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THOMAS F. MCFARLAND

October 10, 2012

By e-filing

Ms. Cynthia T. Brown, Chief
Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, S.W.
Washington, DC 20024

Re: STB Finance Docket No. 35625, *City of Milwaukie (OR) v. Oregon Pacific
Railroad Company*

Dear Ms. Brown:

Hereby transmitted is a Reply In Opposition To Petition For Declaratory Order for filing
with the Board in the above referenced matter.

Very truly yours,



Thomas F. McFarland
Attorney for Replicant

TMcF:kl:1551\efSTB2

cc: Ronald G. Guerra, *by e-mail*
Mr. Richard Samuels, *by fax*

BEFORE THE
SURFACE TRANSPORTATION BOARD

CITY OF MILWAUKIE -- PETITION) FINANCE DOCKET
FOR DECLARATORY ORDER) NO. 35625

**REPLY IN OPPOSITION TO PETITION
FOR DECLARATORY ORDER**

OREGON PACIFIC RAILROAD COMPANY
P.O. Box 22548
Portland, OR 97269

Replicant

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Attorney for Replicant

DUE DATE: October 10, 2012

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SURFACE TRANSPORTATION BOARD

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FOR DECLARATORY ORDER**

Pursuant to 49 C.F.R. § 1104.13(a) and the Board’s procedural decision served September 10, 2012, OREGON PACIFIC RAILROAD COMPANY (OPR) hereby replies in opposition to a Petition for Declaratory Order^{1/} filed by the City of Milwaukie, Oregon (the City) on June 29, 2012.

THE PETITION

The City seeks a declaration that 49 U.S.C. § 10501(b) does not federally preempt the City’s enforcement of municipal ordinances that prohibit OPR from scattering rubbish and from obstructing vehicular and pedestrian traffic by storing rails, crossties, ballast, gravel, and other track materials in a public right-of-way adjacent to McBrod Avenue in Milwaukie, Oregon. The City has twice cited OPR for violation of those ordinances. One such citation resulted in a judgment in favor of the City in the amount of \$48,000, which is under appeal. The other citation has been stayed pending the outcome of the present proceeding.

The City contends that its ordinances are valid exercises of its police powers that are not federally preempted because:

^{1/} The City’s pleading is headed “Complaint for Declaratory Ruling” and is styled as if it were a complaint by the City against OPR.

- (1) they are not directed at, or limited to rail carriers, but instead are of general application; and
- (2) they are directed at use of property in a public right-of-way, not at OPR's use of its own property; and
- (3) their enforcement will not adversely affect rail transportation.

REPLY

Contrary to the City's position, OPR has a lawful right to use land adjacent to McBrod Avenue for railroad purposes. The ordinances effectively preclude that use. Inability to use that land for rail purposes adversely affects OPR's ability to provide efficient and economical rail service. Accordingly, enforcement of those ordinances is federally preempted under 49 U.S.C. § 10501(b).

The facts alleged in this Reply are verified by Mr. Richard Samuels, President of OPR, whose verification is attached to this Reply as Appendix 1.

I. OPR IS A SMALL FAMILY-OWNED CLASS III RAIL CARRIER OF LIMITED FINANCIAL MEANS

In 1991, East Portland Traction Company (EPTC), a Class III rail carrier incorporated by Mr. Richard Samuels, acquired a 5-mile segment of rail line at and near Milwaukie, OR from Portland Traction Company (PTC). The latter company was jointly owned by Southern Pacific Transportation Company and Union Pacific Railroad Company.

No equipment or real estate was included in that acquisition, which encompassed only the track structure and railroad easements. EPTC began operations with locomotives owned individually by Mr. Samuels.

At startup, rail traffic consisted of only a few cars per week. However, after intense marketing efforts, traffic grew to over 150 cars per month. That seriously taxed the track structure, which had been neglected by PTC. Derailments were common.

While originally intended to be a one or two person operation, the EPTC work force grew to seven persons. All surplus operating funds, plus a loan from the Oregon Economic Development Department, were used to rehabilitate the rail line by relaying 56-pound and 70-pound rail with 90-pound and 100-pound rail; by replacing every other crosstie; and by ballasting, surfacing and lining all trackage. As a result, most of the trackage is capable of accommodating loaded railcars weighing up to 286,000 pounds. However, traffic is quite limited. Only two shippers currently use the rail line, both of whom ship perishable commodities in refrigerated railcars.

In 1997, EPTC and another rail carrier owned by Mr. Samuels were consolidated to form OPR.

