

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

CITY OF OZARK, ARKANSAS, a municipal corporation	)	
	)	
Plaintiff,	)	
	)	
	)	
vs.	)	
	)	
	)	
UNION PACIFIC RAILROAD COMPANY, the ARKANSAS STATE HIGHWAY & TRANSPORTATION DEPARTMENT (an Agency of) The State of Arkansas, AND THE ARKANSAS STATE HIGHWAY COMMISSION	)	
	)	
	)	
Defendants,	)	

CIVIL ACTION NO:2:14-CV-02196-TLB

**PLAINTIFF, CITY OF OZARK’S, REPLY TO THE DEFENDANT, UNION PACIFIC
RAILROAD COMPANY’S, OPPOSITION TO THE PLAINTIFF’S MOTION FOR
PARTIAL SUMMARY JUDGMENT**

Comes now the Plaintiff, the City of Ozark, Arkansas, a municipal corporation by and through its undersigned counsel, Christopher D. Brockett of Sayre & Brockett, and for its Reply to the Defendant, Union Pacific Railroad Company’s, Opposition to the Plaintiff’s Motion for Partial Summary Judgment the Plaintiff states in the affirmative as follows:

1. Plaintiff asserts it is entitled to Partial Summary Judgment on Count I of its Amended and Restated Complaint seeking a finding by this Honorable Court that a previously installed at-grade crossing, referred to by the Plaintiff as the Oliver St. Crossing, was a public at-grade crossing that was removed without authority by the Defendant.

2. The Defendant asserts the Plaintiff is not entitled to partial summary judgment because a declaration is improper and second because the matter is preempted by the ICCTA.

3. Plaintiff and the Defendant have both fully briefed the issue of preemption in the Defendant's Motion to Dismiss and the Plaintiff's Response and they have again fully briefed the issue of Federal preemption in the Defendant's Motion for Summary Judgment and the Plaintiff's Response and Opposition of the Defendant's Motion for Summary Judgment.

4. The Plaintiff asserts this matter relates to a routine at-grade crossing dispute; therefore, the matter is not preempted by Federal law, specifically the ICCTA. In addition, the Plaintiff asserts the reinstallation of the Oliver St. Crossing at the same location that is previously existed for at least 85 years with only one (1) know accident, does not create an unreasonable interference with the Defendant's railroad operations; nor does it create any undue risk to the public or the Defendant's employees.

5. The Exhibits attached to the Plaintiff's Motion for Partial Summary Judgment, specifically the Plaintiff's ordinances minutes, official maps, clearly show the existence of a street known as Oliver St., which is a central issue in this civil matter.

6. An Affidavit of Sandy Key is attached hereto as **Exhibit A**, authenticating the following exhibits:

a. Minutes of the Plaintiff's 1940, 1951, 1956, and 1957 City Council authorizing the payment to Nelsie Oliver for lease of real property located South of the Defendant's Railroad tracks that were used for the Plaintiff's city dump.

b. The October 13, 1942 Ordinance and incorporated blueprint that shows the request by the Defendant's predecessor, Missouri Pacific Railroad Company, to install an industrial rail spur down what was known

as Water Street on the Defendant's maps and as River Street by the Plaintiff. The blueprint is the first known document in the Plaintiff's possession that shows the existence of the gravel road known as Oliver St.

c. The document entitled the City of Ozark, Arkansas House Numbers March 1962. This document shows the existence of Oliver Street, as a street of the Plaintiff that had individuals and the business known as F & S Lumber Co., located on the street.

d. The February 1962 Map of the Plaintiff's city streets, which shows the existence of Oliver St., crossing the Defendant's railroad tracks at the location of the Oliver St. Crossing and the enlarged portion of the Oliver St. area showing the existing structures that correspond to the addresses listed in the March 1962 address book.

e. The May 1975 Map of the Plaintiff's city streets, which shows the existence of Oliver St., crossing the Defendant's railroad tracks at the location of the Oliver St. Crossing.

