

OFFICIAL OPINION NO. 6

May 18, 1973

Mr. W. W. Hill, Jr., Chairman  
Public Service Commission  
Room 901 State Office Building  
Indianapolis, Indiana 46204

Dear Mr. Hill:

This letter is in response to your request for my official opinion concerning the following questions:

“1. Should any city or incorporated town desiring modification or elimination of the warning requirements of Section 1(a) file a formal proceeding with this Commission and, in addition, publish notice of the filing thereof?

“2.a. Should this Commission, after giving appropriate notice, schedule and conduct a public hearing upon a formal application by a city or incorporated town to modify or eliminate the warning requirement of section 1 (a) ?

“2.b. In the instance that a city or incorporated town adopts a resolution or ordinance reducing or eliminating the warnings to be given at all crossings generally located therein, should this Commission conduct a separate public hearing on each of said crossings or may all be considered collectively at one hearing?

“3. What standards should this Commission adopt and/or use in making the determination of what ‘creates an undue risk of harm to the public?’

“4. Could the manner of modification or elimination of the warning signals in any way affect the prospective civil liability of this Commission?”

ANALYSIS

Public Laws 63, Burns' (1972 Supp.), Sections 55-1243 and 55-1244, is a railroad safety statute requiring trains to sound their whistles four times from the time that they come within

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80 rods of a railroad crossing to the time that they are at the railroad crossing. Under Section 1(c) of the Act, the Public Service Commission of Indiana may grant a city or town permission to regulate the sounding of the locomotive whistle or the ringing of the bell after the Commission has determined that the ordinance as applied to a particular railroad crossing will not create an undue risk or harm to the public.

Your first two questions concern your procedure in discharging your duties under Section 1(c) of the Act. You ask whether a city or incorporated town seeking to regulate the warning requirements must file a formal proceeding with the Commission and publish notice of the filing thereof. You also ask whether the Commission, after receiving appropriate notice, should schedule and conduct a public hearing upon a formal application by a city or incorporated town seeking to regulate the sounding of the whistle or ringing of the bell of the locomotive.

The Act does not contain specifications concerning notice and a public hearing. However, there are statutes which substantially guide the Commission with respect to such questions. The Act, according to its digest, purported to amend IC 1971, 8-6, concerning the operation of railroad locomotives. It provides where petitions concerning railroad crossing safety are filed with the Commission then "such petitions, hearings and all proceedings thereon shall be had in conformity with the law governing petitions, hearings and proceedings before said commission in regard to rates and service of public utilities."

It is clear that the Legislature intended that Public Laws 63 (Acts of 1972) be amendatory to the collective body of statutes compiled in IC 1971, 8-6, with Burns' (1972 Supp.), Section 55-2012 being one of such Acts. Furthermore, even if the digest of Public Law 63 made no reference to IC 1971, 8-6, it is elementary that statutes which relate to the same thing or subject matter are in *pari materia* and should be construed together. Therefore, requirements for hearing and public notice are the same as directed by Burns' (1972 Supp.), Section 55-2012, *supra*. Thus, there must be a formal petition with a hearing, and all proceedings thereon should be held in conformity with Burns' (1972 Supp.), Section 55-2012, *supra*.

With respect to your question as to whether a separate hearing should be held on each railroad crossing in a city or incorporated town or whether they may all be considered collectively at one hearing, that would essentially be an administrative determination based upon feasibility. If it is feasible to do so I see no reason why all crossings in a city or incorporated town cannot be considered collectively at one hearing.

As to your question of what standards your Commission should adopt and/or use in making the determination of what created an undue harm to the public, "that is essentially a question of fact rather than one of law, and it invokes the Commission's expertise in railroad safety matters."

Your last question is whether the Commission is subject to civil liability for injury to a person at a grade crossing where the necessity of warning has been eliminated by a city or incorporated town upon application to the Commission through application of Section 1(c) of Public Law 63. The former doctrine of sovereign immunity has been severely emasculated by the Supreme Court of Indiana. *Campbell v. State of Indiana* (1972), — Ind. —, 284 N.E. 2d 733. However, it is still the law of this state, unless a person employs the statutory method of questioning an order and decision of the Public Service Commission, such challenge is a collateral attack thereon, and the Commission's order and decision are conclusive upon a court. *Southern Indiana Railroad Company v. Railroad Commission of Indiana* (1922), 193 Ind. 27, 137 N.E. 705.

It should be added that in the *Campbell* decision, *supra*, the Court stated as follows:

"We do not mean to say by this opinion that all governmental units can be held liable for any and all acts or omissions which might cause damage to persons. For example, one may not claim a recovery because a city or state failed to provide adequate police protection to prevent crime. *Simpson's Food Fair, Inc. v. City of Evansville* (1971), Ind. App., 272 N.E. 2d 871. Transfer denied. Nor may one recover damages because a state official made an appointment of an individual whose incompetent performance gives rise to a suit

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alleging negligence on the part of the state official for making such an appointment. Likewise the United States Supreme Court has recognized a judicial immunity. *Pierson v. Ray* (1967), 386 U.S. 547, 87 S.Ct. 1213, 18 L.Ed. 2d 288. On this subject matter Professor Prosser, in his treatise stated the following:

“‘At the very outset it was more or less obvious that some vestige of the governmental immunity must be retained. It was, for example unthinkable that either state [or] a municipality be held liable for a wrong decision of its courts, for an erroneous evaluation of property by a tax assessor. In several of the decisions abrogating the immunities, there was language used which reserved the possibility that there might still be immunity as to ‘legislative’ or ‘judicial’ functions, or as to acts or omissions of government employees which were ‘discretionary.’ Prosser, *Law of Torts* § 131, at 986 (4th ed. 1971.)’

“Therefore, it appears that in order for one to have standing to recover in a suit against the state there must have been a breach of duty owed to a private individual.” 284 N.E. 2d 733, 737.

The Commission, in performing its obligations under Public Law 63 is operating under a delegation of legislative authority. Under the *Campbell* decision, this type of activity apparently comes within the vestige of governmental immunity which still remains. Therefore, the Commission might not be exposed to civil liability in performance of its functions under Public Law 63.

## CONCLUSION

It is, therefore, my Official Opinion that:

1. In reference to Public Service Commission procedure where cities or incorporated towns desire to modify or eliminate warning signals, there must be a formal petition filed with the Public Service Commission of Indiana, which in turn shall give proper statutory notice to all parties concerned; and a hearing must be held in conformance with existing statutes;

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2. For a particular city or town, resolutions reducing or eliminating warning signals at crossings may be considered collectively at one Public Service Commission hearing;

3. In accordance with appropriate laws and procedures, the Commission may adopt certain standards, rules, and regulations deemed proper to hear and determine matters filed before the Commission; and,

4. The Public Service Commission may be exposed to a civil claim occasioned by the elimination or modification of warning signals; however, recovery against the Commission in such an action is not now certain insofar as the Commission's function is a discretionary one, and immunity has thus far attached in such circumstances.