

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
Defendant.	)	
	)	
	)	
	)	

**UNION PACIFIC RAILROAD COMPANY’S
RESPONSE TO THE CITY’S MOTION FOR PARTIAL SUMMARY JUDGMENT.**

For its Response to the City of Ozark’s Motion for Partial Summary Judgment, including the Undisputed Facts, Union Pacific Railroad Company (“Union Pacific”) states:

1. Union Pacific lacks information sufficient to either admit or deny the statements contained in “Fact 1” as no citation to any record is made. However, they are not material facts for the summary judgment motion. A material fact is one which, depending on the applicable substantive law, might affect the outcome of the lawsuit. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986); *Longen v. Waterous Co.*, 347 F.3d 685, 688 (8th Cir. 2003). An issue is genuine "if the evidence is sufficient to allow a reasonable jury to return a verdict for the non-moving party." *Longen*, 347 F.3d 685, 688 (8th Cir. 2003).

2. Union Pacific lacks information sufficient to either admit or deny the statements contained in “Fact 2” as no citation to any record is made. However, they are not material facts for the summary judgment motion. A material fact is one which, depending on the applicable substantive law, might affect the outcome of the lawsuit. *Anderson v. Liberty Lobby, Inc.*, 477

U.S. 242, 248, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986); *Longen v. Waterous Co.*, 347 F.3d 685, 688 (8th Cir. 2003). An issue is genuine "if the evidence is sufficient to allow a reasonable jury to return a verdict for the non-moving party." *Longen*, 347 F.3d 685, 688 (8th Cir. 2003).

3. Union Pacific lacks information sufficient to either admit or deny the statements contained in "Fact 3." Union Pacific states that the Exhibits speak for themselves. However, they have not been authenticated and are not proper summary judgment evidence. "To be considered on summary judgment, documents must be authenticated by and attached to an affidavit made on personal knowledge setting forth such facts as would be admissible in evidence or a deposition that meets the requirements of Fed. R. Civ. P. 56(e). Documents which do not meet those requirements cannot be considered." (quoting *Stuart v. Gen. Motors Corp.*, 217 F.3d 621, 635-36 n.20 (8th Cir. 2000))." *Shanklin v. Fitzgerald*, 397 F.3d 596, 602 (8th Cir. 2005).

Further, "Fact 3" are not material facts for the summary judgment motion. A material fact is one which, depending on the applicable substantive law, might affect the outcome of the lawsuit. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986); *Longen v. Waterous Co.*, 347 F.3d 685, 688 (8th Cir. 2003). An issue is genuine "if the evidence is sufficient to allow a reasonable jury to return a verdict for the non-moving party." *Longen*, 347 F.3d 685, 688 (8th Cir. 2003).

4. Union Pacific lacks information sufficient to either admit or deny the statements contained in "Fact 4." Union Pacific states that the Exhibits speak for themselves. However, they have not been authenticated and are not proper summary judgment evidence. "To be considered on summary judgment, documents must be authenticated by and attached to an affidavit made on personal knowledge setting forth such facts as would be admissible in evidence or a deposition that meets the requirements of Fed. R. Civ. P. 56(e). Documents which do not meet those

requirements cannot be considered." (quoting *Stuart v. Gen. Motors Corp.*, 217 F.3d 621, 635-36 n.20 (8th Cir. 2000))." *Shanklin v. Fitzgerald*, 397 F.3d 596, 602 (8th Cir. 2005).

Further, "Fact 4" are not material facts for the summary judgment motion. A material fact is one which, depending on the applicable substantive law, might affect the outcome of the lawsuit. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986); *Longen v. Waterous Co.*, 347 F.3d 685, 688 (8th Cir. 2003). An issue is genuine "if the evidence is sufficient to allow a reasonable jury to return a verdict for the non-moving party." *Longen*, 347 F.3d 685, 688 (8th Cir. 2003).

5. Union Pacific lacks information sufficient to either admit or deny the statements contained in "Fact 5" as no citation to any record is made. However, they are not material facts for the summary judgment motion. A material fact is one which, depending on the applicable substantive law, might affect the outcome of the lawsuit. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986); *Longen v. Waterous Co.*, 347 F.3d 685, 688 (8th Cir. 2003). An issue is genuine "if the evidence is sufficient to allow a reasonable jury to return a verdict for the non-moving party." *Longen*, 347 F.3d 685, 688 (8th Cir. 2003).

