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October 24, 2012

Cynthia T. Brown
Chief of Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, S.W.
Washington, DC 20423-0001

ENTERED
Office of Proceedings
October 25, 2012
Part of
Public Record

Re: *City of Milwaukie v. Oregon Pacific Railroad Company*
Docket No. FD35625
Rebuttal Statement of the City of Milwaukie
Our File No. 49979-70698

RONALD G. GUERRA

Dear Ms. Brown:

Admitted In:
Oregon

On behalf of the City of Milwaukie ("City") we electronically transmit the City of Milwaukie's *Rebuttal Statement* and *Declaration of Timothy Salyers* in the matter listed above.

Sincerely,

JORDAN RAMIS PC

Ronald G. Guerra

Direct Dial
(503) 598-5540

Enclosures

E-mail
ron.guerra@jordanramis.com

cc: City of Milwaukie (via e-mail)
Thomas F. McFarland (via E-mail and US Mail)

BEFORE THE
SURFACE TRANSPORTATION BOARD

CITY OF MILWAUKIE v. OREGON PACIFIC RAILROAD COMPANY

Docket No. FD35625 (Petition for Declaratory Order)

CITY OF MILWAUKIE'S REBUTTAL STATEMENT

Submitted by:
Ronald G. Guerra
JORDAN RAMIS PC
Two Centerpointe Dr., 6th Fl.
Lake Oswego, OR 97035

Attorney for City of Milwaukie

Due Date: October 25, 2012

BEFORE THE	
SURFACE TRANSPORTATION BOARD	
CITY OF MILWAUKIE (Oregon),	Docket No. FD35625
Complainant,	
v.	
OREGON PACIFIC RAILROAD COMPANY,	
Defendant.	

CITY OF MILWAUKIE’S REBUTTAL STATEMENT

The City of Milwaukie (“City”) seeks a declaratory ruling that 49 U.S.C. § 10501(b) does not preempt enforcement of local municipal ordinances of the Milwaukie Municipal Code (“MMC”) 10.44.030 and MMC 8.04.120 to order Oregon Pacific Railroad Company (“OPRC”) to remove rails, railroad ties, gravel, and other items it has placed upon a city street, and to fine OPRC for not removing these items. The City’s enforcement of its local ordinances will not interfere with interstate rail operations.

The City rebuts OPRC’s Reply as follows. First, OPRC has incorrectly decided that it has appropriated public land under Oregon Revised Statutes (“ORS”) § 772.105. Instead of having a right to use the public land, OPRC is trespassing and violating local ordinances by its use of public property for long-term storage. Second, long-term storage is not the type of storage that can be considered “transportation” under 49 U.S.C. § 10102(9)(B). Therefore, federal law does not preempt the City’s enforcement of its ordinances against OPRC.

REBUTTAL FACTS

A. OPRC’s “Notice of Appropriation” was rejected by the City.

In early 2010, the City exchanged several letters with OPRC and its principal, Richard Samuels. *See* Declaration of Timothy Salyers, October 23, 2012 (“Salyers II Dec.”),

Exhibit J, filed in tandem with this brief. On March 16, 2010, OPRC sent the City a “Notice of Appropriation of Public Land for Railroad Purposes” (“Notice”), pursuant to ORS § 772.105. *See* Appendix 2, attached to OPRC’s Reply. On March 22, 2010, the City sent a letter to OPRC rejecting its request to appropriate the public right of way and noting that ORS 772.105 allows appropriation for the construction of a road, not for storage. This letter was sent to OPRC via certified and regular mail. The certified mail copy was refused. *See* Salyers II Dec., Ex. K. In this rejection letter, the City again requested OPRC’s compliance in removing the items stored in the public right of way in violation of the Milwaukie Municipal Code. OPRC did not comply with the City’s requests to remove the items. *Id.*

B. OPRC misdescribes the items it has left on the City’s property.

Contrary to OPRC’s assertions on page 5 of its Reply, the materials stored on the City’s property are not protected by reflective barriers, as can be seen in the Rice Declaration and Exhibit A, submitted with the City’s complaint. Also, again contrary to OPRC’s assertions on page 5, the materials are on both sides of the road, not solely the east side. Rice Declaration; Declaration of Timothy Salyers, June 20, 2012 (Salyers I Dec.), Ex. A. The gravel is not stored in concrete enclosures, but is loose in many places and travels onto the surface that cars and bicycles use, making OPRC’s use a potential hazard, as well as inconvenient. Complaint p. 4, Rice Dec. ¶¶ 9-10.