7. An Affidavit of Andy Dibble is attached hereto as **Exhibit B**, authenticating the following exhibits:

a. A 1965 Ozark, Arkansas Water Distribution System map that shows an "unnamed" street crossing the Defendant's railroad tracks at the location of the Oliver St. Crossing.

b. An aerial photo of the area at issue in this civil matter that is dated April 12, 1965, which shows the various structures located South of the Defendant's railroad tracks, including F & S Lumber Co., the small community of houses and both the Oliver St. Crossing and Oliver St.

c. The Ozark Lock and Dam Relocations City of Ozark Streets, Water Lines and Sewage Facilities projection Location map that was prepared by the U.S. Army Engineer District, Little Rock, Arkansas dated March 1966. This map shows the Peach Valley's propane/butane tanks, F & S Lumber Co., the small community of houses, and the sewer pipes that Plaintiff used to pump sewer into the Arkansas River.

d. A 1980 Arkansas Highway and Transportation Department Division of Planning and Research map of the Oliver St. Crossing area that shows an unnamed road crossing the Defendant's railroad tracks at the Oliver St. Crossing location.

e. A 1980 Bike Route Map that shows "Oliver St.," crossing the Defendant's railroad tracks at the location of the Oliver St. Crossing location.

8. An Affidavit of Tommy Watson is attached hereto as **Exhibit C**, authenticating the following exhibits:

a. A deed from WM Hail to William Cureton, which transaction related to real property owned in the location of Oliver St., prior to the Defendant's predecessor construction of railroad tracks through Plaintiff's downtown area.

b. A deed from John Hail to William Hail, which transaction related to real property owned in the location of Oliver St., prior to the Defendant's predecessor construction of railroad tracks through Plaintiff's downtown area.

c. A deed from Cureton to James F. Quaile, which transaction related to real property owned in the location of Oliver St., prior to the Defendant's predecessor construction of railroad tracks through Plaintiff's downtown area.

d. A deed from J.V. Bourland to Samuel Church, which transaction related to real property owned in the location of Oliver St., after the Defendant's predecessor constructed railroad tracks through Plaintiff's downtown area.

e. A deed from Church to J.V. Bourland, which transaction related to real property owned in the location of Oliver St., after the Defendant's predecessor constructed railroad tracks through Plaintiff's downtown area. This deed specifically references that Mr. Church resided on the real property.

f. A deed from Bourland to Walting which transaction related to real property owned in the location of Oliver St., after the Defendant's predecessor constructed railroad tracks through Plaintiff's downtown area.

g. A deed from Walting to Oliver, which transaction related to real property owned in the location of Oliver St., after the Defendant's predecessor constructed railroad tracks through Plaintiff's downtown area.

9. The above Exhibits show undisputed evidence that a city street known as Oliver St., existed and crossed the Defendant's railroad tracks at the location of the

Oliver St. Crossing. Further, the existence of a small community of residents that resided on privately owned property that was located South of the Defendant's Railroad tracks in Plaintiff's downtown area is also undisputed.

10. Additionally, the undisputed testimony by various witnesses provide that this gravel and dirt road was the main access and the only road access to the real property located South of the Defendant's railroad tracks until approximately 1970, when the U.S. Corps of Engineers cleaned the North shore of the Arkansas River. After the Corps had cleaned the North shore, individuals were able to cross the Defendant's railroad tracks at any place without the use of a crossing for fishing or swimming purposes. See Dep. of R. Anderson Pg. 42:1-23, attached hereto as **Exhibit D** and incorporated herein.

11. Notwithstanding the above undisputed facts and Exhibits, the Defendant asserts the at-grade public crossing was not a public crossing as there is no documentation to specifically show an easement for the public at-grade crossing. As stated in **Exhibit C**, there is no evidence in the public records that the Defendant has a railroad right-of-way, as Mr. Watson has researched this issue with the Franklin County Circuit Court and the records of Adams Abstract and Title Co. Therefore, the Plaintiff asserts that a lack of documentation filed in the records of the offices of Franklin County Circuit Clerk is not a fatal flaw to the Plaintiff's cause of action.

12. Finally, Defendant's own undisputed maps show the existence of the at-grade crossing at the Oliver St. Crossing location, which was classified by the Defendant's original predecessor, the Fort Smith & Little Rock Railroad, **as a public at-grade crossing.**

13. An Affidavit of Royce Gattis is attached hereto as **Exhibit E**, authenticating the following exhibits:

a. The June 30, 1916 Missouri Pacific Railroad Company Track Right of Way map that he obtained from the Defendant's employee, Sandy Robertson, Map Librarian ASI-Dept. EDM Engineering R/W Maps. The 1916 map shows a public crossing at the location of the Oliver St. Crossing.

b. The August 15, 1946, Station Map Right of Way, Tracks and Structures Little Rock and Ft. Smith R.R. Co., Owned and Operated by Missouri Pacific Railroad Co., Ozark, Franklin Co., Arkansas Station 6388+00 to Station 6440+80 that he also obtained from the Defendant's employee, Sandy Robertson, Map Librarian ASI-Dept. EDM Engineering R/W Maps. This map also shows an at-grade crossing at the location of the Oliver St. Crossing, which was classified as a public crossing and shows a crossing sign at this location.