6. Union Pacific lacks information sufficient to either admit or deny the statements contained in "Fact 6." Union Pacific states that the Exhibits speak for themselves. However, they have not been authenticated and are not proper summary judgment evidence. "To be considered on summary judgment, documents must be authenticated by and attached to an affidavit made on personal knowledge setting forth such facts as would be admissible in evidence or a deposition that meets the requirements of Fed. R. Civ. P. 56(e). Documents which do not meet those requirements cannot be considered." (quoting *Stuart v. Gen. Motors Corp.*, 217 F.3d 621, 635-36 n.20 (8th Cir. 2000))." *Shanklin v. Fitzgerald*, 397 F.3d 596, 602 (8th Cir. 2005).

Further, “Fact 6” are not material facts for the summary judgment motion. A material fact is one which, depending on the applicable substantive law, might affect the outcome of the lawsuit. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986); *Longen v. Waterous Co.*, 347 F.3d 685, 688 (8th Cir. 2003). An issue is genuine “if the evidence is sufficient to allow a reasonable jury to return a verdict for the non-moving party.” *Longen*, 347 F.3d 685, 688 (8th Cir. 2003).

7. Union Pacific admits the statements contained in “Fact 7.” However, they are not material facts for the summary judgment motion. A material fact is one which, depending on the applicable substantive law, might affect the outcome of the lawsuit. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986); *Longen v. Waterous Co.*, 347 F.3d 685, 688 (8th Cir. 2003). An issue is genuine “if the evidence is sufficient to allow a reasonable jury to return a verdict for the non-moving party.” *Longen*, 347 F.3d 685, 688 (8th Cir. 2003).

8. Union Pacific lacks information sufficient to either admit or deny the statements contained in “Fact 8.” Union Pacific states that the Exhibits speak for themselves. However, they have not been authenticated and are not proper summary judgment evidence. “To be considered on summary judgment, documents must be authenticated by and attached to an affidavit made on personal knowledge setting forth such facts as would be admissible in evidence or a deposition that meets the requirements of Fed. R. Civ. P. 56(e). Documents which do not meet those requirements cannot be considered.” (quoting *Stuart v. Gen. Motors Corp.*, 217 F.3d 621, 635-36 n.20 (8th Cir. 2000)).” *Shanklin v. Fitzgerald*, 397 F.3d 596, 602 (8th Cir. 2005).

Further, “Fact 8” are not material facts for the summary judgment motion. A material fact is one which, depending on the applicable substantive law, might affect the outcome of the

lawsuit. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986); *Longen v. Waterous Co.*, 347 F.3d 685, 688 (8th Cir. 2003). An issue is genuine "if the evidence is sufficient to allow a reasonable jury to return a verdict for the non-moving party." *Longen*, 347 F.3d 685, 688 (8th Cir. 2003).

9. Union Pacific denies that the street was named "Oliver Street" and further states that the exhibits do not support any street called "Oliver Street" and no evidence supports the statement that the tracks were "constructed over and across the existing, dedicated, and platted dirt and gravel city street known as Oliver St. . . ." Union Pacific further states that the Exhibits speak for themselves. However, they have not been authenticated and are not proper summary judgment evidence. "To be considered on summary judgment, documents must be authenticated by and attached to an affidavit made on personal knowledge setting forth such facts as would be admissible in evidence or a deposition that meets the requirements of Fed. R. Civ. P. 56(e). Documents which do not meet those requirements cannot be considered." (quoting *Stuart v. Gen. Motors Corp.*, 217 F.3d 621, 635-36 n.20 (8th Cir. 2000))." *Shanklin v. Fitzgerald*, 397 F.3d 596, 602 (8th Cir. 2005).