OPRC does not offer any facts supporting its bare assertions that it needs the additional space. In fact, OPRC appears to have ample storage space in the .78 acres of property it owns. *See* Salyers II Dec., Exs. L-N. The aerial photos in Exhibits L through N further demonstrate that OPRC has increased its use of the City’s property over the past 3 years, while appearing to decrease its use of its own property. *Id.*

LEGAL ANALYSIS

This is not a situation in which the City seeks to enforce its ordinances based on the railroad's use of the railroad's property. *See e.g., Boston & Maine Corp. v. Town of Ayer*, 330 F.3d 12, 13 (1st Cir. 2003). Instead, the City seeks to enforce its ordinances on the City's own public property. State law governs whether OPRC has a right to use this property. As shown below, OPRC does not have a right to use this property under state law.

In addition, the City's enforcement of municipal ordinances designed for the welfare and safety of its citizens is not related to the "rates, classifications, rules (including car service, interchange, and other operating rules), practices, routes, services, and facilities of such carriers[.]" and the effect of enforcement against OPRC on federal law is merely peripheral. Therefore, such enforcement is not preempted under 49 U.S.C. § 10501(b).

A. OPRC has not and cannot appropriate public property under ORS 772.105.¹

ORS 772.105 does not give a railroad carte blanche to appropriate any land for any purpose, but limits the appropriation in multiple ways. *Oregon R. Co. v. City of Portland*, 9 Or. 231, 236-37 (1881) (interpreting prior version of statute similar to ORS 772.105).

Further, nothing allows appropriation to occur simply by giving notice, and the City rejected

¹ The City notes that the abstention doctrine and jurisdictional limits may apply to limit the STB's ability to make a final determination regarding the interpretation or application of Oregon law. While recognizing this issue, the City responds herein to the Oregon law issue OPRC raised. The City continues to seek the Board's ruling as to the issues raised under federal law, and, to the extent determination of the Oregon law issue is a pre-requisite to determining federal law issues, would appreciate the Board's guidance on the state and federal law overlap, so that it may proceed to prosecute its citations in municipal court in the most efficient manner possible. The City notes that neither the constitutionality of ORS 772.105 nor the validity of ORS 772.105 under federal railway laws and regulations are at issue herein. Thus, the state law issue is purely a matter of the interpretation or application of ORS 772.105, without raising any issues of federal preemption. *See*, 49 U.S.C. § 10501 (STB jurisdictional limits); 5 U.S.C. § 706(2)(C) (judicial review of agency decisions may set aside agency conclusions in excess of statutory jurisdiction); 28 U.S.C. § 1367 (supplemental jurisdiction of the federal courts over state law claims), *Privitera v. California Bd. of Med. Quality Assur.*, 926 F.2d 890, 896 (9th Cir. 1991) (discussing abstention doctrines).

OPRC's Notice of Appropriation, but allowed OPRC to submit additional information to support its application for appropriation. OPRC never responded and did not submit any additional information for its application.²

ORS 772.105 states:

“(1) When it is necessary or convenient in the location of any railway to appropriate any part of any public road, street, alley or public grounds not within the corporate limits of a municipal corporation, the county court of the county wherein such road, street, alley or public grounds is located, may agree with the corporation constructing the **road**, upon the extent, terms and conditions upon which the same may be appropriated or used, and occupied by such corporation. If the parties are unable to agree, the corporation may appropriate so much thereof as is necessary and convenient in the location and construction of the road.

(2) 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.” (emphases added).

The power to appropriate public property already devoted to a public use must be given in express terms or by necessary implication, and such a statutory grant will be strictly interpreted. *Oregon R. Co.*, 9 Or. at 236-37 (prior version of statute does not appear to have limited the railroad's use to use for a road). Even when the prior version of the statute allowed appropriation for uses other than a road, the Oregon Supreme Court noted that “[n]o

² Note that OPRC utilizes the wrong definition for “appropriate,” citing to criminal law from Chapter 164 of the Oregon Revised Statutes (Offenses Against Property). This definition is used in assessing when theft or related offenses have occurred. Under real property law, appropriation of property is usually related to the need to obtain land for the public good or for access and the allowance for appropriation is set forth and clearly established by law, as in ORS 772.105. *See e.g.*, ORS § 35.605 (authorization and limitations on eminent domain power to build and enlarge roads).

permanent obstructions, such as depots, etc., which must necessarily obstruct or extinguish the original public use, can be tolerated without an agreement with the local authorities, as provided by the statute.” *Id.* at 241 (emphasis added). In *Oregon R. Co.*, the Oregon Supreme Court held that a railroad could not appropriate a public levee to its use without an agreement with the local authorities. It noted that the railroad company must provide for itself sufficient grounds for its depot purposes and could not use the streets for that purpose, explaining that the public could continue to share the road with the railroad, unless the local authorities decided otherwise. *Id.* at 241.

1. Appropriation for storage purposes is not allowed under ORS. 772.105.

Here, ORS 772.105 allows appropriation for the construction of a road, not for storage. This means a railroad may be able to appropriate public roads when the railroad is constructing another road.