II. OPR IS REQUIRED TO USE LAND ADJACENT TO McBROD AVENUE FOR STORAGE OF TRACK MATERIALS

OPR's right-of-way easement is between 17 and 20 feet wide, which is barely wide enough to accommodate a train. As a result, there is no place within OPR's rail line to stockpile replacement crossties, rail, ballast, and other track materials that are essential for track maintenance purposes.

OPR's track maintenance facility is located adjacent to McBrod Avenue in Milwaukie, OR. That facility is used for mandated FRA inspections that require a pit, and for ordinary track maintenance purposes. OPR's forklift and hi-rail vehicle are located at that maintenance facility.

It is essential that OPR's replacement track materials be stored adjacent to its track maintenance facility where such materials are accessible by forklift. However, inasmuch as there is no OPR owned or controlled land adjacent to the OPR maintenance facility, it is essential that OPR store its track materials on public right-of-way land adjacent to McBrod Avenue.

OPR's track materials are stored in the easterly 10 feet of the 60-foot width of McBrod Avenue at that location. Those track materials are neatly stacked well away from the travel lanes of McBrod Avenue. The track materials are protected by reflective barriers to warn vehicular traffic and pedestrians of their presence. The materials are carefully positioned so as not to interfere with adjacent businesses accessing their driveways with delivery trucks. Ballast and gravel are stored within concrete enclosures well back from travel lanes.

III. OPR HAS A LAWFUL RIGHT TO USE LAND ADJACENT TO McBROD AVENUE FOR RAILROAD PURPOSES

By means of appropriation under Oregon law, OPR has a lawful right to use land adjacent to McBrod Avenue for railroad purposes, including for storage of replacement track materials.

It is provided in Oregon Revised Statutes (ORS) § 772.105(2) as follows:

Whenever a private corporation is authorized to appropriate any public highway or grounds as mentioned in subsection (1) of this section, within the limits of any town, whether incorporated or not, such corporation shall locate their road upon such particular road, street, alley, or public grounds, within such town as the local authorities designate. If the local authorities fail to make such designation within a reasonable time when requested, the corporation may make such appropriation without reference thereto.

Subsection (1) referred to in the above provision (ORS § 772.105[1]) provides for railway appropriation power "in the location of any railway" in regard to property not located within the corporate limits of a town.

The appropriation power given to rail carriers in the foregoing statutes is a power distinct from condemnation power under eminent domain statutes. The terms “appropriate property of another to oneself or to a third person” and “appropriate” are defined in ORS § 164.005(1)(a) as follows:

‘Appropriate property of another to oneself or to a third person’ or ‘appropriate’ means to: (a) exercise control over property of another, or to aid a third person to exercise control over property of another, permanently or for so extended a period or under such circumstances as to acquire the major portion of the economic value or benefit of such property.

Thus, in conjunction with locating a railway within an incorporated town, a rail carrier has the power to exercise control over the property of another permanently. It is clear that “location of a railway” within the meaning of that term in the statute cited above includes locating property on which essential replacement track materials can be stored awaiting their use for track maintenance.

OPR exercised that power of appropriation as to the land adjacent to McBrod Avenue that is being used for storage of OPR’s track materials. Attached to this Reply as Appendix 2 is a copy of a Notice of Appropriation of Public Lands for Railroad Purposes issued by Richard A. Samuels, President of OPR, on April 7, 2010. That Notice correctly referred to ORS § 772.105 in appropriating City property, including the land on which OPR’s track materials are stored.

As shown in Appendix 2, such appropriation was for a period of 99 years and for storage of railroad-owned vehicles and/or equipment, maintenance supplies or other materials as necessary for continued maintenance and operation of common-carrier rail facilities.

Based on the foregoing, it is evident that OPR has a lawful right to use land adjacent to McBrod Avenue for railroad purposes, including storage of replacement track materials.

**IV. ENFORCEMENT OF THE CITY'S ORDINANCES AGAINST OPR IS
FEDERALLY PREEMPTED**

It is provided in 49 U.S.C. § 10501(b) that the jurisdiction of the STB over transportation by rail carrier is exclusive, and that the remedies provided under federal law with respect to regulation of rail transportation preempt remedies on that subject under State or municipal law.

The term "transportation" is defined broadly in 49 U.S.C. § 10102(9)(B) to include "storage" related to the movement of property by rail.

It is evident that the City's ordinances constitute regulation of rail transportation that is federally preempted by virtue of 49 U.S.C. § 10501(b). Those ordinances penalize OPR substantially for storage of replacement track materials on land that OPR is authorized to use for storage purposes. The ordinances would effectively preclude OPR from using the land under consideration for storage of track materials. OPR would be unable financially to pay the substantial fines and penalties imposed by the ordinances in the event of OPR's continuing use of the land. OPR's only alternative would be to vacate that land. The inability to store track materials adjacent to its track maintenance facility would have a serious adverse operational effect on OPR.