10. Union Pacific admits the statements contained in "Fact 10" but states that no citation to any record is made. However, they are not material facts for the summary judgment motion. A material fact is one which, depending on the applicable substantive law, might affect the outcome of the lawsuit. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986); *Longen v. Waterous Co.*, 347 F.3d 685, 688 (8th Cir. 2003). An issue is genuine "if the evidence is sufficient to allow a reasonable jury to return a verdict for the non-moving party." *Longen*, 347 F.3d 685, 688 (8th Cir. 2003).

11. Union Pacific lacks information sufficient to either admit or deny the statements contained in “Fact 11” as no citation to any record is made. However, they are not material facts for the summary judgment motion. A material fact is one which, depending on the applicable substantive law, might affect the outcome of the lawsuit. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986); *Longen v. Waterous Co.*, 347 F.3d 685, 688 (8th Cir. 2003). An issue is genuine “if the evidence is sufficient to allow a reasonable jury to return a verdict for the non-moving party.” *Longen*, 347 F.3d 685, 688 (8th Cir. 2003).

12. Union Pacific lacks information sufficient to either admit or deny the statements contained in “Fact 12.” Union Pacific states that the Exhibits speak for themselves. However, they have not been authenticated and are not proper summary judgment evidence. “To be considered on summary judgment, documents must be authenticated by and attached to an affidavit made on personal knowledge setting forth such facts as would be admissible in evidence or a deposition that meets the requirements of Fed. R. Civ. P. 56(e). Documents which do not meet those requirements cannot be considered.” (quoting *Stuart v. Gen. Motors Corp.*, 217 F.3d 621, 635-36 n.20 (8th Cir. 2000)).” *Shanklin v. Fitzgerald*, 397 F.3d 596, 602 (8th Cir. 2005).

Further, “Fact 12” are not material facts for the summary judgment motion. A material fact is one which, depending on the applicable substantive law, might affect the outcome of the lawsuit. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986); *Longen v. Waterous Co.*, 347 F.3d 685, 688 (8th Cir. 2003). An issue is genuine “if the evidence is sufficient to allow a reasonable jury to return a verdict for the non-moving party.” *Longen*, 347 F.3d 685, 688 (8th Cir. 2003).

13—15. Union Pacific lacks information sufficient to either admit or deny the statements contained in “Facts 13—15.” Union Pacific states that the Exhibits speak for themselves. However, they have not been authenticated and are not proper summary judgment evidence. “To be considered on summary judgment, documents must be authenticated by and attached to an affidavit made on personal knowledge setting forth such facts as would be admissible in evidence or a deposition that meets the requirements of Fed. R. Civ. P. 56(e). Documents which do not meet those requirements cannot be considered.” (quoting *Stuart v. Gen. Motors Corp.*, 217 F.3d 621, 635-36 n.20 (8th Cir. 2000)).” *Shanklin v. Fitzgerald*, 397 F.3d 596, 602 (8th Cir. 2005).

Further, “Facts 13—15” are not material facts for the summary judgment motion. A material fact is one which, depending on the applicable substantive law, might affect the outcome of the lawsuit. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986); *Longen v. Waterous Co.*, 347 F.3d 685, 688 (8th Cir. 2003). An issue is genuine “if the evidence is sufficient to allow a reasonable jury to return a verdict for the non-moving party.” *Longen*, 347 F.3d 685, 688 (8th Cir. 2003).

16. Union Pacific lacks information sufficient to either admit or deny the statements contained in “Fact 16” as no citation to any record is made. However, they are not material facts for the summary judgment motion. A material fact is one which, depending on the applicable substantive law, might affect the outcome of the lawsuit. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986); *Longen v. Waterous Co.*, 347 F.3d 685, 688 (8th Cir. 2003). An issue is genuine “if the evidence is sufficient to allow a reasonable jury to return a verdict for the non-moving party.” *Longen*, 347 F.3d 685, 688 (8th Cir. 2003).

17. Union Pacific lacks information sufficient to either admit or deny the statements contained in “Fact 17.” Union Pacific states that the Exhibits speak for themselves. However, they have not been authenticated and are not proper summary judgment evidence. “To be considered on summary judgment, documents must be authenticated by and attached to an affidavit made on personal knowledge setting forth such facts as would be admissible in evidence or a deposition that meets the requirements of Fed. R. Civ. P. 56(e). Documents which do not meet those requirements cannot be considered.” (quoting *Stuart v. Gen. Motors Corp.*, 217 F.3d 621, 635-36 n.20 (8th Cir. 2000)).” *Shanklin v. Fitzgerald*, 397 F.3d 596, 602 (8th Cir. 2005).