A “road” does not include “storage.” *See Oregon R. Co.*, 9 Or. at 241 (statutory grant only allows use of public property for a “mere right of way” and use inconsistent with this grant is not allowed). “Road” is not defined in Chapter 772. Elsewhere in the Oregon Revised Statutes, a road is defined as:

- “a public or private way that is created to provide ingress or egress,” ORS 92.010(14) (Chapter 92, Subdivisions and Partitions);
- a road or highway includes bridges, culverts, and city streets, ORS 366.010(2).

A road is “a public way outside of an urban district.” *Webster’s Third New International Dictionary* 1963 (Merriam-Webster 1993). Webster’s lists other meanings of the term, all similar to this, and none connoting that “road” means “storage.” By contrast, in

fact, Webster's defines that term as "a space for storing," and no meaning Webster ascribes to that term connotes a sense of roadway or even travel. *Id.* at p. 2252. Appropriation of public property for use as storage is not allowed under ORS 772.105.

ORS 772.105 allows a limited appropriation for roads (in other words, "railway lines"). This accords with earlier versions of the statute that allowed the railroad to share the public right of way for its rail lines because having the rail lines operated in the public's interest. *Oregon R. Co.*, 9 Or. at 236, 242-243.

ORS 772.105's limited appropriation is also in concert with the general property law premise that a person who needs access to his or her property has the right to such access. *See Nice v. Priday*, 149 Or. App. 667, 673, 945 P.2d 559, 563 (1997) review denied, 327 Or. 82, 961 P.2d 216 (1998) (discussing prescriptive easements). Even this premise, however, usually must be supported by a legislative grant, allowing an individual to obtain access. *See* ORS 376.150 (describing "way of necessity" as a route allowed by statute to provide motor vehicle access to land that otherwise would not have vehicle access); 16 U.S.C. § 3210 (allowing access to private lands landlocked by publicly owned land); *Cabinet Res. Group v. U.S. Forest Serv.*, CV 00-225-M-DWM, 2004 WL 966086 (D. Mont. Mar. 30, 2004) (discussing private landowners right to access subject to regulation by Forest Service).³

Because OPRC is not seeking to appropriate public property for a road, it cannot use ORS 772.105 to appropriate public property. Because OPRC's use obstructs the original

³ OPRC is not seeking to appropriate land to build or construct rail lines, therefore, 49 U.S.C. Chapter 109, which would apply to regulate the construction of rail lines, does not apply. Even if OPRC were seeking to construct an extension of its rail lines, 49 U.S.C. § 10910 allows the state to require a rail carrier to comply with local public safety standards "that are not unreasonably burdensome to interstate commerce and do not discriminate against rail carriers." The ordinances here do not burden interstate commerce or discriminate against rail carriers – no one is allowed to appropriate public property for private storage purposes.

public use, even if the statute were read broadly, OPRC cannot use ORS 772.105 to appropriate public property without an agreement or designation by the local authorities.

2. OPRC has not effected an appropriation of public property by giving notice.

Because OPRC seeks to appropriate public property within a town, it must use the property designated by the town. ORS 772.105(2). Here, OPRC sent a “Notice of Appropriation” to the City on March 16, 2010. In its March 22, 2010 letter rejecting OPRC’s Notice, the City asked OPRC to provide justification or authority for the proposed appropriation. Ex. K. OPRC did not respond and never provided any justification or authority for its appropriation. Despite the correspondence exchanged before OPRC gave notice (*see* Ex. J), after it gave notice and received the City’s rejection and request for additional information, OPRC stopped communicating with the City. The statute states that OPRC “shall” use the land the City designates, which, in turn, requires that the parties communicate about the appropriation. OPRC cannot appropriate property unless the City fails to designate property for a road within a reasonable time. OPRC did nothing further after sending its “Notice.” It did not follow the statutory requirements that it use the land the City designates. It did not communicate with the City further about its need for such property in order to allow the City reasonable time to allocate property for OPRC’s road.

Additionally, failure of local authorities to designate grounds for the railroad’s use does not allow the railroad to appropriate any public property for any railroad purpose. *Oregon R. Co.*, 9 Or. at 242-43 (results of approach in which the public must yield to the railroad, regardless of whether railroad’s use would be detrimental to “public convenience, comfort or prosperity,” would be illogical).

This is not a situation in which the local authorities failed to make a designation for use of public property by a railroad for the construction of a road or unreasonably rejected the railroad's application. Instead, the facts show that OPRC did not qualify for an appropriation under ORS 772.105(2) because it was not constructing a road and it never provided any justification to the City that would allow the City to designate the appropriate public property for use as a road.

