

IN THE SUPREME 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

MANDAMUS PROCEEDING

**Defendant-Relator Union Pacific Railroad Company's
Opening Brief on the Merits**

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

Wendy M. Margolis, OSB No. 945675
wmargolis@cosgravelaw.com
Julie A. Smith, OSB No. 983450
jsmith@cosgravelaw.com
Cosgrave Vergeer Kester LLP
888 SW Fifth Avenue, Suite 500
Portland, OR 97204
(503) 323-9000

For Defendant-Relator
Union Pacific Railroad
Company

James K. Vucinovich, OSB 030373
jvucinovich@rvflegal.com
Rossi Vucinovich PC
1000 Second Avenue, Suite 1610
Seattle, WA 98104
(866) 357-7245

Paul Bovarnick, OSB 791654
pbovarnick@rsblaw.net
Rose Senders & Bovarnick LLC
1205 NW 25th Avenue
Portland, OR 97210
(503) 226-2486

For Plaintiff-Adverse Party
Christopher S. Barrett

June 2016

TABLE OF CONTENTS

I. STATEMENT OF THE CASE	1
A. Nature of the Proceeding and Relief Sought	1
B. Nature of the Order on Review	2
C. Basis of Appellate Jurisdiction	2
D. Relevant Dates for Mandamus Purposes	2
E. Questions Presented	2
F. Summary of Argument	3
G. Summary of Material Facts	4
II. ASSIGNMENT OF ERROR.....	5
The trial court erred in denying Union Pacific’s motion to dismiss for lack of personal jurisdiction.	
A. Preservation of Error	5
B. Scope and Standard of Review.....	6
III. ARGUMENT	7
A. A Corporation Is Subject to General Jurisdiction Only in the One or Two States in Which it Is “At Home”	8
B. Union Pacific Is Not “At Home” in Oregon.....	15
C. The “At Home” Rule Applies to All Corporations.....	18
D. ORCP 4 A(4) Is Unenforceable.....	19
E. The FELA Does Not Create Personal Jurisdiction (Nor Can It)	21
IV. CONCLUSION.....	25
Appendix: Comment to Rule 4, Final Rule, Oregon Rules of Civil Procedure, Counsel on Court Procedure, Dec 2, 1978	

TABLE OF AUTHORITIES

Cases

<i>Action Embroidery Corp. v. Atl. Embroidery, Inc.</i> , 368 F3d 1174 (9th Cir 2004)	23
<i>Atlantic Marine Const. Co., Inc. v. U.S. Dist. Court for Western Dist. of Texas</i> , ___ US ___, 134 S Ct 568, 187 L Ed 2d 487 (2013).....	23
<i>Baltimore & O.R. Co. v. Kepner</i> , 314 US 44, 62 S Ct 6, 86 L Ed 28 (1941).....	21
<i>Boyd v. Grand Trunk W. R. Co.</i> , 338 US 263, 70 S Ct 26, 94 L Ed 55 (1949).....	21
<i>Brown v. Lockheed Martin Corp.</i> , 814 F3d 619 (2d Cir 2016)	15, 17, 18
<i>Cabbage v. Merchant</i> , 744 F2d 665 (9th Cir 1984), <i>cert den</i> , 470 US 1005 (1985)	10
<i>Daimler AG v. Bauman</i> , 571 US ___, 134 S Ct 746, 180 L Ed 2d 796 (2014).....	3-5, 7-8, 12-20
<i>Fraley v. Chesapeake & Ohio Ry. Co.</i> , 397 F2d 1 (3d Cir 1968)	22
<i>Goodyear Dunlop Tires v. Brown</i> , 564 US 915, 131 S Ct 2846, 180 L Ed 796 (2011).....	3, 5, 7-8, 10-12, 14-15, 17-20, 23
<i>Hagan v. Gemstate Manufacturing, Inc.</i> , 328 Or 535, 982 P2d 1108 (1999)	24
<i>Helicopteros Nacionales de Columbia S.A. v. Hall</i> , 466 US 408, 104 S Ct 1868, 80 L Ed 2d 404 (1984).....	9-11, 15

AUTHORITIES (Cont.)