Further, “Fact 17” are not material facts for the summary judgment motion. A material fact is one which, depending on the applicable substantive law, might affect the outcome of the lawsuit. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986); *Longen v. Waterous Co.*, 347 F.3d 685, 688 (8th Cir. 2003). An issue is genuine “if the evidence is sufficient to allow a reasonable jury to return a verdict for the non-moving party.” *Longen*, 347 F.3d 685, 688 (8th Cir. 2003).

18. Union Pacific lacks information sufficient to either admit or deny the statements contained in “Fact 18” as no citation to any record is made. However, they are not material facts for the summary judgment motion. A material fact is one which, depending on the applicable substantive law, might affect the outcome of the lawsuit. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986); *Longen v. Waterous Co.*, 347 F.3d 685, 688 (8th Cir. 2003). An issue is genuine “if the evidence is sufficient to allow a reasonable jury to return a verdict for the non-moving party.” *Longen*, 347 F.3d 685, 688 (8th Cir. 2003).

19—22. Union Pacific lacks information sufficient to either admit or deny the statements contained in “Facts 19—22” with the exception that Union Pacific admits that the crossing is shown on the maps. Union Pacific states that the Exhibits speak for themselves. However, they have not been authenticated and are not proper summary judgment evidence. “To be considered on summary judgment, documents must be authenticated by and attached to an affidavit made on personal knowledge setting forth such facts as would be admissible in evidence or a deposition that meets the requirements of Fed. R. Civ. P. 56(e). Documents which do not meet those requirements cannot be considered.” (quoting *Stuart v. Gen. Motors Corp.*, 217 F.3d 621, 635-36 n.20 (8th Cir. 2000)).” *Shanklin v. Fitzgerald*, 397 F.3d 596, 602 (8th Cir. 2005).

Further, “Facts 19—22” are not material facts for the summary judgment motion. A material fact is one which, depending on the applicable substantive law, might affect the outcome of the lawsuit. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986); *Longen v. Waterous Co.*, 347 F.3d 685, 688 (8th Cir. 2003). An issue is genuine “if the evidence is sufficient to allow a reasonable jury to return a verdict for the non-moving party.” *Longen*, 347 F.3d 685, 688 (8th Cir. 2003).

23—25. Union Pacific lacks information sufficient to either admit or deny the statements contained in “Facts 23—25.” Union Pacific denies that there was a classification of “Oliver Street” and denies that the crossing was always classified as a public at-grade crossing. In addition, Union Pacific lacks information sufficient to either admit or deny the statements contained in “Facts 23—25” as no citation to any record is made. Union Pacific states that the Exhibits speak for themselves. However, they have not been authenticated and are not proper summary judgment evidence. “To be considered on summary judgment, documents must be authenticated by and attached to an affidavit made on personal knowledge setting forth such facts

as would be admissible in evidence or a deposition that meets the requirements of Fed. R. Civ. P. 56(e). Documents which do not meet those requirements cannot be considered." (quoting *Stuart v. Gen. Motors Corp.*, 217 F.3d 621, 635-36 n.20 (8th Cir. 2000))." *Shanklin v. Fitzgerald*, 397 F.3d 596, 602 (8th Cir. 2005).

Further, Facts 23—25" are not material facts for the summary judgment motion. A material fact is one which, depending on the applicable substantive law, might affect the outcome of the lawsuit. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986); *Longen v. Waterous Co.*, 347 F.3d 685, 688 (8th Cir. 2003). An issue is genuine "if the evidence is sufficient to allow a reasonable jury to return a verdict for the non-moving party." *Longen*, 347 F.3d 685, 688 (8th Cir. 2003).