3. OPRC has ample space on its property for storage or can obtain and pay for storage.

Appropriation for use as storage is not convenient or necessary. OPRC does not offer any facts supporting its bare assertions that it needs the additional space, such as an assessment of the current use of its space or reasons for its inability to re-order its space to store additional items on its .78 acre facility. In fact, OPRC appears to have ample storage space in the property it owns. *See Salyers II Dec., Ex. L.* Further, OPRC appears to have previously used more of its own property for such storage. *See Ex. N (2009 view).* Now it appears to use its own property less. *See Ex. L (2011 view).* Further, the items currently left on City property could be placed in long-term storage with an entity that provides storage services or leases storage space.⁴

4. OPRC has created what may be hazardous conditions in McBrod Avenue

As the City noted in its complaint, the railroad's conduct may create hazards for those using the road. Complaint p. 4, Rice Dec. ¶¶ 9-10. Contrary to OPRC's assertions on page 5

⁴ All entities must pay when they take the land of another without a legal basis for the taking. If a public body sought to use another's land for storage purposes, it would have to compensate the individual who owned the land. If OPRC sought to condemn land for railway purposes, it would have to compensate the owner. ORS 772.055 (compensation required); ORS 772.020 (railway condemnation allowed for *necessary* sidetracks, spurs, etc.).

of its Reply, the materials stored on the City's property are not protected by reflective barriers, as can be seen in the Rice Declaration and Exhibit A, submitted with the City's complaint. Additionally, the materials are on both sides of the road, not solely the east side, as claimed in OPRC's Reply, page 5. Rice Declaration; Salyers I Dec., Ex. A. The gravel is not stored in concrete enclosures, but is loose in many places and travels onto the surface that cars and bicycles use, making OPRC's use a potential hazard, as well as inconvenient. Complaint p. 4, Rice Dec. ¶¶ 9-10. Nothing in state or federal law requires the City to accept this state of affairs.

B. 49 U.S.C. § 10501(b) does not permit OPRC to store items on the City's public property.

Enforcement of the ordinances in question are not related to "rates, classifications, rules (including car service, interchange, and other operating rules), practices, routes, services, and facilities of such carriers" since OPRC doesn't own the property on which the offending materials and equipment rest.

This is not a situation in which the City seeks to enforce its ordinances based on the railroad's use of the railroad's property. *See e.g., Boston & Maine Corp. v. Town of Ayer*, 330 F.3d 12, 16-17 (1st Cir. 2003) (railroad sought to use its own land for storage; town objected based on concerns for town's water source). Instead, the City seeks to enforce its ordinances on its *own public property*.

In addition, the enforcement of the ordinances does not affect OPRC's "services" because OPRC's long-term storage on the City's public property is not the type of "storage"

identified under 49 U.S.C. § 10102(9)(B).⁵ Under 49 U.S.C. § 10102(9)(B), the term “storage” is storage related to services for goods shipped by rail. *Cleveland, C., C. & St. L. Ry. Co. v. Dettlebach*, 239 U.S. 588, 36 S. Ct. 177, 60 L. Ed. 453 (1916). Within the statutory definition, “storage” is related to the movement of passengers or property by rail. 49 U.S.C. § 10102(9)(A)-(B). It is not related to the general storage of a railroad’s property. Instead, the storage must relate to “transported property.” *Cleveland*, 239 U.S. at 594 (discussing rate regulation of storage of goods after transport).

Further, “storage” only encompasses “temporary” storage. *New England Transrail*, *1. In *New England Transrail*, the Board noted that transportation under 49 U.S.C. 10102(9) “is not limited to the movement of a commodity while it is in a rail car, but includes such *integrally related* activities as loading and unloading material from rail cars and temporary storage.” *Id.* (emphasis added). “[M]anufacturing activities and other facilities owned by railroads which are not integrally related to the railroad’s provision of interstate rail service, i.e., non-transportation facilities, are not subject to STB jurisdiction or subject to federal preemption.” *Flynn v. Burlington Northern Santa Fe Corp.*, 98 F.Supp.2d 1186, 1189 (E.D. Wash. 2000) (citing *Borough of Riverdale—Petition for Declaratory Order—The New York Susquehanna & Western Railway Corp.*, 1999 WL 715272, STB Finance Docket No. 33466 at 10 (9/9/99)). These facilities are subject to local regulation. *Id.*

⁵ 49 U.S.C. § 10102(9)(B) defines transportation as including “services related to that movement [of passengers or property by rail], including receipt, delivery, elevation, transfer in transit, refrigeration, icing, ventilation, storage, handling, and interchange of passengers and property[.]” See also *New England Transrail, LLC, d/b/a Wilmington & Woburn Terminal Ry.--Constr., Acquisition & Operation Exemption--in Wilmington & Woburn, Ma*, Fed. Carr. Cas. (CCH) ¶ 37241, *1 (S.T.B. June 29, 2007).