14. The Defendant does not dispute that an at-grade crossing existed at this location, but disputes the crossing was an at-grade public crossing; however, the Defendant's own undisputed maps shows the existence of a public at-grade crossing at the location of the Oliver St. Crossing. This fact alleviates the need of the Plaintiff to have specific documentation of the at-grade crossing easement.

15. The Plaintiff further asserts it is necessary for this Court to determine whether the at-grade crossing was a public crossing, as Arkansas law is clear on how a public easement, alleyway or street can be abandoned or vacated by a municipality.

16. In the event that this Honorable Court determines the at-grade crossing was a public crossing, then the crossing was, as a matter of Arkansas law, illegally removed by the Defendant. Therefore, as a matter of law, Plaintiff would be entitled to reinstallation of the at-grade crossing without the Court devoting judicial resources to weighing the Defendant's arguments of unreasonable interference or undue safety issue to the public or Defendant's employees.

17. In the alternative, if this Honorable Court determines the at-grade crossing was not a public crossing and was actually a private crossing then, the Defendant had the ability to remove the at-grade crossing, without the requirement of an affirmative vote of the Plaintiff's 2001 Council.

18. The Plaintiff seeks this declaration to avoid wasting judicial resources or funds of the Plaintiff or Defendant.

19. A determination that the at-grade crossing was a public crossing would avoid the necessity of a trial and would simply lead require the Plaintiff to prove any damages that is suffered by the illegal acts of the Defendant in removing the at-grade public crossing without authority. Alternatively, a determination that the at-grade crossing was a private crossing would cancel all counts of the Plaintiff's Amended and Restated Complaint except for the Plaintiff's alternative count for Condemnation of an easement.

20. Therefore, Plaintiff asserts that the Plaintiff's declaratory relief will serve a useful purpose by avoiding unnecessary litigation between the parties by either (1) finding the crossing was public and the Defendant as a matter of law, must reinstall the crossing as the Defendant did not comply with Arkansas statutory law when the Defendant removed it; or (2) finding the crossing was a private crossing which the Defendant remove property as it was not required to comply with Arkansas statutory law.

21. The granting of the declaratory judgment will reduce the use of judicial resources and will serve a useful purpose as set forth herein above.

WHEREFORE, the Plaintiff, the City of Ozark, Arkansas, a municipal corporation, respectfully prays that this Honorable Court issue an Order granting the Plaintiff's Motion for Partial Summary Judgment by declaring the at-grade crossing a public crossing, for its reasonable attorney's fees and costs; and for any and all other relief to which this Court finds the Plaintiff is entitled.

Respectfully submitted:

By: /s/ Christopher D. Brockett
Christopher D. Brockett
Ark. Bar No. 2005192
Sayre & Brockett
401 West Commercial Street
Ozark, Arkansas 72949
Telephone (479) 667-3000
Facsimile (479) 667-4188
Email: cbrockett@bslawarkansas.com
ATTORNEYS FOR THE PLAINTIFF

CERTIFICATE OF SERVICE

I, Christopher D. Brockett, hereby certify that the foregoing pleading was filed with the Clerk of the Court using the CM/ECF Filing System on this 26th day of May, 2015, and said clerk shall serve an electronic copy of same upon the following counsel of record:

Scott H. Tucker
Friday, Eldredge & Clark, LLP
400 W. Capitol Ave., Suite 2000
Little Rock, Arkansas 72201-3522
Telephone: (501) 370-1430
Facsimile: (501) 244-5340
Email: tucker@fridayfirm.com

Joseph McKay
Friday, Eldredge & Clark, LLP
400 W. Capitol Ave., Suite 2000
Little Rock, Arkansas 72201-3522
Telephone: (501) 370-1430
Facsimile: (501) 244-5340
Jamie Huffman Jones
Friday, Eldredge & Clark, LLP
400 W. Capitol Ave., Suite 2000
Little Rock, Arkansas 72201-3522
Telephone: (501) 370-1430
Facsimile: (501) 244-5340
Email: jjones@fridayfirm.com

Done at Ozark, Arkansas, this 26th day of May 2015.

/s/ Christopher D. Brockett
Christopher D. Brockett

EXHIBIT A
AFFIDAVIT OF SANDY KEY

EXHIBIT B
AFFIDAVIT OF ANDY DIBBLE

EXHIBIT C
AFFIDAVIT OF TOMMY WATSON

EXHIBIT D
DEPOSITION OF R. ANDERSON

EXHIBIT E
AFFIDAVIT OF ROYCE GATTIS