IN THE SUPEME COURT FOR THE STATE OF OREGON

Christopher S. Barrett, Plaintiff-Adverse Party, v. Union Pacific Railroad Company, Defendant-Relator.	Multnomah County Circuit Court Case No. 15CV27317 Supreme Court Case No. S063914 (control)
Lillian Figueroa, Plaintiff-Adverse Party, v. BNSF Railway Company, a Delaware Corporation, Defendant-Relator.	Multnomah County Circuit Court Case No. 15CV13390 Supreme Court Case No. S063929 **MANDAMUS PROCEEDING**

DEFENDANT-RELATOR UNION PACIFIC RAILROAD COMPANY'S REPLY BRIEF ON THE MERITS

Proceeding in Mandamus from the
Order of the Multnomah County Circuit Court,
by the Honorable Kenneth R. Walker, Judge

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October 2016

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A. Union Pacific Is Not "At Home" in Oregon and Thus Cannot Be Sued Here for Idaho-Based Injuries

Plaintiff argues that, even after *Daimler AG v. Bauman*, __ US __, 134 S Ct 746, 187 L Ed 624 (2014), and *Goodyear Dunlop Tires Operations, S.A. v. Brown,* 564 US 915, 131 S Ct 2846, 180 L Ed 2d 796 (2011), an Oregon court can exercise general personal jurisdiction over Union Pacific without violating the Due Process Clause because it is "fair" to do so in this case. Plaintiff is wrong. A state court's authority to exercise personal jurisdiction over an out-of-state defendant does not depend on some free-floating assessment of what is "fair" under the particular circumstances of a particular case. Instead, the Supreme Court has given "specific content to the 'fair play and substantial justice' concept" through the distinct tests it has developed for specific and general jurisdiction. *Goodyear*, 564 US at 923. The factors that come into play in determining what qualifies as "fair" vary, depending on which type of personal jurisdiction is at issue.

For *general* jurisdiction, "only a limited set of affiliations with a forum will render a [corporate] defendant amenable to all-purpose jurisdiction there": the defendant must have continuous corporate operations within the forum that are "so substantial and of such a nature" as to render the corporation essentially "at home" there. *Daimler*, 134 S Ct at 754, 760-61; *Goodyear*, 564 US at 919, 924; *International Shoe Co. v. Washington*, 326 US 310, 318, 66 S Ct 154, 90 L Ed 95 (1945). Under that exacting standard, an out-of-state corporation typically is "at home" – and thus "fairly" subjected to a state court's plenary authority – in two

unique and easily ascertainable places: the place of its incorporation and its principal place of business. *Daimler*, 134 S Ct at 760; *Goodyear*, 564 US at 924.

Although plaintiff pays lip service to the "at home" test, the rationale he offers for exercising general jurisdiction in this case is in no way tethered to it. He concedes that neither of the classic bases for general jurisdiction exist in Oregon – Union Pacific was incorporated in Delaware, and its principal place of business is Nebraska. Pl's Br at 21. Nor does he assert that this case involves the kind of "exceptional" facts that might render Oregon Union Pacific's *de facto* or surrogate place of incorporation or principal place of business, like Ohio was for the Philippine mining company in *Perkins v. Benguet Consol. Mining Co.*, 342 US 437, 72 S Ct 413, 96 L Ed 485 (1952). Instead, he contends that an Oregon court can "fairly" consider Union Pacific at home in Oregon based on the duration and "substantial" magnitude of its "continuous operation and presence in Oregon" as part of its 23-state railroad system. Pl's Br at 18, 21-22, 24, 26.

But that is exactly the rationale for exercising general jurisdiction that the Supreme Court rejected when it adopted the "at home" test. Under that test, due process does not permit a state court to exercise personal jurisdiction over an out-of-state corporation on matters arising from out-of-state activities simply because the corporation does a "sizable" amount of business within the state. Or engages in a "substantial, continuous, and systematic course of business" within the state. Or even has a "quantum of local activity" that is comparable to that of a truly local company but is still far less than the quantum of out-of-state activities. *See Daimler*, 134 S Ct at 761-62 & n 20 (rejecting each of those formulations in

adopting the "at home" test); *Goodyear*, 564 US at 927 ("A corporation's 'continuous activity of some sorts within a state,' *International Shoe* instructed, 'is not enough to support the demand that the corporation be amenable to suits unrelated to that activity.' 326 US at 318.").