Here, OPRC is storing rails, railroad ties, gravel, and other items over the long-term. The storage of these items is not related to the movement of them as a commodity over the railway. Even if OPRC could characterize its use as an attempt to create a facility for storing goods, this facility would be a non-transportation facility and not subject to federal preemption. The long-term “storage” at issue here is not related to “transportation” as defined under 49 U.S.C. § 10102(9)(B).

C. 49 U.S.C. § 10501 does not provide any other basis or allowance for OPRC’s use and appropriation of City property.

The City seeks to enforce ordinances that do not interfere with interstate rail operations.⁶ The City’s ordinance enforcement is similar to that in *State ex rel. Oklahoma Corp. Comm’n v. Burlington N. & Santa Fe Ry. Co.*, 2001 OK CIV APP 55, 24 P.3d 368, 369 (2000). In *State v. BNSF*, the court held that the state’s corporation commission could require the railroad to build or repair a fence along its right-of-way adjacent to the property of a non-railroad neighbor. The court found that this fencing requirement did not impede or conflict with the “uniform economic regulation” of the rail industry and did not have any impact on BNSF’s “interstate rail operations.” The regulation was not directed to regulation of railroads, but was directed to ensure public safety.

The STB has noted that federal law does not preempt local authorities from exercising their local police power in prohibiting railroads “from dumping excavated earth into local waterways[;]” in seeking damages or imposing fines “if harmful substances were discharged

⁶ Even assuming OPRC has a right to appropriate the public property under state law, federal law still would not preempt municipal regulation for health and safety concerns, much the same way federal law allows a city to prohibit dumping earth into waterways or bear the cost of waste disposal.

during a railroad construction or upgrading project[;]” or in requiring the railroad “to bear the cost of disposing of the waste from the construction in a way that did not harm the health or well being of the local community.” *Cities of Auburn and Kent, WA—Petition for Declaratory Order—Burlington Northern Railroad Company—Stampede Pass Line*, STB Finance Docket No. 33200 (July 2, 1997) (*Cities of Auburn and Kent*).

Similarly, the City’s enforcement of code violations, by fining OPRC for putting and leaving its property in the public right of way and by requiring OPRC to remove its property from City public property, is not preempted.

OPRC has not met its burden to show federal preemption of the City’s enforcement of its ordinances. OPRC has not and cannot appropriate the City’s public property for storage under Oregon law. Long-term storage unrelated to the shipping of commodities is not “transportation” related to railways under federal law. Therefore, the storage here, of miscellaneous items OPRC leaves on the City’s roadside, and which may endanger the public traveling on the City road, is not the type of storage governed by federal law. Instead, the effect of enforcement of the ordinances is merely peripheral to federal railway laws. If OPRC needs a larger space, it has the same right as all other businesses and railways to purchase such property or find other available property. It cannot simply appropriate another’s property for its own purposes.

CONCLUSION

For the foregoing reasons and those stated in the City’s complaint, federal regulation does not preempt the City’s enforcement of its ordinances on the City’s public property. The City respectfully requests that the Board grant the declaratory relief it requests and order that federal

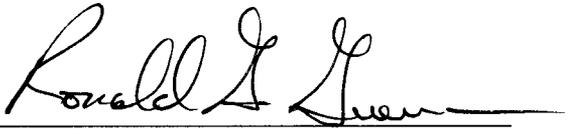
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law does not preempt enforcement of the ordinances it seeks to enforce against OPRC.

Dated this 24 day of October, 2012.

JORDAN RAMIS PC
Attorneys for Complainant City of
Milwaukie

By: 

Ronald G. Guerra, OSB # 943272
ron.guerra@jordanramis.com

CERTIFICATE OF SERVICE

I hereby certify that on the date shown below, I served a true and correct copy of the foregoing CITY OF MILWAUKIE'S REBUTTAL STATEMENT on:

Thomas F. McFarland
208 S LaSalle St Ste 1890
Chicago IL 60604-1112
Facsimile: (312) 201-9695

- by first class mail, postage prepaid.
- by hand delivery.
- by facsimile transmission.
- by facsimile transmission and first class mail, postage prepaid.
- by electronic transmission to *mcfarland@aol.com* and first class mail, postage prepaid.

DATED: October 24, 2012.



Ronald G. Guerra, OSB # 943272
Attorney for Complainant City of
Milwaukie

BEFORE THE
SURFACE TRANSPORTATION BOARD

CITY OF MILWAUKIE v. OREGON PACIFIC RAILROAD COMPANY

Docket No. FD35625 (Petition for Declaratory Order)

DECLARATION OF TIMOTHY SALYERS

(Filing contains color images)

Submitted by:
Ronald G. Guerra
JORDAN RAMIS PC
Two Centerpointe Dr., 6th Fl.
Lake Oswego, OR 97035

Attorney for City of Milwaukie

Due Date: October 25, 2012

BEFORE THE
SURFACE TRANSPORTATION BOARD

CITY OF MILWAUKIE,

Complainant,

v.