26—27. Union Pacific lacks information sufficient to either admit or deny the statements contained in "Facts 26—27." Union Pacific states that the Exhibits speak for themselves. However, they have not been authenticated and are not proper summary judgment evidence. "To be considered on summary judgment, documents must be authenticated by and attached to an affidavit made on personal knowledge setting forth such facts as would be admissible in evidence or a deposition that meets the requirements of Fed. R. Civ. P. 56(e). Documents which do not meet those requirements cannot be considered." (quoting *Stuart v. Gen. Motors Corp.*, 217 F.3d 621, 635-36 n.20 (8th Cir. 2000))." *Shanklin v. Fitzgerald*, 397 F.3d 596, 602 (8th Cir. 2005).

Further, "Facts 26—27" are not material facts for the summary judgment motion. A material fact is one which, depending on the applicable substantive law, might affect the outcome of the lawsuit. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986); *Longen v. Waterous Co.*, 347 F.3d 685, 688 (8th Cir. 2003). An issue is

genuine "if the evidence is sufficient to allow a reasonable jury to return a verdict for the non-moving party." *Longen*, 347 F.3d 685, 688 (8th Cir. 2003).

28. Union Pacific lacks information sufficient to either admit or deny the statements contained in "Fact 28," as no citation to any record is made. Union Pacific states that they are not material facts for the summary judgment motion. A material fact is one which, depending on the applicable substantive law, might affect the outcome of the lawsuit. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986); *Longen v. Waterous Co.*, 347 F.3d 685, 688 (8th Cir. 2003). An issue is genuine "if the evidence is sufficient to allow a reasonable jury to return a verdict for the non-moving party." *Longen*, 347 F.3d 685, 688 (8th Cir. 2003).

29—31. Union Pacific lacks information sufficient to either admit or deny the statements contained in "Facts 29—31." Union Pacific states that the Exhibits speak for themselves. However, they have not been authenticated and are not proper summary judgment evidence. "To be considered on summary judgment, documents must be authenticated by and attached to an affidavit made on personal knowledge setting forth such facts as would be admissible in evidence or a deposition that meets the requirements of Fed. R. Civ. P. 56(e). Documents which do not meet those requirements cannot be considered." (quoting *Stuart v. Gen. Motors Corp.*, 217 F.3d 621, 635-36 n.20 (8th Cir. 2000))." *Shanklin v. Fitzgerald*, 397 F.3d 596, 602 (8th Cir. 2005).

Further, Facts "29—31" are not material facts for the summary judgment motion. A material fact is one which, depending on the applicable substantive law, might affect the outcome of the lawsuit. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986); *Longen v. Waterous Co.*, 347 F.3d 685, 688 (8th Cir. 2003). An issue is

genuine "if the evidence is sufficient to allow a reasonable jury to return a verdict for the non-moving party." *Longen*, 347 F.3d 685, 688 (8th Cir. 2003).

32. Union Pacific lacks information sufficient to either admit or deny the statements contained in "Fact 32," as no citation to any record is made. Union Pacific states that they are not material facts for the summary judgment motion. A material fact is one which, depending on the applicable substantive law, might affect the outcome of the lawsuit. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986); *Longen v. Waterous Co.*, 347 F.3d 685, 688 (8th Cir. 2003). An issue is genuine "if the evidence is sufficient to allow a reasonable jury to return a verdict for the non-moving party." *Longen*, 347 F.3d 685, 688 (8th Cir. 2003).

33—55. Union Pacific lacks information sufficient to either admit or deny the statements contained in "Facts 33—55." Union Pacific states that the Exhibits speak for themselves. However, they have not been authenticated and are not proper summary judgment evidence. "To be considered on summary judgment, documents must be authenticated by and attached to an affidavit made on personal knowledge setting forth such facts as would be admissible in evidence or a deposition that meets the requirements of Fed. R. Civ. P. 56(e). Documents which do not meet those requirements cannot be considered." (quoting *Stuart v. Gen. Motors Corp.*, 217 F.3d 621, 635-36 n.20 (8th Cir. 2000))." *Shanklin v. Fitzgerald*, 397 F.3d 596, 602 (8th Cir. 2005).

