

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

CITY OF OZARK, a municipal corporation	)	
	)	
Plaintiff,	)	
	)	
vs.	)	CIVIL ACTION NO: 2:14-cv-02196-TLB
	)	
UNION PACIFIC RAILROAD COMPANY,	)	
	)	
Defendant.	)	
	)	
	)	

**UNION PACIFIC’S REPLY IN SUPPORT OF ITS
MOTION FOR SUMMARY JUDGMENT.**

I. INTRODUCTION.

The City fails to rebut Union Pacific’s Motion for Summary Judgment, relying instead on unsupported factual allegations and uncited legal propositions. The undisputed evidence in the record is that the proposed crossing would unreasonably interfere with railroad operations by reducing rail line capacity, reducing siding storage capacity, eliminating train meets, increasing switching operations, increasing labor costs, and increasing transit times. The proposed crossing would also create undue safety risks, including the risk of death, injury, and contamination of the Arkansas River. For these reasons, the City’s action is preempted by the ICCTA.

Further, the Rule 30(b)(6) testimony of the City establishes that it authorized then-mayor Todd Timmerman to ask the Railroad to take the crossing out. Years later, it regrets that decision. Regret is not a legally valid theory on which to bring a lawsuit. Instead, the lawsuit should be barred by estoppel, laches, and waiver as discussed in Union Pacific’s Motion for Summary Judgment.

For the reasons stated in Union Pacific's Original Memorandum of Law in Support of the Motion for Summary Judgment, in Union Pacific's Response to the City's Motion for Partial Summary Judgment (docket 56), and the reasons contained herein, Union Pacific is entitled to summary judgment.

II. ARGUMENT: THE CITY FAILED TO MEET PROOF WITH PROOF; THUS UNION PACIFIC IS ENTITLED TO SUMMARY JUDGEMENT.

A. The City's first twelve pages fail to include a single citation to the record; accordingly, those pages should be stricken.

Federal Rule of Civil Procedure 56 (a) requires that "[a] party asserting that a fact cannot be or is genuinely disputed must support the assertion by: (a) citing to particular parts of materials in the record. . . ." The rule makes sense—how can the other party respond to factual allegations without a citation to the record? Most of the first twelve pages of the City's memorandum response is an alleged "factual background," yet it does not contain a single citation to the record. Accordingly, the Court should not consider (and should strike) pages 3-12, as well as the numerous other unsupported statements beyond page twelve.

B. The parties agree on the ICCTA standard; and the City fails to meet Union Pacific's proof that the crossing would unreasonably interfere with railroad operations and would pose undue safety risks.

While the City spends pages discussing the ICCTA, the parties agree on the governing standard: if the proposed action would unreasonably interfere with railroad operations *or* would pose undue safety risks, the action is preempted. (*See e.g.* Response, pp. 15—16). The City is required to set forth a material fact in dispute in order to overcome summary judgment. 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). The evidence of record would not allow a reasonable jury to find for the City. As discussed below, the City does not challenge the evidence put forth by Union Pacific's witnesses Gary Wolf, Bill Huston, or Steve Kifer. Instead, the City makes arguments without citations to the record or to any proper summary judgment evidence. Accordingly, summary judgment should be granted.

i. George Soliz is not an expert on crossings or the impact that the crossing would have on railroad operations.

George Soliz is the City's designated expert. His affidavit does not rebut the sworn testimony of Gary Wolf, Bill Huston, or Steve Kifer. Nevertheless, he opines about the use of Union Pacific's facilities, the safety of the proposed crossing, and the impact on operations. Given that he is not an expert in these areas, Union Pacific will file a *Daubert* motion to exclude his testimony. While Mr. Soliz may have expertise regarding locomotives, Soliz, 17, 49—50¹, he has no expertise regarding crossings, crossing safety, or railroad operations. Soliz, 17 (admitting that he does not have expertise in the design, layout, and function of actual grade crossings). He admitted that he would not be an expert on a grade crossing design or the warning devices to be installed at a crossing. Soliz, 50. He has never worked as a locomotive engineer or conductor. Soliz, 52. In fact, this is the first time he has ever been asked to look at the effect that a proposed crossing would have on train operations and safety issues. Soliz, 142.