OREGON PACIFIC RAILROAD COMPANY,

Defendant.

Docket No. FD35625

DECLARATION OF TIMOTHY SALYERS

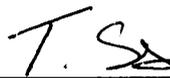
I, Timothy Salyers, hereby declare:

1. I make this declaration based upon my personal knowledge, and I am competent to testify to the matters stated in this declaration. I make this declaration in support of Complainant the City of Milwaukie's *Rebuttal Statement*. I am the Code Compliance Coordinator for the City of Milwaukie.
2. In early 2010, the City exchanged several letters with Oregon Pacific Railroad Company ("OPRC") and its principal, Richard Samuels, regarding the items and debris left on the side of the City's road. Those letters are attached hereto as Exhibit J.
3. On March 22, 2010, the City sent a letter to OPRC rejecting its request to appropriate the public right of way and noting that ORS 772.105 allows appropriation for the construction of a road, not for storage. This letter was sent to OPRC via certified and regular mail. The certified mail copy was refused. A true copy of the March 22, 2010 letter and the returned envelope rejecting the certified mail for the letter are attached hereto as Exhibit K. In this letter, the City also requested OPRC's compliance in removing the items stored in the public right of way in violation of the Milwaukie Municipal Code. OPRC did not comply with the City's requests to remove the items.

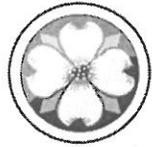
3. Attached hereto as Exhibits L through N are true and correct copies of aerial photos available on www.portlandmaps.com, a web-based service of the City of Portland, Oregon. The photos reflect overhead views of OPRC's .78-acre (approximate) facility. According to the website, the photo embodied in Exhibit L was dated 2011. Similarly, the photos embodied in Exhibits M through N were dated 2010 and 2009, respectively. The data is available from:

http://www.portlandmaps.com/detail.cfm?action=Photo&propertyid=C234582&state_id=11E26AA00405&address_id=745742&intersection_id=&dynamic_point=0&x=7652234.747&y=660353.607&place=9001%20SE%20MCBROD%20AVE&city=MILWAUKIE&neighborhood=&seg_id=300715

I, Timothy Salyers, DECLARE UNDER PENALTY OF PERJURY THAT THE FOREGOING IS TRUE AND CORRECT. FURTHER, I CERTIFY THAT I AM QUALIFIED AND AUTHORIZED TO FILE THIS DECLARATION ON OCTOBER 23, 2012.

By: 

Timothy Salyers
Code Compliance Coordinator,
City of Milwaukie



MILWAUKIE

Dogwood City of the West

February 11, 2010

Richard Samuels
PO Box 22548
Milwaukie, OR 97269

SUBJECT: Ordinance Violations – 8.04.120 & 10.44.030

SITE ADDRESS: 9001 SE McBrod Ave, Milwaukie OR 97222

Mr. Samuels:

It has come to our attention that there is a violation occurring on the property you own at the above site address. Specifically, the debris and/or supplies on or abutting SE McBrod Ave are in violation of our Municipal code.

It is the City's policy to provide you with the opportunity to correct these problems before we pursue formal enforcement actions. Please carefully note the following information regarding this matter:

Section 8.04.120 Scattering rubbish and composting.

A. No person may throw, dump or deposit upon public or private property any injurious or offensive substance or any kind of rubbish, trash, debris or refuse which would mar the appearance, create a stench or detract from the cleanliness or safety of such property, or would be likely to injure an animal, vehicle or person traveling upon a public way.

Section 10.44.030 Obstruction of Traffic

Except as provided by this title or any other ordinance of the City, no person shall place, park, deposit, or leave upon any street or other public way, sidewalk, or curb any article or thing or material which in any way prevents, interrupts, or obstructs the free passage of pedestrian or vehicular traffic, or obstructs a driver's view of traffic or official traffic signs and signals. No person shall blockade or cause to be blockaded in any manner any street, sidewalk, or public way, except that a special permit may be obtained from the City Manager or designated appointee when the blockage is determined to be temporary, for a lawful purpose, and will not lead to a breach of peace.

To prevent further enforcement action please complete the following no later than
February 21, 2010:

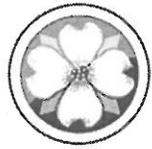
- Remove all items from the right-of-way.

Thank you for your cooperation. We appreciate your help in keeping Milwaukie clean and livable. This property will be reevaluated for your voluntary compliance by the above-mentioned date. Please contact me if you have any questions or if I can offer you any assistance regarding this matter.