Cases (Cont.)

<i>Imm v. Union Railroad Company</i> , 289 F2d 858 (3d Cir 1961)	22
<i>Ins. Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee</i> , 456 US 694, 102 S Ct 2099, 72 L Ed 2d 492 (1982).....	23
<i>International Shoe Co. v. Washington</i> , 326 US 310, 66 S Ct 154, 90 L Ed 94 (1945).....	8
<i>Johnson v. Multidata Systems Intern. Corp.</i> , 523 F3d 602 (5th Cir 2008)	10
<i>Johnson v. U.S.</i> , ___ US ___, 135 S Ct 2551, 192 L Ed 2d 569 (2015).....	24
<i>Lanham v. Pilot Travel Centers, LLC</i> , 2015 WL 5167268 (D Or Sept. 2, 2015)	17
<i>Leroy v. Great W. United Corp.</i> , 443 US 173, 99 S Ct 2710, 61 L Ed 2d 464 (1979).....	23
<i>Martinez v. Aero Caribbean</i> , 764 F3d 1062 (9th Cir 2014)	17
<i>Metropolitan Life Ins. Co. v. Robertson-Ceco Corp.</i> , 84 F3d 560 (2d Cir 1996)	10
<i>Miles v. Illinois</i> , 315 US 698, 62 S Ct 827, 86 L Ed 827 (1942).....	21
<i>Mondou v. New York, New Haven & Hartford R.R. Co.</i> , 223 US 1, 32 S Ct 169, 56 L Ed 327 (1912).....	22
<i>North Pacific v. Guarisco</i> , 293 Or 341, 647 P2d 920 (1982)	7, 23

AUTHORITIES (Cont.)

Cases (Cont.)

<i>Perkins v. Benguet Consol. Min. Co.</i> , 342 US 437, 72 S Ct 413, 96 L Ed 485 (1952).....	8-9, 13-17, 20
<i>Pope v. Atl. Coast Line R. Co.</i> , 345 US 379, 73 S Ct 749, 97 L Ed 1094 (1953).....	21
<i>Robertson v. R.R. Labor Bd.</i> , 268 US 619, 45 S Ct 621, 69 L Ed 1119 (1925).....	23
<i>Robinson v. Harley-Davidson Motor Co.</i> , 354 Or 572, 316 P3d 287 (2013)	6-7
<i>S. Pac. Transp. Co. v. Fox</i> , 609 So2d 357 (Miss 1992).....	22
<i>State ex rel. Circus Reno, Inc. v. Pope</i> , 317 Or 151, 854 P2d 461 (1993)	6, 10
<i>State v. Peekema</i> , 328 Or 342, 976 P2d 1128 (1999)	2
<i>Trop v. Dulles</i> , 356 US 86, 78 S Ct 590, 2 L Ed 2d 630 (1958)	24
<i>Tuazon v. R.J. Reynolds Tobacco Co.</i> , 433 F3d 1163 (9th Cir 2006)	10
<i>Tyrrell v. BNSF Railway Co.</i> , ___ P3d ___, 2016 WL 3067430 (Mont May 31, 2016)	24
<i>Youn v. Track, Inc.</i> , 324 F3d 409 (6th Cir 2003).....	10
<i>Willemsen v. Invacare Corp.</i> , 352 Or 191, 282 P3d 8677 (2012), <i>cert den</i> , 133 S Ct 984 (2013)...	7, 11

AUTHORITIES (Cont.)