Further, "Facts 33—55" are not material facts for the summary judgment motion. A material fact is one which, depending on the applicable substantive law, might affect the outcome of the lawsuit. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986); *Longen v. Waterous Co.*, 347 F.3d 685, 688 (8th Cir. 2003). An issue is

genuine "if the evidence is sufficient to allow a reasonable jury to return a verdict for the non-moving party." *Longen*, 347 F.3d 685, 688 (8th Cir. 2003).

56. Union Pacific lacks information sufficient to either admit or deny the statements contained in "Fact 56," as no citation to any record is made. Union Pacific states that they are not material facts for the summary judgment motion. A material fact is one which, depending on the applicable substantive law, might affect the outcome of the lawsuit. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986); *Longen v. Waterous Co.*, 347 F.3d 685, 688 (8th Cir. 2003). An issue is genuine "if the evidence is sufficient to allow a reasonable jury to return a verdict for the non-moving party." *Longen*, 347 F.3d 685, 688 (8th Cir. 2003).

57—60. Union Pacific lacks information sufficient to either admit or deny the statements contained in "Facts 57—60." Union Pacific states that the Exhibits speak for themselves. However, they have not been authenticated and are not proper summary judgment evidence. "To be considered on summary judgment, documents must be authenticated by and attached to an affidavit made on personal knowledge setting forth such facts as would be admissible in evidence or a deposition that meets the requirements of Fed. R. Civ. P. 56(e). Documents which do not meet those requirements cannot be considered." (quoting *Stuart v. Gen. Motors Corp.*, 217 F.3d 621, 635-36 n.20 (8th Cir. 2000))." *Shanklin v. Fitzgerald*, 397 F.3d 596, 602 (8th Cir. 2005).

Further, "Facs 57—60" are not material facts for the summary judgment motion. A material fact is one which, depending on the applicable substantive law, might affect the outcome of the lawsuit. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986); *Longen v. Waterous Co.*, 347 F.3d 685, 688 (8th Cir. 2003). An issue is

genuine "if the evidence is sufficient to allow a reasonable jury to return a verdict for the non-moving party." *Longen*, 347 F.3d 685, 688 (8th Cir. 2003).

61. Union Pacific admits that the FRA contains an inventory of crossings but denies its reliability. Union Pacific incorporates herein its Response to the Motion for Summary Judgment regarding the reliability of the FRA inventory. Union Pacific further refers to the history of the inventory described in the Code of Federal Regulations.

62. Union Pacific admits that the FRA contains an inventory of crossings but denies its reliability. Union Pacific incorporates herein its Response to the Motion for Summary Judgment regarding the reliability of the FRA inventory. Union Pacific further refers to the history of the inventory described in the Code of Federal Regulations. Union Pacific denies that the August 2007 handbook describes a procedure that applied at any time relevant to this case.

63. Union Pacific admits that the FRA contains an inventory of crossings but denies its reliability. Union Pacific incorporates herein its Response to the Motion for Summary Judgment regarding the reliability of the FRA inventory. Union Pacific further refers to the history of the inventory described in the Code of Federal Regulations.

64. Union Pacific admits that the FRA contains an inventory of crossings but denies its reliability. Union Pacific incorporates herein its Response to the Motion for Summary Judgment regarding the reliability of the FRA inventory. Union Pacific further refers to the history of the inventory described in the Code of Federal Regulations.

65. Union Pacific admits that by 1970 there were no longer any residences that were located south of the railroad tracks but denies the remaining statements in "Fact 65." In fact, the testimony from the very residents identified by the City indicate that there was very little or no

use of the crossing after 1970. Union Pacific references the summary chart attached to its Motion for Summary Judgment.

66. Denied. Union Pacific refers to the Affidavit of Colby Rinker, attached to the Motion for Summary Judgment.

67. Union Pacific lacks information sufficient to either admit or deny the statements contained in "Fact 67." Union Pacific states that the Exhibits speak for themselves. However, they have not been authenticated and are not proper summary judgment evidence. "To be considered on summary judgment, documents must be authenticated by and attached to an affidavit made on personal knowledge setting forth such facts as would be admissible in evidence or a deposition that meets the requirements of Fed. R. Civ. P. 56(e). Documents which do not meet those requirements cannot be considered." (quoting *Stuart v. Gen. Motors Corp.*, 217 F.3d 621, 635-36 n.20 (8th Cir. 2000))." *Shanklin v. Fitzgerald*, 397 F.3d 596, 602 (8th Cir. 2005).