As plaintiff admits, Oregon is one of 23 states in which Union Pacific operates its interstate railroad system. Despite the Supreme Court's admonition that "[a] corporation that operates in many places can scarcely be deemed at home in all of them," *Daimler*, 134 S Ct at 762 n 20, plaintiff fails to identify anything unique about the nature or substance of Union Pacific's contacts with Oregon or otherwise show that those contacts are so qualitatively different from Union Pacific's contacts with the other 22 states as to render Union Pacific "at home" in Oregon. In fact, he admits that Union Pacific's operations in Oregon are *less* substantial than those in Nebraska, its principal place of business. Pl's Br at 22. Union Pacific's longstanding, ongoing activities in Oregon plainly do not suffice to establish that Union Pacific is "at home" in Oregon for general jurisdiction purposes.

Plaintiff also contends that Union Pacific can fairly be considered "at home" in Oregon "in this matter" because he is an Oregon resident who was injured in Idaho while working for Union Pacific and because his claim against Union Pacific is an "exceptional" one. Pl's Br at 23 n 7, 24-25, 26-27. But plaintiff's focus on those case-specific details confuses the specific and general jurisdictional inquiries. *See Walden v. Fiore*, __ US __, 134 S Ct 1115, 1121 n 6, 188 L Ed 2d 12 (2014)

(distinguishing specific or "case-linked" jurisdiction from general or "all-purpose" jurisdiction); *Goodyear*, 564 US at 919 (same).

The specific jurisdiction inquiry "focuses on the relationship among the defendant, the forum, and the litigation." *Walden*, 134 S Ct at 1121 (internal quotation marks omitted). A state court has authority to assert specific jurisdiction over a nonresident corporate defendant where the corporation engages in continuous and systematic activities within the forum that give rise to the controversy at issue. *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 US 408, 414, 104 S Ct 1868, 80 L Ed 2d 404 (1984); *International Shoe*, 326 US at 317. As part of the inquiry, the court also considers additional "reasonableness" factors, such as the burden on the defendant and the interests of both the state and the plaintiff. *Daimler*, 134 S Ct at 762 n 20 (discussing factors identified in *Asahi Metal Indus. Co. v. Superior Court of California, Solano Cty.*, 480 US 102, 113, 107 S Ct 1026, 94 L Ed 2d 92 (1987)).

By contrast, an Oregon court's authority to assert *general* jurisdiction over a nonresident corporation on claims arising from out-of-state activities is based *solely* on whether the defendant is "at home" in Oregon. It makes no difference whether the corporation has a "massive presence" in Oregon or whether the plaintiff is an Oregon resident. *See Goodyear*, 564 US at 927 ("[T]ies serving to bolster the exercise of specific jurisdiction do not warrant a determination that, based on those ties, the forum has *general jurisdiction* over a defendant." (Emphasis in original.)); *id*. at 922 & 929 n 5 (concluding that plaintiff's relationship to the forum or the state's interest in providing a forum for its citizens

to seek redress for their injuries are improper bases for general jurisdiction); *see also Daimler*, 134 US at 762 n 20 (*Asahi* reasonableness factors are not part of the general jurisdiction determination).