Sincerely,

Tim Salyers
Code Enforcement Officer
503-786-7409
salyerst@ci.milwaukie.or.us

cc: File



MILWAUKIE

Dogwood City of the West

February 22, 2010

Richard Samuels
PO Box 22548
Milwaukie, OR 97269

SUBJECT: Ordinance Violations – 8.04.120 & 10.44.030
SITE ADDRESS: 9001 SE McBrod Ave, Milwaukie OR 97222

Mr. Samuels:

On February 11, 2010, a letter was sent to regarding a violation that was occurring adjacent to your property. Upon a recent inspection it appears that the violations are still occurring.

It is the City's policy to provide you with the opportunity to correct these problems before we pursue formal enforcement actions. Please carefully note the following information regarding this matter:

Section 8.04.120 Scattering rubbish and composting.

A. No person may throw, dump or deposit upon public or private property any injurious or offensive substance or any kind of rubbish, trash, debris or refuse which would mar the appearance, create a stench or detract from the cleanliness or safety of such property, or would be likely to injure an animal, vehicle or person traveling upon a public way.

Section 10.44.030 Obstruction of Traffic

Except as provided by this title or any other ordinance of the City, no person shall place, park, deposit, or leave upon any street or other public way, sidewalk, or curb any article or thing or material which in any way prevents, interrupts, or obstructs the free passage of pedestrian or vehicular traffic, or obstructs a driver's view of traffic or official traffic signs and signals. No person shall blockade or cause to be blockaded in any manner any street, sidewalk, or public way, except that a special permit may be obtained from the City Manager or designated appointee when the blockage is determined to be temporary, for a lawful purpose, and will not lead to a breach of peace.

To prevent further enforcement action please complete the following no later than

March 5, 2010:

- Remove all items from the right-of-way.

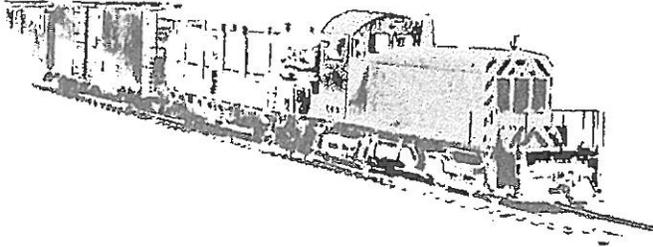
If compliance is not met a citation may be issued, which would require a court appearance.

Thank you for your cooperation. We appreciate your help in keeping Milwaukie clean and livable. This property will be reevaluated for your voluntary compliance by the above-mentioned date. Please contact me if you have any questions or if I can offer you any assistance regarding this matter.

Sincerely,

Tim Salyers
Code Enforcement Officer
503-786-7409
salyerst@ci.milwaukie.or.us

cc: File



OREGON PACIFIC RAILROAD COMPANY

OPERATIONS: 28800 S. Highway 213
Molalla, Oregon 97038

MAIL: P. O. Box 22548
Portland, Oregon 97269

February 24, 2010

Mr. Tim Salyers
City of Milwaukie
10722 S.E. Main
Milwaukie, OR 97222

Mr. Salyers

Reference is made to your letters of February 11th and 22nd addressed to Mr. Richard Samuels, relative to alleged code violations occurring adjacent to property owned by Mr. Samuels located at 9001 McBrod Avenue.

Please be advised that all trackage and material located in the former public right of way are property of the Oregon Pacific Railroad, not the property owner, and occupy the unimproved portion of McBrod Avenue by authority granted under ORS 772.105.

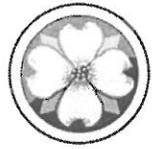
Trust the foregoing should be sufficient to allow you to close your file on the matter. Please address any future correspondence to the undersigned.

Sincerely,

OREGON PACIFIC RAILROAD

Kelly S. Anable, Manager
Safety & Regulatory Compliance

OREGON'S *PROGRESSIVE Shortline* RAILROAD



MILWAUKIE

Dogwood City of the West

March 8, 2010

Oregon Pacific Railroad Co.
Attn: Kelly S. Anable
P.O. Box 22548
Portland, OR 97269

SUBJECT: Ordinance Violations – 8.04.120 & 10.44.030

SITE ADDRESS: 9001 SE McBrod Ave, Milwaukie OR 97222

Kelly S. Anable:

We are in receipt of your letter regarding the violations occurring in the right-of-way adjacent to the above site address. Our City Prosecutor and I have reviewed your letter and ORS 772.105, and do not believe you are exempt from the Milwaukie Municipal Code. The right-of-way is in the City limits it is our understanding that this ORS does not apply. Also, we do not show any record that you have "requested" to use this right-of-way, so we were unable to respond "within a reasonable time."

