, based upon my examination of South Carolina negligence cases, that the common law relating to negligence at railroad crossings is entirely consistent with the foregoing general principles.

This letter is an informal opinion only. It has been written by a designated Assistant Deputy Attorney General and represents the position of the undersigned attorney as to the specific questions asked. It has not, however, been personally scrutinized by the Attorney General nor officially published in the manner of a formal opinion.

With kind regards, I am

Very truly yours,

Robert D. Cook
Assistant Deputy Attorney General

RDC/an