In support of his view that the circumstances of this case establish the fairness of subjecting Union Pacific to general jurisdiction here, plaintiff also emphasizes – by mentioning it in five different places – the Supreme Court's recognition that due process gives potential defendants "a degree of predictability" that allows them "to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit." *World-Wide Volkswagen Corp. v. Woodson*, 444 US 286, 297, 100 S Ct 559, 62 L Ed 2d 490 (1980); Pl's Br at 13, 17 n 5, 19, 26, 35 (quoting same). But that principle cuts against, rather than supports, his general jurisdiction argument. As the Court held in *Daimler*, "exorbitant exercises of all-purpose jurisdiction" over corporate defendants that are neither incorporated nor headquartered in the forum state but do sizable business there would scarcely provide out-of-state defendants any assurance as to where their primary conduct will subject them to all-purpose jurisdiction. *Daimler*, 134 S Ct at 761-62; *see also id.* at 760 (noting that paradigm bases for general jurisdiction are "[s]imple jurisdictional rules," which promote greater predictability). The approach plaintiff would have this court take impermissibly shifts the jurisdictional analysis away from a proper "at home" inquiry.

Finally, plaintiff highlights all of the international entities and events involved in each of the general jurisdiction cases on which the Court relied in *Daimler* and *Goodyear* and insists that the Court's analysis in those decisions cannot be "separated" or "divorced" from their international context. Pl's Br at 3-5, 20, 23-24. But he never explains why that is so or attempts to attribute any legal significance to those distinguishing facts. Nor can he. As plaintiff readily concedes, the Court's due process analysis regarding "foreign" corporations is not limited only to "foreign-country" corporations but applies equally to "sister-state" corporations. Pl's Br at 20, 23. A proper application of that analysis to the "foreign" corporation in this case compels the conclusion that Union Pacific is not "at home" in Oregon and, thus, is not subject to an Oregon court's exercise of general jurisdiction.

B. FELA Does Not – and Cannot – Authorize an Oregon Court to Exercise Personal Jurisdiction Over Union Pacific

Plaintiff next contends that Congress enacted the Federal Employers' Liability Act (FELA), 45 USC § 51, to create a cause of action against railroad employers that was radically different from any existing common-law tort remedy and that provided a far more liberal recovery for injured plaintiffs. Pl's Br at 27-30. He then reasons that, because FELA is "unique and exceptional" – and because, in enacting FELA, Congress recognized the "unique and exceptional nature" of a railroad's interstate operations and the railroad industry in general – it follows that a FELA case like this one is "exactly the type of 'exceptional' case that fully satisfies the due process principles annunciated by the Supreme Court

from *International Shoe* through *Daimler*." Pl's Br at 27-28, 34-35. Once again, plaintiff is wrong.

An "exceptional" case for *Daimler* purposes is not industry- or statute-dependent. Rather, whether a case is an "exceptional" one depends on whether the corporation's contacts with the forum state are so extensive that the forum state has become a "surrogate for the [corporation's] place of incorporation or head office." 134 S Ct at 756 n 8, 760-61 & n 19. As discussed above, that analysis is a defendant-focused one that looks to one and only one consideration: whether the defendant is "at home" in the forum state. Nothing in the Supreme Court's jurisprudence remotely supports that the type of business the defendant conducts, or the industry in which it operates, or the type of claim the plaintiff asserts against it, has *any* bearing on whether a state court has adjudicatory power over an out-of-state defendant on matters arising from its out-of-state conduct.[1]

Plaintiff's repeated use of two words from the *Daimler* decision – "unique" and "exceptional" – to describe everything from the needs of railroad employees to the nature of interstate railroads and FELA claims, does not make an otherwise unconstitutional assertion of general jurisdiction over a FELA defendant into a permissible one under *Daimler*. *See* Pl's Br at 27-35 (using one or both terms 13 different times). Because plaintiff has failed to show anything "exceptional" about

[1] Plaintiff takes as a given that the railroad industry is unique, but it is not. There are a number of industries with extensive multi-state operations that are highly regulated by federal statute. If that is the criterion for being "unique and exceptional," then all common carriers, including trucking companies, package delivery companies, and airlines presumably would be "unique and exceptional," too.

Union Pacific's contacts with Oregon, this case is not and cannot be the only kind of "exceptional case" *Daimler* contemplated.