Statutes

ORS 34.120	2
45 USC § 56	5, 6, 24, 25

Rules

ORCP 4	5, 19-20
ORCP 21	2, 5

Constitutional Provisions

Or Const, Art VII (Amend), §2	2
US Const, Amend XIV	2

Other Authorities

Bryan A Garner, <i>A Dictionary of Modern Legal Usage</i> (2d ed 1995)	22
---	----

I. STATEMENT OF THE CASE

A. Nature of the Proceeding and Relief Sought

This mandamus proceeding concerns one of the most basic of constitutional rights – the due process right not to be brought into court arbitrarily in a state that has no connection whatsoever to the claim. The claim in this particular case arises from injuries plaintiff allegedly sustained in Idaho while working as a machine operator for defendant Union Pacific Railroad Company, a Delaware corporation with its principal place of business in Omaha, Nebraska. In response to Union Pacific’s motion to dismiss the case for lack of personal jurisdiction, plaintiff did not argue that the case arises out of or relates to Union Pacific’s activities in Oregon. That is, he did not argue that the court can exercise *specific* jurisdiction in this case. He argued, instead, that it would be appropriate for the court to exercise *general* jurisdiction over Union Pacific.

When the trial court refused to dismiss the case, Union Pacific petitioned this court for an alternative writ of mandamus directing the trial court to dismiss the case or show cause for not doing so. This court issued an alternative writ. The trial court did not respond to the alternative writ, so Union Pacific now seeks a peremptory writ of mandamus commanding the trial court to vacate its order denying the motion to dismiss and to enter a judgment dismissing the case for lack of jurisdiction.

B. Nature of the Order on Review

The trial court entered an order denying Union Pacific's motion to dismiss for lack of personal jurisdiction pursuant to ORCP 21 A(2).

C. Basis of Appellate Jurisdiction

This court has original mandamus jurisdiction under ORS 34.120 and Article VII (amended), section 2, of the Oregon Constitution.

D. Relevant Dates for Mandamus Purposes

The trial court entered the order denying Union Pacific's motion to dismiss on January 25, 2016. Union Pacific timely filed its mandamus petition less than thirty days later, on February 23, 2016. *See State v. Peekema*, 328 Or 342, 346, 976 P2d 1128 (1999). This court issued the alternative writ on May 5, 2016, directing the trial court to act by May 19, 2016. The trial court did not respond to the writ.

E. Questions Presented

1. Does the Due Process Clause of the Fourteenth Amendment to the United States Constitution permit Oregon courts to exercise general jurisdiction over Union Pacific, when it is incorporated in Delaware and its principal place of business is in Nebraska?

2. Does the Federal Employers' Liability Act (FELA) authorize Oregon courts to exercise personal jurisdiction over a railroad in suits brought by a railroad employee? If it does, can an Oregon court exercise personal jurisdiction under the FELA, when doing so would violate due process?

F. Summary of Argument

1. In *Goodyear Dunlop Tires v. Brown*, 564 US 915, 131 S Ct 2846, 180 L Ed 796 (2011), and *Daimler AG v. Bauman*, 571 US ___, 134 S Ct 746, 180 L Ed 2d 796 (2014), the United States Supreme Court held that the Due Process Clause prohibits states from exercising general jurisdiction over a corporation outside of the one or two places where it is “at home” – its place of incorporation and its principal place of business. In so concluding, the Court unequivocally rejected lower court decisions in Oregon and elsewhere holding that courts could exercise general jurisdiction over a corporation in every state in which the corporation’s contacts are substantial, continuous, and systematic.

In footnote 19 of the *Daimler* opinion, the Court declined to “foreclose the possibility” that there may be “an exceptional case” in which due process would permit finding a corporation “at home” in a state other than its place of incorporation or its “formal” principal place of business. At most, however, footnote 19 only leaves open a sliver of a possibility of general jurisdiction in a state that has become the corporation’s *de facto*, if not formal, principal place of business. As *Daimler* otherwise makes clear, there is no scenario in which due

process would permit general jurisdiction in the three, four, or five states in which a corporation does the most business. Under *Daimler*, a corporation cannot ever be “at home” in that many places.

Union Pacific is not “at home” in Oregon under the *Daimler* definition of “at home.” Union Pacific is not incorporated in Oregon, and Oregon is not, nor has it ever been, its principal place of business. The trial court thus violated Union Pacific’s due process rights when it exercised general personal jurisdiction over Union Pacific in this Idaho-based personal injury action.