It is with this letter that we request that the railroad ties and other materials being stored in the City of Milwaukie's public right-of-way be removed by **March 18, 2010:**

- Remove all items from the City of Milwaukie public right-of-way.

If compliance is not met a citation may be issued, which would require a court appearance.

Thank you for your cooperation. We appreciate your help in keeping Milwaukie clean and livable. This property will be reevaluated for your voluntary compliance by the above-mentioned date. Please contact me if you have any questions or if I can offer you any assistance regarding this matter.

Sincerely,

Tim Salyers
Code Enforcement Officer
503-786-7409
salyerst@ci.milwaukie.or.us

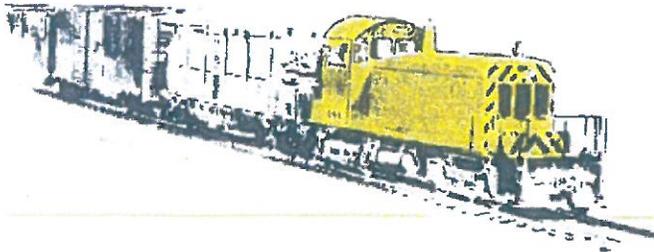
Attached: ORS 772.105

cc: File
Richard Samuels, PO Box 22548, Milwaukie, OR 97269
Larry J. Blake Jr., City Prosecutor

Oregon Revised Statutes

772.105 Authority to appropriate. (1) When it is necessary or convenient in the location of any railway to appropriate any part of any public road, street, alley or public grounds **not within the corporate limits of a municipal corporation**, the county court of the county wherein such road, street, alley or public grounds is located, may agree with the corporation constructing the road, upon the extent, terms and conditions upon which the same may be appropriated or used, and occupied by such corporation. If the parties are unable to agree, the corporation may appropriate so much thereof as is necessary and convenient in the location and construction of the road.

(2) 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.



OREGON PACIFIC RAILROAD COMPANY

OPERATIONS: 28800 S. Highway 213
Molalla, Oregon 97038

MAIL: P. O. Box 22548
Portland, Oregon 97269

March 16, 2010

Mr. Tim Salyers
City of Milwaukie
10722 S.E. Main
Milwaukie, OR 97222

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 (" *railroad* " as defined in ORS 824.020 (2) (a) and ORS 824.022 (a) through (d)) hereby **APPROPRIATES** for **RAILROAD PURPOSES** (*APPROPRIATE: 1 To set apart for a particular use; 2. To take for ones own use*) (*Webster Contemporary Dictionary, 1982*) 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.

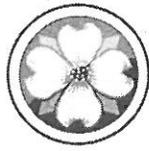
Trust the foregoing should be sufficient to comply with the Statute and allow you to close your file on the matter. Please address any future correspondence to the undersigned.

Sincerely,

OREGON PACIFIC RAILROAD

Ms. Kelly S. Anable, Manager
Safety & Regulatory Compliance

OREGON'S *PROGRESSIVE Shortline* **RAILROAD**



MILWAUKIE

Dogwood City of the West

Certified Mail: 7007 3020 0001 4229 7396
First Class Mail

March 22, 2010

Oregon Pacific Railroad Co.
Attn: Kelly S. Anable
P.O. Box 22548
Portland, OR 97269

SITE ADDRESS: 9001 SE McBrod Ave, Milwaukie, OR 97222

Kelly S. Anable:

We are in receipt of your letter "Notice of Appropriation of Public Lands for Railroad Purposes." It appears that this is your version of a request to use this right-of-way, if so we do not accept your request.

The statute contemplates that the appropriation is for construction/location of a road (as opposed to storage). Please provide justification/authority for the proposed appropriation based on the statute.

We trust that you will now continue your efforts to comply with Milwaukie Municipal Code.

Thank you for your cooperation. We appreciate your help in keeping Milwaukie clean and livable. Please contact me if you have any questions or if I can offer you any assistance regarding this matter.

Sincerely,

Tim Salyers
Code Enforcement Officer
503-786-7409
salyerst@ci.milwaukie.or.us

cc: File
Larry J. Blake Jr., City Prosecutor
Bill Monahan, City Attorney







CERTIFICATE OF SERVICE

I hereby certify that on the date shown below, I served a true and correct copy of the foregoing DECLARATION OF TIMOTHY SLAYERS on:

Thomas F. McFarland
208 S LaSalle St Ste 1890
Chicago IL 60604-1112
Facsimile: (312) 201-9695

- by first class mail, postage prepaid.
- by hand delivery.
- by facsimile transmission.
- by facsimile transmission and first class mail, postage prepaid.
- by electronic transmission to *mcfarland@aol.com* and first class mail, postage prepaid.

DATED: October 24, 2012.



Ronald G. Guerra, OSB # 943272
Attorney for Complainant City of
Milwaukie