Soliz's opinions on the interference with railroad operations alone should be excluded because he conceded that he is not an expert:

Q: Do you have expertise in determining that if a crossing goes in and goes over a siding, how that can adversely impact railroad operations? Is that something you have expertise in?

¹ Attached hereto as Exhibit 1.

A: Are you asking me if I am an expert on that is that?

Q: Yes, sir.

A: No, sir. I am not.

Soliz, 109—110 (emphasis added). He further has admitted that he is not an expert:

- on the physics of train slack action and train forces. Soliz, 51;
- at calculating train stopping distances. Soliz, 52;
- in train dispatching, train operations, scheduling of trains, or determining the economic impact of train delays. Soliz, 52;
- in calculating the capacity of a given train corridor. Soliz, 52—53;
- in the analysis and reconstruction of trespasser accidents. Soliz, 53;
- in the analysis and reconstruction of train derailments. Soliz, 53;
- in the discipline of grade crossing safety. Soliz, 83—84, 109;
- in how to calculate clearing site distances for a crossing. Soliz, 113;
- in train meet and pass operations. Soliz, 151—52.

The above admissions illustrate why Mr. Soliz’s opinions on the safety risks associated with the proposed crossing should be excluded. In addition, the sole basis for Mr. Soliz’s claim that the proposed crossing would present minimal safety concerns is based “upon the FRA databank that they established for at-grade crossings. And at that particular time, they showed nothing ever occurring there at the crossing. . . .” Soliz, 122. However, Mr. Soliz reviewed only the FRA safety data from January 2010 through July 2014. Soliz, 123. It is little surprise that there were no accident at the crossing during this time frame. Union Pacific had removed the crossing in 2001.

Further, while Mr. Soliz visited the location of the proposed crossing,² he did not take a single measurement. Soliz, 74—75. He did not make any calculations to determine the safety risks at the proposed crossing and stated that he is not a certified safety professional. Soliz, 121. In fact, he was unaware of a method to quantify the risk of an accident. Soliz, 122. He did not make any calculations to determine the train delays that would result if trains had to be separated and reconnected at the proposed crossing. Soliz, 127—28. Mr. Wolf, on the other hand, has the expertise, made the measurements, and provided the calculations.

Mr. Soliz readily admitted that he does not have the expertise to render opinions on the safety of the proposed crossing or its operational impact on Union Pacific. He therefore cannot rebut Union Pacific's evidence in support of ICCTA preemption. Mr. Soliz did agree that re-installation of the crossing will result in a 600 foot loss of storage capacity. Soliz, 117—118. He conceded that this will have a negative impact on railroad operations. Soliz, 224. He even admitted that the proposed crossing could stop train meets, which definitely would interfere with railroad operations. Soliz, 223—24.

Further, Mr. Soliz agreed that people crawling under trains carries a high risk of injury or death. Soliz, 183. He also agreed that if an engineer had to apply the emergency brakes to avoid an accident at the proposed crossing, the train could derail. Soliz, 193. He acknowledged that if

² As a side note, Mr. Soliz opines that some of the facilities were not being used by Union Pacific. However, he explained in his deposition that his affidavit was referring to the house tracks—not the siding track and main line Union Pacific refers to in its briefing. Soliz, 142—43. Additionally, Mr. Soliz admitted that the house tracks could have been used the week before he was there or the week after he was there. *Id.*

a train carrying hazardous chemicals derailed so close to the river, it could cause severe environmental contamination. Soliz, 211.

Accordingly, even if Mr. Soliz ultimately survives the *Daubert* challenge, his admissions demonstrate that the proposed crossing would unreasonably interfere with railroad operations and pose undue safety risks. His testimony does not allow the City to survive summary judgment.

ii. Royce Gattis cannot offer opinions on crossing safety.