Further, "Fact 67" are not material facts for the summary judgment motion. A material fact is one which, depending on the applicable substantive law, might affect the outcome of the lawsuit. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986); *Longen v. Waterous Co.*, 347 F.3d 685, 688 (8th Cir. 2003). An issue is genuine "if the evidence is sufficient to allow a reasonable jury to return a verdict for the non-moving party." *Longen*, 347 F.3d 685, 688 (8th Cir. 2003).

68. Union Pacific lacks information sufficient to either admit or deny the statements contained in "Fact 68." Union Pacific states that the Exhibits speak for themselves. However, they have not been authenticated and are not proper summary judgment evidence. "To be considered on summary judgment, documents must be authenticated by and attached to an

affidavit made on personal knowledge setting forth such facts as would be admissible in evidence or a deposition that meets the requirements of Fed. R. Civ. P. 56(e). Documents which do not meet those requirements cannot be considered." (quoting *Stuart v. Gen. Motors Corp.*, 217 F.3d 621, 635-36 n.20 (8th Cir. 2000))." *Shanklin v. Fitzgerald*, 397 F.3d 596, 602 (8th Cir. 2005).

Further, "Fact 68" are not material facts for the summary judgment motion. A material fact is one which, depending on the applicable substantive law, might affect the outcome of the lawsuit. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986); *Longen v. Waterous Co.*, 347 F.3d 685, 688 (8th Cir. 2003). An issue is genuine "if the evidence is sufficient to allow a reasonable jury to return a verdict for the non-moving party." *Longen*, 347 F.3d 685, 688 (8th Cir. 2003).

69—71. Union Pacific lacks information sufficient to either admit or deny the statements contained in "Facts 69—71." Union Pacific states that the Exhibits speak for themselves. However, they have not been authenticated and are not proper summary judgment evidence. "To be considered on summary judgment, documents must be authenticated by and attached to an affidavit made on personal knowledge setting forth such facts as would be admissible in evidence or a deposition that meets the requirements of Fed. R. Civ. P. 56(e). Documents which do not meet those requirements cannot be considered." (quoting *Stuart v. Gen. Motors Corp.*, 217 F.3d 621, 635-36 n.20 (8th Cir. 2000))." *Shanklin v. Fitzgerald*, 397 F.3d 596, 602 (8th Cir. 2005).

Further, "Facts 69—71" are not material facts for the summary judgment motion. A material fact is one which, depending on the applicable substantive law, might affect the outcome of the lawsuit. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 91 L. Ed. 2d 202,

106 S. Ct. 2505 (1986); *Longen v. Waterous Co.*, 347 F.3d 685, 688 (8th Cir. 2003). An issue is genuine "if the evidence is sufficient to allow a reasonable jury to return a verdict for the non-moving party." *Longen*, 347 F.3d 685, 688 (8th Cir. 2003).

72. Denied. Union Pacific affirmatively states that the City is bound by the testimony of witnesses Timmerman, McNutt, Edgin, and Milam as its designated Rule 30(b)(6) testimony.

73. Denied. Plaintiff asserts no alleged facts in paragraph number 73. Union Pacific refers to its Response to the City's Motion for Partial Summary Judgment.

74. Denied. Plaintiff asserts no alleged facts in paragraph number 74. Union Pacific refers to its Response to the City's Motion for Partial Summary Judgment.

75. Denied. Plaintiff asserts no alleged facts in paragraph number 75. Union Pacific refers to its Response to the City's Motion for Partial Summary Judgment and to its Motion for Summary Judgment, and Memorandum of Law in Support.

76. Denied. Plaintiff asserts no alleged facts in paragraph number 76. Union Pacific refers to its Response to the City's Motion for Partial Summary Judgment.

77. Union Pacific denies that the City is entitled to the relief requested in the Wherefore clause and refers to its Response to the City's Motion for Partial Summary Judgment.

Respectfully submitted,

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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 14th day of May, 2015, and said Clerk shall serve an electronic copy of same upon the following counsel of record:

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