

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF ARKANSAS
FORT SMITH DIVISION

CITY OF OZARK, a municipal corporation	)	
	)	
Plaintiff,	)	
	)	
vs.	)	
	)	
UNION PACIFIC RAILROAD COMPANY,	)	CIVIL ACTION NO: 2:14-cv-02196-TLB
ARKANSAS STATE HIGHWAY	)	
COMMISSION, as Governing Body of the	)	
ARKANSAS STATE HIGHWAY AND	)	
TRANSPORTATION DEPARTMENT,	)	
	)	
Defendants.		

UNION PACIFIC RAILROAD COMPANY'S
STATEMENT OF UNDISPUTED FACTS

For its Statement of Undisputed Facts, Union Pacific states as follows:

1. Union Pacific's main line track runs through Ozark, Arkansas. (Huston Aff. 1)¹
2. Union Pacific's right of way is 50 feet from the center of the track, on both sides of the track. (Key Dep., 12:3—5.)²
3. In some spots at the location east of the railroad depot, that 50 feet right of way goes into the Arkansas River. (Key Dep., 12:18.)
4. On the south side of the river, there is a recreational vehicle park.
5. On the north side of the river, also winding its way between the river and downtown Ozark, is a Union Pacific mainline track, and two side tracks that are commonly referred to as house tracks. (B. Huston Aff. 1, ¶3).
6. The tracks are often used to set out cars. (B. Huston Aff. 1, ¶3).
7. In addition, between the mainline track and the river is a side track. (*Id.*)
8. This side track is used as a storage track and for train meets, which allows one train to move from the mainline to this track so that another train can pass on the mainline. (*Id.* at ¶4, 6).
9. The side track is the longest storage track on the Van Buren subdivision, which runs between Little Rock and Van Buren. (*Id.*)
10. At this location, just east of a railroad depot donated to the City by Union Pacific and across the street from the current post office, the City seeks the re-installation of a former crossing. (Key Dep., 11:22-24).

¹ Attached to the Motion for Summary Judgment as Exhibit 2.

² Attached to the Motion for Summary Judgment as Exhibit 3.

11. The parties do not know when the Crossing was installed.
12. Prior to approximately 2001, an at-grade crossing existed in downtown Ozark at this approximate location.
13. The crossing consisted of asphalt planks, or slabs, that went across the tracks. (McNutt Dep., 60:15.)³
14. It was only wide enough for one car to go across. (McNutt Dep., 62:25; McDaniel Dep., 19:9⁴).
15. It did not have flashing lights or gates. (Sneath Dep., 78:11).⁵
16. Prior to 1970, there was a fair amount of land between the tracks and the river where there were houses and businesses.
17. Propane tanks were situated immediately south of the tracks on Union Pacific's right-of-way. (McNutt Dep., 61:18—19).
18. Missouri Pacific Railroad Company ("Missouri Pacific"), Union Pacific's predecessor, leased the land to a gas company. (Rinker Aff., ¶11)⁶; McDaniel Dep., 22:5-6 (testifying that he assumed the propane tanks were on Union Pacific land)).
19. Further south from the propane tanks, F.S. Lumber Company had a building. (McDaniel Dep., 17:23; K. Smith Dep., 12:5.)⁷
20. F&S Lumber Company leased the approximately ten acres of land its building sat on from Missouri Pacific Railroad Company, including a spur track. (K. Smith Dep., 23:5—12).
21. F&S Lumber Company was a private company that sold to the U.S. Government, not to the public. (K. Smith Dep., 19:2).
22. The post office did not deliver mail to F&S Lumber Company; the mail was delivered through a post office box. (K. Smith Dep., 16:19).
23. F&S Lumber Company closed in the mid 1960s. (K. Smith Dep., 10:1—16).
24. Further southeast from the lumber company, there was a barn where horses were kept. (Brooks Dep., 11:25-12:12).⁸
25. Still further southeast, the City had a dump that was used by the public. (McNutt Dep., 61:18—19).
26. South of the horse barn, but going away from the landfill, there was a small neighborhood consisting of several houses. (McDaniel Dep., 18:2—5).
27. The City has stipulated that there is no evidence of any funds expended by the City for the purpose of maintaining Oliver Street since 1975. (Attorney Brockett Stipulation at Milam Dep, 11.)⁹
28. The City has stipulated that there is no evidence of any ordinance accepting and recording a plat dedicating an Oliver Street for a public purpose. (Attorney Brockett Stipulation at Milam Dep, 13.)

³ Attached to the Motion for Summary Judgment as Exhibit 1.

⁴ Attached to the Motion for Summary Judgment as Exhibit 4.

⁵ Attached to the Motion for Summary Judgment as Exhibit 5.

⁶ Attached to the Motion for Summary Judgment as Exhibit 11.

⁷ Attached to the Motion for Summary Judgment as Exhibit 9.

⁸ Attached to the Motion for Summary Judgment as Exhibit 12.

⁹ Attached to the Motion for Summary Judgment as Exhibit 8.