Royce Gattis is an Ozark resident and lay witness. He seeks to opine regarding the safety of the proposed crossing through an affidavit. However, FRE 701 provides that if a witness is not testifying as an expert, his testimony in the form of an opinion is limited to one that is:

(a) rationally based on the witness's perception; (b) helpful to clearly understanding the witness's testimony or to determining a fact in issue; and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.

Mr. Gattis has no expertise in railroad crossing safety and cannot opine about it by simply going and viewing a crossing. He brings nothing to the table that would assist the factfinder in determining a fact in issue. Accordingly, Union Pacific will file a separate motion strike his affidavit.

iii. The City ignores that Union Pacific owns the land on which the tracks run.

Throughout its Response Brief, the City inaccurately refers to Union Pacific's property as an "easement." The property in question is not an easement—it is owned in fee simple absolute by Union Pacific.

iv. *The impenetrable fence.*

The City makes a strange and unsupported argument—that a safety fence “could prevent a derailed car from entering the Arkansas River as it would serve as an additional barrier.” There are numerous problems with the use of a “safety fence,” as Bill Huston discussed in his previously submitted affidavits. These include trapping individuals within the confines of the fence and hampering the railroad from bringing in equipment in the event of a derailment. *See* Huston, Exhibits 2 and 25 attached to the Original Motion for Summary Judgment. Moreover, Union Pacific is unaware of any fence that could stop a 286,000 pound coal car moving at 45 mph. If a train derailed at this location, it would simply (and quite easily) take the fence with it.

C. The City has failed to meet proof with proof on estoppel, laches, and waiver.

Union Pacific has already briefed the arguments as to estoppel, laches, and waiver. Accordingly, Union Pacific incorporates Section B of its Response to the City’s Motion for Summary Judgment (docket 56) and section IV(B) of its Original Memorandum of Law (docket 43). In its Response Brief, the City makes numerous statements that are not supported by the record or are contrary to the law, a few of which are discussed below.

i. *The City’s reliance on City Council Minutes is unfounded.*

Throughout the City’s response, it relies upon City Council minutes and records. However, it is clear from the testimony of Sonya Eveld, the current city clerk, that the minutes don’t tell the whole story. Ms. Eveld testified:

Q: Can you agree that sometimes the minutes don’t state what is being discussed?

A: That’s true. It’s an overview.

Q: And there could be discussions that occur that might be put in the minutes in a way that you can’t really see what the discussion was, correct, unless you were there?

A: That's possible, yes.

Q: And sometimes there's votes that just say things like, a vote was had, or someone motioned, and they don't—they may say a reading occurred, but they don't recite what the reading was, correct?

A: That's true.

Q: And, in fact, 2001-2002, oftentimes there is no notation of what the vote was or the title of the vote?

A: That's true. Uh-huh.

Eveld, 10—11, attached hereto as Exhibit 2.

ii. Ms. Key was not the City's representative for discussions with the railroad in taking the crossing out; Mayor Timmerman was the City's representative.

The City apparently argues that Ms. Key was the City's representative; not its own mayor. It states that "the Plaintiff's representative, Sandy Key, believed that the Defendant removed the Oliver St. Crossing for construction of high speed rails" and that "it was not until after Plaintiff's representative, Sandy Key, asked about the status of the reinstallation of the public crossing that Plaintiff was put on notice that Defendant was not planning on [sic] to reinstall the Oliver St. Crossing." (Response, 47). This argument is nonsensical: Ms. Key is the executive director of Main Street Ozark, which is not a city office. Former Mayor Timmerman testified that he had the authority to ask Union Pacific to take out the crossing and that there was no reason for Union Pacific to believe it was not proper to do so. Timmerman, 18:16—17; 19:10—13, 24:23, attached to Docket 37 as Exhibit 16. It is not material what Ms. Key believed.

iii. Mr. Timmerman and Mr. McNutt were designated Rule 30(b)(6) witnesses and the City cannot ignore its own stipulations.