Where, as here, provisions of municipal law would constitute regulation of rail transportation, enforcement of such municipal provisions as to such transportation is federally preempted. *See, e.g., Green Mountain R.R. v. Vermont*, 404 F.3d 638 (2d Cir. 2005).

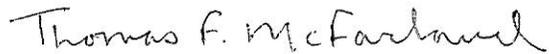
CONCLUSION AND REQUESTED RELIEF

WHEREFORE, for the reasons stated, the Board should decline to issue the declaration sought by the City, but instead should declare that the City's ordinances are federally preempted as attempted to be enforced against OPR.

Respectfully submitted,

OREGON PACIFIC RAILROAD COMPANY
P.O. Box 22548
Portland, OR 97269

Replicant



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Attorney for Replicant

DUE DATE: October 10, 2012

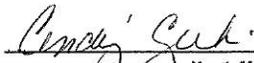
VERIFICATION

STATE OF OREGON)
) SS:
COUNTY OF CLACKAMAS)

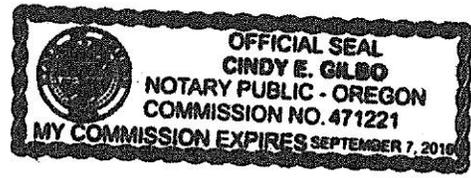
RICHARD SAMUELS, being duly sworn on oath, deposes and states that he has read the foregoing statement, that he knows the contents thereof, and that the facts therein stated are true and correct.


RICHARD SAMUELS

SUBSCRIBED AND SWORN to
before me this 25 day
of September, 2012.


Notary Public

My Commission Expires: 9-7-16



OREGON PACIFIC RAILROAD COMPANY

NOTICE OF APPROPRIATION OF PUBLIC LANDS FOR RAILROAD PURPOSES

As Authorized by Oregon Revised Statutes 772.105 (1) (2)

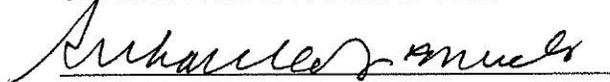
NOTICE IS HEREBY GIVEN, pursuant to ORS 772.105, the Oregon Pacific Railroad Company, a Class III railroad common carrier incorporated in the State of Oregon (" **railroad** " as defined in ORS 824.020 (2) (a) and ORS 824.022 (a) through (d)) hereby **APPROPRIATES for RAILROAD PURPOSES** the following land all of which is within the city of Milwaukie, County of Clackamas, Oregon:

1. A strip of land twenty feet in width comprising the southerly portion of the Ochoco Street right of way beginning at its intersection with S. E. 17th Avenue and continuing 915 feet easterly, more or less, all of which is within the public right of way of Ochoco Street.
2. A strip of land twenty feet in width comprising the westerly portion of the McBrod Avenue right of way beginning 163 feet east of its intersection with S.E. 17th Avenue and continuing 2,463 feet, more or less, northerly to the southern boundary of the Oregon Pacific Railroad right of way easement at its intersection with McBrod Avenue, all of which is within the public right of way of McBrod Avenue.
3. Additional land within the easterly portion of the McBrod Avenue right of way as may be deemed necessary for future railroad purposes, all within the McBrod Avenue right of way.

Said land is appropriated for a period of ninety-nine (99) years from date signed and such use as railroad deems appropriate including, but not limited to, the construction of siding or auxiliary tracks, storage of railroad-owned vehicles and / or equipment, maintenance supplies or other materials as necessary for continued maintenance and operation of common-carrier rail facilities.

Dated this 7th day of April, 2010.

OREGON PACIFIC RAILROAD COMPANY


Richard A. Samuels, President

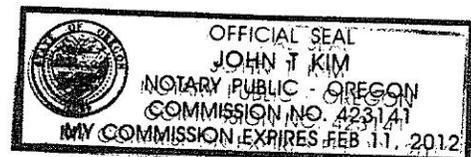
State of Oregon

County of Clackamas

This instrument was acknowledged before me on APRIL 7th 2010 by RICHARD A SAMUELS as President of the Oregon Pacific Railroad company.


Notary Public; State of Oregon

My commission expires 2-11-2012



CERTIFICATE OF SERVICE

I hereby certify that on October 10, 2012, I served the foregoing document, Reply In Opposition To Petition For Declaratory Order, on Ronald G. Guerra, Jordan Ramis PC, Two Centerpointe Drive, 6th floor, Lake Oswego, OR 97035, by e-mail to *ron.guerra@jordanramis.com*.

Thomas F. McFarland

Thomas F. McFarland