Plaintiff's related argument – that FELA's venue provision, 45 USC § 56, somehow displaces the "at home" standard for general jurisdiction – fares no better. Plaintiff contends that, in amending Section 56 to allow plaintiffs to bring FELA claims "in a district court of the United States, in the district * * * in which the defendant shall be doing business," Congress "recognized" that interstate railroad carriers are "at home" wherever they do business. So too, he says, has the Supreme Court "continually and repeatedly" treated FELA defendants "as 'at home' in any jurisdiction where they are doing business" and "continually upheld the jurisdiction of courts" in those states even though the defendants were neither incorporated nor headquartered there. According to plaintiff, *Goodyear* and *Daimler* "do not upend multiples decades" of Supreme Court FELA decisions. Pl's Br at 27, 31-32. Plaintiff is wrong on all counts.

By its terms, Section 56 does two things: (1) it gives FELA plaintiffs the initial choice of *venue* in the federal district courts, and (2) it recognizes that federal and state courts have concurrent jurisdiction over the *subject matter*.[2] Union Pacific's Opening Br at 21-23; *see Baltimore & O.R. Co. v. Kepner*, 314 US 44, 52, 62 S Ct 6, 86 L Ed 28 (1941) ("[Section 56] establishes venue for an action in the federal courts."); *Miles v. Illinois Cent. R. Co.*, 315 US 698, 703, 62 S Ct

[2] Section 56's second sentence expressly provides what would otherwise be presumed. *See Tafflin v. Levitt*, 493 US 455, 458, 110 S Ct 792, 107 L Ed 2d 887 (1990) (reiterating deeply rooted presumption that state courts have concurrent subject-matter jurisdiction over federal claims).

827, 86 L Ed 827 (1942) (although Congress granted state courts subject-matter jurisdiction over FELA claims, "venue of state court suits was left to the practice of the forum"). Neither has anything to do with whether a state court has the power to assert *personal jurisdiction* over the defendant in a FELA case.

Plaintiff does not take issue with any of those well-established legal propositions.[3] Instead, he disregards the distinctions among venue, subject-matter jurisdiction, and personal jurisdiction and speaks generally in terms of FELA "jurisdiction." Pl's Br at 27, 30-32. But the only jurisdictional inquiry that is relevant here is personal jurisdiction in state courts, which Section 56 does not address. Nor has the Supreme Court ever held otherwise. Indeed, none of the FELA "jurisdiction" cases that plaintiff cites even mentions personal jurisdiction, much less construes Section 56 in a way that would grant state courts greater adjudicatory authority over nonresident defendants in FELA cases than in non-FELA cases.

In *Kepner*, the issue was whether a state court equitably could enjoin one of its citizens from prosecuting a FELA action brought in an admittedly proper venue under Section 56 – a federal district court in another state where the defendant carrier was doing business – on the ground that the continued prosecution in that venue was "vexatious and inequitable." The Court said no, concluding that "venue is a privilege created by federal statute" with which a state court cannot interfere "on the ground of inequity based on cost, inconvenience, or harassment." 314 US

[3] Nor does *amicus curiae* Academy of Rail Labor Attorneys (ARLA), which makes the same FELA-based arguments that plaintiff makes. ARLA Br at 2-9.

at 51-54. The Court applied the same reasoning, and reached the same conclusion, in *Miles*, which differed from *Kepner* only in that the FELA action there had been brought in a state court of another state, rather than in a distant federal court. *See Miles,* 315 US at 702-03 ("[T]he right to [sue] in state courts of proper venue where their jurisdiction is adequate is of the same quality as the right to sue in federal courts [and] is no more subject to interference by state action than was the federal venue in the *Kepner* case."). Finally, *Pope v. Atl. Coast Line R. Co.*, 345 US 379, 73 S Ct 749, 97 L Ed 1094 (1953), involved the same facts as *Miles*, but the defendant there argued that a federal statute that allowed federal courts to transfer FELA cases to a more convenient federal forum implicitly authorized state courts to enjoin FELA actions that were brought in proper, but burdensome, venues. The Court rejected that argument too, concluding that the transfer statute applied to federal courts only and that *Miles*'s conclusion regarding the FELA venue statute was still controlling. *Pope*, 345 US at 383-84, 387. In none of those cases did the Court "uphold" a state court's authority to treat a FELA defendant differently than any other defendant with respect to personal jurisdiction.