2. The FELA gives injured railroad workers who sue their employers in federal court a choice of venue. But plaintiff brought this case in state court, not federal court, and venue is an entirely different question from personal jurisdiction, which is governed by state law and the Constitution, not by the FELA. In any case, a state cannot exercise personal jurisdiction pursuant to a statute where, as here, doing so would violate the defendant’s constitutional right to due process.

G. Summary of Material Facts

Union Pacific operates an interstate railroad system in 23 states, including Oregon. ER 28-29, 38.¹ It has a number of facilities in Oregon, including switching yards and locomotive facilities, a classification yard, a locomotive

¹ The excerpt references in this brief are to the excerpt of record Union Pacific filed with its petition.

maintenance shop, a crew change point, and an operational office. ER 36. It is beyond dispute, however, that Union Pacific is incorporated in Delaware, and its principal place of business and corporate headquarters, including its rail traffic control center, are all located in Omaha, Nebraska. ER 9, 28, 38.

Plaintiff claims he was injured while working for Union Pacific in Idaho as a spiker machine operator. ER 30. According to plaintiff, the spiker machine he was using to install railroad spikes on the tracks vibrated and jarred him so excessively on one particular day that it damaged his kidneys. ER 30-32.

II. ASSIGNMENT OF ERROR

The trial court erred in denying Union Pacific's motion to dismiss for lack of personal jurisdiction.

A. Preservation of Error

The issue is preserved. Union Pacific moved to dismiss the action pursuant to ORCP 21 A(2) for lack of personal jurisdiction. In this motion, Union Pacific argued that the court could not exercise specific jurisdiction over it because the claim arose in Idaho and that the court could not exercise general jurisdiction over Union Pacific under *Daimler* and *Goodyear* because Oregon is not its "home." ER 3-8.

In response, plaintiff did not argue that Oregon can exercise specific jurisdiction over Union Pacific under ORCP 4 or the Due Process Clause. He argued, instead, that the FELA, specifically 45 USC § 56, authorizes Oregon

courts to exercise personal jurisdiction over Union Pacific and that due process permits Oregon courts to exercise general jurisdiction over Union Pacific. ER 11-22.²

The trial court ruled as follows: “Defendant[’s] Motion to Dismiss for lack of Personal Jurisdiction [is] DENIED.” ER 81.³

B. Scope and Standard of Review

Plaintiff bears the burden of alleging and proving sufficient facts to support the exercise of personal jurisdiction over Union Pacific. *State ex rel. Circus Circus Reno, Inc. v. Pope*, 317 Or 151, 153, 854 P2d 461 (1993). On review of a trial court’s order on a motion to dismiss for lack of personal jurisdiction, this court considers the facts alleged in the complaint and any evidence the parties submitted. *Robinson v. Harley-Davidson Motor Co.*, 354 Or 572, 576, 316 P3d 287 (2013). Where the facts are undisputed, this court reviews the trial court’s conclusions about personal jurisdiction for legal error.

² Plaintiff submitted trial court rulings in two other cases – *Newsom v. Union Pacific Railroad Company*, Multnomah County Circuit Court Case No. 14CV20433, and *Langlois v. BNSF Railway. Co.*, Multnomah County Circuit Court Case No. 14CV2053 – in which other circuit court judges held that Oregon courts can exercise general jurisdiction over Union Pacific and BNSF. ER 43-46, 50. Plaintiff also submitted this court’s order denying Union Pacific’s petition for writ of mandamus in *Langlois*. ER-48.

³ Two weeks later, Judge Marshall denied a similar motion filed by the defendant in *Figueroa v. BNSF Railway Company*, Multnomah County Circuit Court Case No. 15CV13390, and this court also granted that defendant’s petition for an alternative writ of mandamus. See SC No. S063929.

Id. at 595-96; *see also North Pacific v. Guarisco*, 293 Or 341, 346 n 3, 647 P2d 920 (1982) (recognizing that mandamus relief is appropriate when a trial court errs in denying a motion to dismiss for lack of personal jurisdiction).

