

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 MOTION TO DISMISS PLAINTIFF'S
FIRST AMENDED COMPLAINT AND INCORPORATED MEMORANDUM OF LAW**

Comes now Union Pacific Railroad Company, and for its Motion to Dismiss Plaintiff's First Amended Complaint and Incorporated Memorandum of Law, states:

1. Union Pacific previously filed a Motion to Dismiss and Memorandum of Law in Support.
2. The City of Ozark has filed a First Amended Complaint. The First Amended Complaint should be dismissed for the same reasons as the Original Complaint: (1) because the City waited 13 years after the removal of the crossing to file this lawsuit, the City's action is barred by the doctrine of laches; (2) the City's claims are preempted by federal law; (3) the City's request that Union Pacific remove the crossing constitutes a waiver; (4) the City is estopped from now requesting that Union Pacific re-install the crossing; (5) the condemnation action should be dismissed because the City lacks the authority to condemn the property at issue; and (6) the conversion claim should be dismissed because (a) the statute of limitations has

expired; (b) Arkansas does not recognize a cause of action for conversion of real property; and (c) the City does not have an ownership interest in the real property.

3. Union Pacific adopts and incorporates herein by reference pursuant to Federal Rule of Civil Procedure 10(c) its Motion to Dismiss (contained at Docket 10) and the Memorandum of Law (contained at Docket 11) as its Motion to Dismiss and its Memorandum of Law in Support of Motion to Dismiss the First Amended Complaint.

4. The City added a count for a permanent injunction in the First Amended Complaint. The City asks this Court to enjoin “the UP Defendant from obstructing or interfering with the Plaintiff’s use of the dedicated and platted public at-grade railroad crossing known as the Oliver St. Crossing.” ¶204. This count for a permanent injunction should be dismissed pursuant to Rule 12(b)(6). To obtain a permanent injunction, the City must satisfy four prongs. First, as the moving party, the City must show actual success on the merits, rather than the fair chance of prevailing on the merits as required for a preliminary injunction. *Oglala Sioux Tribe v. C&W Enterprises, Inc.*, 542 F.3d 224, 229 (8th Cir. 2008); *Dataphase Sys. v. C.L. Sys., Inc.*, 640 F.2d 109, 114 (8th Cir. 1981). The remaining three prongs are the same in both preliminary and permanent injunction cases: (1) the threat of irreparable harm to the moving party; (2) the balance of harm with any injury an injunction might inflict on other parties; and (3) the public interest. *Ogala*, 542 F.3d at 224. As set forth in the original Motion to Dismiss and Memorandum of Law in Support, the City cannot show that it will actually succeed on the merits. The Court can thus dispose of the claim for a permanent injunction on those grounds alone.

5. Further, this Court should not ignore the obvious: that there is no existing crossing. Thus, there can be no threat of irreparable harm. “The basis of injunctive relief in the

federal courts has always been irreparable harm and inadequacy of legal remedies." *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 506-07 (1959). Harm is irreparable when it cannot be adequately compensated by money damages or redressed in a court of law. *Kreutzer v. Clark*, 271 Ark. 243, 244, 607 S.W.2d 670, 671 (1980). The Eighth Circuit has explained that the harm must be a presently-existing threat, and not something threatened in the future:

An injunction must be tailored to remedy specific harm shown. *Aviation Consumer Action Project v. Washburn*, 175 U.S. App. D.C. 273, 535 F.2d 101, 108 (D.C.Cir.1976); *Davis v. Romney*, 490 F.2d 1360, 1370 (3d Cir. 1974). In order for an injunction to issue, a right must have been violated. *Heasley v. United States*, 312 F.2d 641, 648 (8th Cir. 1963). The court must determine that a cognizable danger of future violation exists and that danger must be more than a mere possibility. *Connecticut v. Massachusetts*, 282 U.S. 660, 674, 51 S. Ct. 286, 291, 75 L. Ed. 602 (1931); *Dyer v. Securities and Exchange Commission*, 291 F.2d 774, 780-81 (8th Cir. 1961). *See generally* 11 C. Wright & A. Miller, Federal Practice and Procedure § 2942. "The dramatic and drastic power of injunctive force may be unleashed only against conditions generating a presently existing actual threat; it may not be used simply to eliminate a possibility of a remote future injury, or a future invasion of rights, be those rights protected by statute or by the common law." *Holiday Inns of America, Inc. v. B & B Corporation*, 409 F.2d 614, 618 (3d Cir. 1969).

Rogers v. Scurr, 676 F.2d 1211, 1214 (8th Cir. 1981). By the City's own admission, there is no presently existing actual harm. This is because there is no existing crossing which Union Pacific could "obstruct or interfere" with as the City alleges. Thus, a permanent injunction is not a proper remedy.

6. In addition, the City's delay in seeking relief undermines its argument that it will suffer irreparable harm if the injunction is not issued. Delays by a plaintiff in seeking preliminary and permanent injunctive relief may be considered by a court in assessing whether the alleged harm is indeed irreparable. *See, e.g., Hubbard Feeds, Inc. v. Animal Feed Supplement, Inc.*, 182 F.3d 598, 603 (8th Cir. 1999) (district court determined that plaintiff's delay in objecting to the

use by defendant of half-barrel container belied any claim of irreparable injury); *Quince Orchard Valley Citizens v. Hodel*, 872 F.2d 75, 80 (4th Cir. 1989) (plaintiff's delay in seeking injunctive relief may indicate an absence of irreparable harm); *Oakland Tribune, Inc. v. Chronicle Publishing Co., Inc.*, 762 F.2d 1374, 1377 (9th Cir. 1985) (plaintiff's long delay before seeking preliminary injunction implies a lack of urgency); *Town of Riverhead v. CSC Acquisition-NY, Inc.*, 618 F.Supp.2d 256 (E.D.N.Y. 2009) ("plaintiffs' collective delay in seeking to address the alleged injury also undermines their claim of irreparable harm"). The City waited 13 years after Union Pacific removed the crossing before filing this lawsuit. This delay, in and of itself, "belie[s] any claim of irreparable injury." *Hubbard Feeds, Inc. v. Animal Feed Supplement, Inc.*, 182 F.3d 598, 603 (8th Cir. 1999) (district court determined that plaintiff's delay in objecting to the use by defendant of half-barrel container belied any claim of irreparable injury);

7. Finally, an injunction is not in the public's interest. An injunction assumes that the crossing will be re-installed. For the safety reasons briefed in the Original Memorandum of Law in Support of the Motion to Dismiss and in the previously-submitted affidavit of Bill Huston (Exhibit 3 to the Original Motion to Dismiss), the re-installation of a crossing is not in the public's interest.

WHEREFORE, premises considered, Union Pacific Railroad Company respectfully requests that the First Amended Complaint be dismissed, for its attorneys' fees and costs, and for all other relief to which it is entitled.

Respectfully submitted,

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By: /s/ Jamie Huffman Jones
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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 16th day of October, 2014, and said Clerk shall serve an electronic copy of same upon the following counsel of record:

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