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January 17, 1961

Mr. Lester L. Nalley
Railway Safety Inspector
Arizona Corporation Commission
Capitol Annex
Phoenix, Arizona

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ARIZONA ATTORNEY GENERAL

Dear Mr. Nalley:

We acknowledge your letter of January 2, 1961, in which you request an opinion construing A.R.S. §§ 40-854 and 40-855.

My understanding is that your questions are:

1. Does A.R.S. § 40-854 apply to a railroad which is owned by a mining or industrial company and used principally or entirely in carrying on the owner's mining or industrial business?
2. Does A.R.S. § 40-855 apply to an officer, agent or servant of a railroad, which is owned by a mining or industrial company and used principally or entirely in carrying on the owner's mining or industrial business?

The Sections involved read thusly:

"40-854. Failure to warn at public crossing; penalty

"A person in charge of a railroad locomotive who before crossing any traveled public way omits to cause the bell to ring or a whistle, siren or other sounding device to sound at a distance of at least eighty rods from a crossing and until it is reached, is guilty of a misdemeanor."

"40-855. Violation of duty by railroad officer or employee; penalty

"An officer, agent or servant of a railroad company who is guilty of any wilful violation or omission of his duty as such officer, agent or servant, whereby human life or safety is endangered, the punishment of which is not otherwise prescribed, is guilty of a misdemeanor."

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Our conclusion is that A.R.S. § 40-854 does apply to a person in charge of a railroad locomotive owned by a mining company if such locomotive crosses a traveled public way. As to the notes under this particular Section:

Note 1. A.R.S. § 40-854 by implication requires that any locomotive which crosses a traveled public way must be equipped with a bell, whistle, siren or other sounding device which may be heard at a distance of at least eighty rods. Thus, such would be required of a locomotive owned by a mining company which crossed a public way, but the statutory requirement that a bell must weigh twenty pounds is set out in A.R.S. §40-847 which patently applies only to locomotives owned by railroad corporations.

Note 4. The cases cited under this note apply to those in charge of railroad locomotives owned by mining companies which cross any traveled public way.

Note 6. (Last paragraph) The substance of this note will be discussed in a latter paragraph.

On its face, A.R.S. § 40-855 applies only to an officer, agent or servant of a railroad company, and cases almost universally hold that a mining or industrial company which operates a railroad as an incident in furtherance of its or his primary business cannot be construed to be a railroad company. Thus, our conclusion is that A.R.S. §40-855 does not apply to an officer, agent or servant of a railroad which is owned by a mining company and operated as an incident in furtherance of the company's primary business of mining.

The Southern Pacific Company is a public service corporation and also a common carrier and as such is subject to control by orders and regulations issued and promulgated by the Arizona Corporation Commission. Since the violations outlined in the memorandum enclosed with your letter of January 2, 1961, occurred on the railroad bed and track, owned by the Southern Pacific Company, perhaps the most practical method of preventing such violations would be to file a complaint or appropriate order against the Southern Pacific Company, compelling that company to operate its railroad in compliance with existing regulations and laws.

Very truly yours,

ROBERT W. PICKRELL
The Attorney General

MORRIS ROZAR
Assistant Attorney General

MR:ec/dd

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