III. ARGUMENT

Under the Due Process Clause, “a state may require an out-of-state defendant to appear in its courts only when the state has general or specific jurisdiction over that defendant.” *Willemsen v. Invacare Corp.*, 352 Or 191, 197, 282 P3d 8677 (2012), *cert den*, 133 S Ct 984 (2013). In this case, plaintiff has never alleged or argued that Oregon can exercise specific jurisdiction over Union Pacific. He claims instead that Oregon has *general* jurisdiction over Union Pacific either because Union Pacific is “at home” in Oregon or because the FELA authorizes Oregon courts to exercise personal jurisdiction over railroad employers for lawsuits brought by injured railroad employees. For the reasons set forth below, this court should hold that Oregon courts do not have general jurisdiction over Union Pacific under the “at home” test for due process described in *Goodyear* and *Daimler* and that the FELA does not authorize personal jurisdiction over railroad employers beyond due process constraints.

A. A Corporation Is Subject to General Jurisdiction Only in the One or Two States in Which it Is “At Home”

General jurisdiction as a concept was first introduced in *International Shoe Co. v. Washington*, 326 US 310, 318, 66 S Ct 154, 90 L Ed 94 (1945), where the Court suggested that there may be cases in which due process would permit a court to exercise general jurisdiction over a corporate defendant: “[T]here have been instances in which the *continuous* corporate operations within a state were thought *so substantial and of such a nature as to justify* suit against it on causes of action arising from dealings entirely distinct from those activities.” (Emphasis added). As the Supreme Court’s personal jurisdiction case law has evolved over the years, however, “specific jurisdiction has become the centerpiece of modern jurisdiction theory, while general jurisdiction [has played] a reduced role.” *Daimler*, 134 S Ct at 755 (quoting *Goodyear*, 564 US at 924). Put another way, general jurisdiction is the exception, not the rule.

For this reason, the Court has not had many opportunities in the 70 or so years that have passed since *International Shoe* to elaborate on what it takes for a corporation’s operations within a state to be “*so substantial and of such a nature as to justify*” the exercise of general jurisdiction over it. Indeed, in that time, the Court has decided only four general jurisdiction cases involving corporate defendants, and it has found general jurisdiction only once – in *Perkins v. Benguet Consol. Min. Co.*, 342 US 437, 72 S Ct 413, 96 L Ed 485 (1952).

In *Perkins*, the defendant, a Philippine mining corporation, suspended its operations during World War II and temporarily moved its corporate headquarters to Ohio, the home state of its president, general manager, and principal stockholder. During the war, the corporation conducted all of its corporate meetings and business activities from, and maintained its office and all of its files in, Ohio. The Court held that, even though the case did not arise out of the corporation's Ohio activities, the corporation's operations in Ohio were *so substantial and of such a nature as to justify* allowing Ohio to exercise general jurisdiction over it. *Perkins*, 342 US at 448.

Thirty years later, the Court decided *Helicopteros Nacionales de Columbia S.A. v. Hall*, 466 US 408, 104 S Ct 1868, 80 L Ed 2d 404 (1984), a case arising from a helicopter crash. The Court held that the corporation's operations in the forum state, which merely involved negotiating and purchasing equipment in, and sending employees to, the forum state, were "insufficient to satisfy the requirements of the Due Process Clause." *Helicopteros*, 466 US at 416-18.

As it turns out, the absence of guidance from the Court on what operations qualify as *so substantial and of such a nature as to justify* general jurisdiction proved problematic for lower courts. In the years that followed *Perkins* and *Helicopteros*, many lower courts, including this court, took the Supreme Court's general jurisdiction cases to mean that a corporation's