In any event, even if Congress had intended for Section 56 to authorize state courts to assert general personal jurisdiction over out-of-state FELA defendants under a "doing business" standard, *Daimler* instructs that such a standard violates due process. Plaintiff tries to get around that indisputable fact by arguing that, because Congress enacted FELA as a broad remedial statute to benefit injured railroad employees and amended Section 56 specifically to remedy the "injustice" that FELA plaintiffs continued to face in suing their railroad-carrier employers,

Congress determined that the needs of the injured plaintiffs outweighed the countervailing interests of the defendants. Pl's Br at 27-31; *see also* ARLA Br at 5 (arguing that "Congress' concern with due process" is evidenced by its interest in removing the impediments and burdens that FELA plaintiffs encountered in having to bring FELA actions in jurisdictions that were inconvenient for them). [4]

The problem with that argument, of course, is that Congress has no authority to abrogate a FELA defendant's right to due process. *See Mississippi Univ. for Women v. Hogan*, 458 US 718, 732–33, 102 S Ct 3331, 73 L Ed 2d 1090 (1982) ("Although we give deference to congressional decisions and classifications, neither Congress nor a State can validate a law that denies the rights guaranteed by the Fourteenth Amendment."); *see also Walden,* 134 S Ct at 1122 & 1125 n 9 (reiterating that, in the context of personal jurisdiction, due process protects the interests of the nonresident defendant, not the plaintiff). Accordingly, even if Congress had intended for Section 56 to authorize state courts to assert general personal jurisdiction over any FELA defendant "doing business" within their state, such a provision is unenforceable. *See Trop v. Dulles*, 536 US 86, 104, 78 S Ct 590, 2 L Ed 2d 630 (1958) (plurality opinion) ("When it appears that an Act of

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[4] *But see Norfolk Southern Railway Company v. Sorrell*, 549 US 158, 171, 127 S Ct 799, 166 L Ed 2d 638 (2007) ("FELA was indeed enacted to benefit railroad employees," but "[i]t does not follow, however, that this remedial purpose requires us to interpret every uncertainty in the Act in favor of employees."); *Rodriguez v. U.S.*, 480 US 522, 525-26, 107 S Ct 1391, 94 L Ed 2d 533 (1987) (*per curiam*) ("[N]o legislation pursues its purposes at all costs. Deciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice – and it frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be the law." (Emphasis in original.)).

Congress conflicts with a [constitutional provision], we have no choice but to enforce the paramount commands of the Constitution.").

Finally, plaintiff relies on *Tyrell v. BNSF Railway Co.*, 373 P3d 1 (Mont 2016), *petition for certiorari* filed September 28, 2016, in which the Montana Supreme Court endorsed the FELA-based arguments that plaintiff advances here and concluded that a FELA defendant is subject to personal jurisdiction in the courts of any state where it does business, regardless of whether its contacts with the forum satisfy the due process standard set forth in *Daimler*. Pl's Br at 33-34. For the reasons explained above, as well as those set out in the well-reasoned and cogent analysis of the dissenting judge in *Tyrell*, 373 P3d at 429-39, this court should decline to follow the Montana court's decision.

C. Plaintiff's Specific Jurisdiction Argument Is Untimely and Not Supported by the Record

Admitting that he never raised the issue below, plaintiff argues that this court nonetheless can "affirm" the trial court's personal jurisdiction decision on the alternative ground that Union Pacific is subject to specific jurisdiction, if that alternative basis is "supported by the record." Pl's Br at 37. But plaintiff also admits, albeit indirectly, that the record contains *no evidence* to support his belated assertion of specific jurisdiction. *Id.* at 40 n 11. Thus, even if the court were otherwise inclined to consider plaintiff's new specific jurisdiction argument, it would have to reject that argument on its "merits."