29. There is no documentation of any dedication of a street at this location by the City. (McNutt Dep., 114:8—12.)
30. There is no documentation of any dedication of a crossing at this location. (Key Dep., 128:22).
31. There is no evidence of any recorded plat dedicated a street at this location to a public use. (McNutt Dep., 114:15; Key Dep., 128:25).
32. There is no evidence of any City ordinance accepting a plat to dedicate a street at this location to public use. (McNutt Dep., 114:16—19; Key Dep., 129:4).
33. There is no evidence of any City ordinance accepting a plat to dedicate a crossing at this location to public use. (Key Dep., 129:11).
34. There is no evidence that the City condemned a street at this location for a public use. (McNutt Dep., 114:20—23).
35. In the late 1960s or early 1970s, the Army Corps of Engineers (“Corps”) constructed the McKellen-Kerr Navigation Way, which flooded most of the land south of the Union Pacific tracks at the subject location. (McNutt Dep., 66:17—21).
36. Everything south of the tracks, except the propane tanks, was gone. (McNutt Dep., 64:11—13 (dump), 64:25 (neighborhood); Key Dep., 47:15—18).
37. In some places, the river is now 8 to 15 feet from the railroad tracks. (Ruck Dep. 125:15-21¹⁰; McNutt Dep., 52:21—25; Affidavit of Mathew Bar¹¹).
38. The lease to the gas company ultimately terminated by Cornerstone Propane effective October 22, 1998. (Rinker Aff., ¶4). And by August 19, 1998, the propane tanks had been removed from the premises. (*Id.*)
39. From 1999 to 2003, Todd Timmerman was Mayor of Ozark. (Timmerman Dep., 13:25).¹²
40. City funds were not used to maintain an “Oliver Street” during Mayor Timmerman’s administration, and the crossing was rarely utilized. (Timmerman Dep., 27:24).
41. Sometime around 2000 or 2001, Scott James, an Ozark resident, complained to Mayor Timmerman about the train horns that sounded for the crossing. (Timmerman Dep., 17:24—25; McNutt Dep., 73:7, 74:2; Felkins Affidavit¹³; Gilmer Dep., 15—16¹⁴).
42. Following Mr. James’ complaint, the Rule 30(b)(6) testimony by the City is that Mayor Timmerman was given authority by the council to contact Union Pacific regarding the matter. (McNutt Dep., 76:22; Milam Dep., 27:19—21; Timmerman Dep., 24:20-23).
43. Following this Council Meeting, Mayor Timmerman spoke with Union Pacific’s Manager of Industry and Public Projects, Charlie Felkins, and asked him to remove the crossing. (Timmerman Dep., 18:16—17; 19:10—13; Felkins Affidavit; McNutt Dep., 83:25).
44. Mayor Timmerman subsequently went back to the Council and showed a letter from Union Pacific whereby the railroad stated that it would take out the crossing and stop the

¹⁰ Attached to the Motion for Summary Judgment as Exhibit 13.

¹¹ Attached to the Motion for Summary Judgment as Exhibit 14.

¹² Attached to the Motion for Summary Judgment as Exhibit 16.

¹³ Attached to the Motion for Summary Judgment as Exhibit 17.

¹⁴ Attached to the Motion for Summary Judgment as Exhibit 18.

- horn blowing. (Milam Dep., 26:1—10; McNutt Dep., 80:3—16; Timmerman Dep., 22:19-25; 23:1-2; Edgin Dep. 20:1-6¹⁵).
45. None of the Council Members objected. (Milam Dep., 26:13; Timmerman Dep., 23:2; McNutt Dep., 80:3—16; Edgin Dep. 20:14-22; 21:10-13). Councilman Milam testified that he thought “we were all in agreeance [sic].” (Milam Dep., 32:25).
46. Shortly thereafter, Union Pacific removed the crossing. (McNutt Dep., 82:4).
47. Despite Mayor Timmerman’s request to remove the crossing, the City subsequently developed plans that called for “a” crossing.
48. The City’s plan has multiple parts. First, the City had wanted to build a marina on the south side of the river. (Key Dep., 95:7—11). Recently, the Corps rejected the proposal for the marina.¹⁶
49. Second, the City wants a floating dock built on the north shore, just south of the railroad tracks. (Jones Dep., 18-4—5¹⁷; Key Dep., 21:7—12). For this floating dock to come to fruition, a grant has to be obtained, and the Corps must approve it. (Jones Dep., 20:11-20). Neither has occurred. (Jones Dep., 20:11-20). In fact, the plans for the floating dock are conceptual in nature only. (Ruck Dep., 124:12-14).
50. Third, the City has a conceptual idea for a walking trail. (Key Dep., 26:13—17). This trail would be located between the river and the railroad tracks on land owned by the Corps but leased to the City in 2001. (Key Dep., 26:13—17; Key Dep., 26:20—25). (See City of Ozark Concepts for Trail Development, Revised September 1997, attached to the Motion as Exhibit 26). It appears from looking at the concept that part of the trail would be on Union Pacific’s right-of-way.
51. The City has not conducted a study to determine how many pedestrians would use the Crossing each day. (Key Dep., 105:7—8).
52. The City has not completed a hazard assessment or risk analysis regarding the placement of this Crossing. (Key Dep., 105:12).
53. A shuttle service could be used to bring people from the marina into town. (Sneath Dep., 72:4).
54. The City Rule 30(b)(6) witness admits that “I just don’t think it’s safe to invite the public down to a place like that, you know, with a lot of trains, high speed trains go through there.” (McNutt Dep., 50:21—25).
55. The City admits that Union Pacific carries “extremely dangerous chemicals, including sulfuric acid, liquefied petroleum gasses, daluine delyalcyanade, sodium hydroxide, paraformaldehyde, and chlorine.” (Key Dep., 110:5—14). See also (Sneath Dep., 75:8).
56. These chemicals are all toxic and potentially deadly if spilled. (Key Dep., 110:17).
57. The City has admitted that the Crossing location is one with particular risk factors for a derailment, including a railroad bridge, a spur, and a curve. (Key Dep., 111:7).
58. A crossing at this location has the risk of a train striking a pedestrian or a vehicle, causing serious injury or death. (McNutt Dep., 51:10—15).
59. A crossing at this location has the risk of a train derailment, which would be catastrophic. (McNutt Dep., 51:16—20).