The City continues to run from Mr. McNutt's testimony³ and wholly ignores Mr. Timmerman's testimony. Yet, both of them were designated by the City (twice) as Rule 30(b)(6) designees, and their testimony is binding on the City. Union Pacific incorporates Section II G of its Response to the City's Motion for Partial Summary Judgment (docket 56) on this issue.

Further, the City's attempt to disavow its stipulations must be rejected. With respect to the categories in Union Pacific's notice of depositions pursuant to Rule 30(b)(6), the City's counsel, Mr. Brockett stipulated:

3 MS. JONES: Okay. Number ten is the
4 existence of any recorded plat purporting
5 to dedicate Oliver Street for a public
6 purpose. I don't have your letter in front
7 of me. Did you have a witness for that?

8 MR. BROCKETT: Tom, Tommy Watkins
9 [sic], who was deposed yesterday, and Royce
10 Gattis, who was deposed yesterday, both
11 spoke regarding a plat.⁴

³ The City states that Mr. McNutt was not on the Council in 2000. While this is true, he was on the Council in 2001 when Mayor Timmerman asked Union Pacific to remove the crossing. Again, Mr. McNutt's testimony (including the when) was designated as Rule 30(b)(6) testimony by the City and is therefore binding.

⁴ Tommy Watson testified that he does not know of any plats that actually purport to dedicate "Oliver Street" for public use, or any document showing the City accepted a recorded plat showing "Oliver Street," or of any ordinance by the City establishing "Oliver Street" or anything to do with "Oliver Street." (Watson Dep., 68:10—69:22, attached to Doc. 37 as Exhibit 60).

12 At this time no plat has been
 13 obtained, but they testified to what they
 14 remember of a plat.
 15 MS. JONES: Okay. So do you agree
 16 that Tommy Watkins [sic] and Royce Gattis'
 17 testimony that's already on record will
 18 stand as the city's 30(b)(6) testimony with
 19 regards to category ten?
 20 MR. BROCKETT: Yes.
 21 MS. JONES: Okay. Eleven is the
 22 existence of an ordinance accepting and
 23 recording plat dedicating Oliver Street for
 24 a public use.
 25 Mr. Brockett, no witness has been
 13
 1 designated for this category. Do you agree
 2 that the city has no evidence or
 3 documentation regarding category 11?
 4 MR. BROCKETT: Yes.
 5 MS. JONES: Okay. Twelve is the
 6 existence of any recorded easement or other
 7 instrument giving the city the right to
 8 cross Union Pacific's right-of-way at the
 9 requested crossing.
 10 Mr. Brockett, you have identified
 11 Carol Sneath as the city's 30(b)(6)
 12 designee for that category.
 13 Do you agree that her testimony is
 14 already of record and stands as the
 15 30(b)(6) testimony?⁵
 16 MR. BROCKETT: Yes

(Stipulations, Milam Dep., 5—9, attached to Docket 37 as Exhibit 8). The City entered into these stipulations rather than provide a Rule 30(b)(6) witness for these categories of the deposition

Royce Gattis only testified that he recalled seeing a “plat,” but to his knowledge it had not been located by anyone. (Gattis Dep., 129:9—25, attached hereto as Exhibit F).

⁵ Carol Sneath testified that she was not aware of any recorded easement or other instrument granting the City the right to cross Union Pacific’s right-of-way and tracks. (Sneath Dep., 89:3).

notice. The City cannot now state that there is evidence contrary to the stipulations it entered into. Such a position not only violates the stipulations, but also the duties and responsibilities under Rule 30(b)(6). See Section II G of Union Pacific's Response to the City's Motion for Partial Summary Judgment (docket 56).

III. CONCLUSION.

The City has not shown any genuine issue of material fact which would preclude summary judgment in favor of Union Pacific. For the reasons stated in Union Pacific's Original Motion and Memorandum of Law in Support, those stated in its Response to the City's Motion for Partial Summary Judgment, and those contained herein, Union Pacific is entitled to summary judgment.

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 8th day of June, 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