In its motion to dismiss, Union Pacific argued that plaintiff had not alleged and could not prove that Union Pacific was subject to *either* specific or general

personal jurisdiction. ER-3-7. In response, plaintiff did not argue that the case arises out of or relates to Union Pacific's activities in Oregon. He argued instead that the court not only should exercise general jurisdiction over Union Pacific, but that the law was so well established on that point that the court also should sanction Union Pacific for seeking dismissal on that basis. ER-11-50. Plaintiff similarly argued in his response to Union Pacific's Petition for Alternative Writ of Mandamus that this court should deny the petition because the facts and the law "firmly establish this matter as an 'exceptional' case where exercise of general jurisdiction is appropriate." Pl's Response to Petition at 1.

Contrary to what plaintiff suggests, this is not a situation where he raised the issue of specific jurisdiction in the trial court and now is simply expanding the scope of that argument on appeal. *See Columbia Boat Sales v. Island Packet Yachts*, 105 Or App 85, 87, 803 P2d 283 (1990) (concluding that raising the issue of specific jurisdiction below under ORCP 4 E and L was enough to allow appeal argument based on ORCP 4 C and D). Instead, plaintiff conceded the issue of specific jurisdiction in the trial court, and even now he offers no explanation for why he should be allowed to raise an entirely new issue that – if meritorious – would render moot the general jurisdiction question on which this original mandamus proceeding is based. The court should not consider plaintiff's belated specific jurisdiction arguments.

In any event, this court can and should reject plaintiff's specific jurisdiction argument for the reasons stated in Union Pacific's motion to dismiss: he has not alleged or proved sufficient facts to establish specific jurisdiction. Plaintiff alleged

that he was in the course and scope of his employment with Union Pacific in Idaho when he was injured while working on a spike machine. ER-30. And, although he *now* says that his injuries "relate to and arise out of" Union Pacific's substantial connections with Oregon, Pl's Br at 40-41, he admits there is no evidence of such "facts" in the record. Pl's Br at 40 n 11. Although he dismisses that omission as a function of the timing of Union Pacific's pleading motion, it was his burden to allege and prove sufficient facts to support the exercise of specific jurisdiction over Union Pacific. *See Robinson v. Harley-Davidson Motor Co.*, 354 Or 572, 576, 316 P2d 287 (2013); *State ex rel. Circus Circus Reno, Inc. v. Pope*, 317 Or 151, 153, 854 P2d 461 (1991) (stating legal standard); *see also* ORCP 21 A (providing that, on a motion to dismiss asserting lack of jurisdiction over the person, the court may defer determination of the existence or nonexistence of the facts supporting the defense until further discovery). Plaintiff failed to satisfy that burden. Accordingly, there is no basis for an Oregon court to exercise specific jurisdiction over Union Pacific in this case.

II. Conclusion

For the reasons set forth above and in Union Pacific's opening brief, the court should issue a peremptory writ of mandamus directing the trial court to vacate the order denying Union Pacific's motion to dismiss and to enter a judgment dismissing this action for lack of personal jurisdiction.

DATED: October 20, 2016

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE
PURSUANT TO ORAP 5.05(2)(b)(ii)

I certify that the brief complies with the "length" provisions of ORAP 5.05(2)(b)(i) in that:

1. It contains 3,993 words, exclusive of those items excludable under ORAP 5.05(2)(a).

2. Its type face is proportionally spaced and is 14-point.

3. In preparing this certificate, I have relied on the word count of the word processing system used to prepare the brief.

DATED: October 20, 2016

s/ Wendy M. Margolis
Wendy M. Margolis

CERTIFICATE OF FILING AND MAILING

I hereby certify that I electronically filed the foregoing **DEFENDANT-RELATOR UNION PACIFIC RAILROAD COMPANY'S REPLY BRIEF ON THE MERITS** with the State Court Administrator by using the Oregon Appellate eFiling system on the 20th day of October, 2016.

I further certify that I electronically-served the foregoing **DEFENDANT-RELATOR UNION PACIFIC RAILROAD COMPANY'S REPLY BRIEF ON THE MERITS** upon the persons listed below that are registered efilers, by using the Oregon Appellate eFiling system on the 20th day of October, 2016.

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