¹⁵ Attached to the Motion for Summary Judgment as Exhibit 19.

¹⁶ Attached to the Motion for Summary Judgment as Exhibit 20.

¹⁷ Attached to the Motion for Summary Judgment as Exhibit 21.

60. Any time a train applies its emergency brakes, the train runs a risk of derailment. (McNutt Dep., 52:9; McDaniel Dep., 36:17; Key Dep., 111:14—17; Sneath Dep., 75:12).
61. When the track is in a curve, the chances of a derailment are even greater when the emergency brakes are applied. (McNutt Dep., 52:16; McDaniel Dep., 36:21).
62. If a pedestrian were walking across the Crossing and an engineer thought the train might hit the pedestrian, it is common sense that the engineer would apply the train's emergency brakes. (Key Dep., 112:2).
63. Doing so would increase the risk of a derailment. (Key Dep., 112:5).
64. A derailment at this location could result in hazardous materials contaminating the Arkansas River. (McNutt Dep., 53:3—21; McDaniel Dep., 38:1; Key Dep., 112:13).
65. Given that Ozark is located in a valley, there is an increased risk for the contamination lingering in the air. (Key Dep., 112:14—25).
66. A derailment could result in a potential for injury or loss of life at the Crossing. (McDaniel Dep., 38:9).
67. A derailment could result in a potential for injury to the railroad employees on the train. (McDaniel Dep., 38:12).
68. If the Crossing is re-installed, more opportunities exist for accidents, derailments, and spills. (Key Dep., 114:9—14).
69. If the Crossing is re-installed, it will increase the amount of pedestrian traffic over the tracks, which increases the risk for a crossing accident. (Key Dep., 117:7).
70. The City is "pretty sure they do, yeah" with regards to people who boat may be drinking alcohol. (Key Dep., 125:20—22).
71. These are the people whom the City seeks to have use the floating dock, cross at the Crossing, and go into Ozark to use the restaurants. (Key Dep., 126:5). The people can also walk into town from the boat, eat and consume alcohol at the City's establishments, and then walk across the Crossing to the boat, possibly inebriated. (Key Dep., 1—16).
72. The City would not have to place flashing lights or gates at the Crossing. Sneath, 78:18.
73. Trains go through the area of the Crossing every day. (McDaniel Dep., 42:17—25). *See also* (Sneath Dep., 90:7 (testifying that it is not "uncommon" to see trains going through this location)).
74. It is not uncommon to see equipment or trains stored on the siding track at that location. (McDaniel Dep., 43:1—5; Sneath Dep., 90:10—13). *See also* (Key Dep., 131:9 (testifying that she sees cars on the side track "more than [she] would like, yes.")).

Respectfully submitted,

Scott H. Tucker, AR 87176
Joseph P. McKay, AR 99006
Jamie Huffman Jones, AR 2003125
Friday, Eldredge & Clark, LLP
400 West Capitol Avenue
Suite 2000
Little Rock, Arkansas 72201-3522
Telephone: 501-370-1430
Facsimile: 501-244-5340
tucker@fridayfirm.com
jmckay@fridayfirm.com
jjones@fridayfirm.com

*Attorneys for Defendant, Union Pacific
Railroad Company*

By: /s/ Jamie Huffman Jones
Jamie Huffman Jones

CERTIFICATE OF SERVICE

I, Jamie Huffman Jones, hereby certify that the foregoing pleading was filed with the Clerk of Court using the CM/ECF Filing System on this 29th day of April, 2015 and said Clerk shall serve an electronic copy of same upon the following counsel of record:

Christopher D. Brockett
Sayre & Brockett
401 West Commercial Street
Ozark, AR 72949
cbrockett@bslawarkansas.com

/s/ Jamie Huffman Jones
Jamie Huffman Jones