operations are *so substantial and of such a nature as to justify* general jurisdiction in any state in which the corporation engages in substantial, continuous, and systematic business activities. *See, e.g., Cubbage v. Merchant*, 744 F2d 665, 667 (9th Cir 1984), *cert den*, 470 US 1005 (1985) (“Where a defendant has substantial or continuous and systematic contacts with the state, a state court may have general personal jurisdiction” (internal quotations omitted)); *Circus Circus*, 317 Or at 154 (quoting with approval the general jurisdiction test described in *Cubbage*).⁴ These courts generally treated *Perkins* and *Helicopteros* as representative of two extremes, with the “line” for general jurisdiction falling somewhere in the middle of the fact patterns presented by these two cases. *See, e.g., Metropolitan Life Ins. Co. v. Robertson-Ceco Corp.*, 84 F3d 560 (2d Cir 1996) (“Many cases, including this one, fall between *Perkins* and *Helicopteros*”); *Tuazon v. R.J. Reynolds Tobacco Co.*, 433 F3d 1163 (9th Cir 2006) (“Navigating the territory between *Perkins* and *Helicopteros* requires us to balance the facts of each case.”).

The Supreme Court put a stop to this line of reasoning, however, when it decided *Goodyear*.

⁴ *See also Johnson v. Multidata Systems Intern. Corp.*, 523 F3d 602, 609 (5th Cir 2008) (general jurisdiction “exists when a non-resident defendant’s contacts with the forum state are substantial, continuous, and systematic”); *Youn v. Track, Inc.*, 324 F3d 409, 417-18 (6th Cir 2003) (“A federal court has general jurisdiction when the defendant’s contacts with the form state are ‘substantial’ and ‘continuous and systematic’”).

On the merits, *Goodyear* was an easy case for the Court to decide because the corporate defendant's contacts with the forum state were materially indistinguishable from the contacts the defendant had with the forum state in *Helicopteros*. See *Goodyear*, 564 US at 929 (so concluding). But *Goodyear* gave the Court the long overdue opportunity to correct the mistaken conclusions lower courts had drawn about what it takes for a corporation's operations within a state to be *so substantial and of such a nature as to justify* general jurisdiction.

As the Court explained, general jurisdiction does not depend on whether the corporate defendant's operations in the forum state are in some sense substantial and continuous – it depends instead on whether they are “so” substantial and continuous that they render the corporation “**at home**” in the forum state:

“A court may assert general jurisdiction over foreign (sister-state or foreign-country) corporations to hear any and all claims against them when their affiliations with the State are *so 'continuous and systematic'* as to render them essentially *at home* in the forum State.”

Id. at 919 (emphasis added). Under this test, a corporation is “at home” in its place of incorporation and its principal place of business. *Id.* at 924; see *Willemssen*, 352 Or at 197 (recognizing *Goodyear*'s “at home” standard for general jurisdiction).

Three years later, in *Daimler*, the Court reaffirmed the test it set out in *Goodyear*: Due process requires a corporation to be “at home” in the forum state before that state can exercise general jurisdiction, and a corporation is “at home” only in two places – the corporation’s “place of incorporation and the principal place of business.” *Daimler*, 134 S Ct 760-61 (internal quotation marks omitted).

The Court also explained *why* a corporation can only be “at home” in these one or two “unique” places – due process requires predictability, and limiting general jurisdiction this way gives corporations “some minimum assurance as to where [their] conduct will and will not render them liable to suit,” while also giving plaintiffs “at least one clear and certain forum in which a corporate defendant may be sued on any and all claims.” *Id.* at 760, 762 (citations and internal quotation marks omitted).⁵ The inquiry cannot turn on whether the corporation’s in-forum contacts are substantial, continuous, and systematic, as many lower courts had held, because extending jurisdiction that far would subject the corporation to general jurisdiction in too many places. *See*

⁵ *See also Daimler*, 134 S Ct at 762 n 20 (noting that a “corporation that operates in many states can scarcely be deemed at home in all of them”); *see also id.* at 761-62 (noting that if a California court could exercise general jurisdiction over the defendant in *Daimler*, then so too could “every other State in which [its] sales are sizeable,” which would be “exorbitant” exercises of general jurisdiction); *id.* at 761 n 19 (“[i]t is one thing to hold a corporation answerable for operations in the forum State, [but] quite another to expose it to suit on claims having no connection whatever to the forum State”).

generally id. at 751, 761-62 (concluding that extending general jurisdiction to multiple states is too “exorbitant,” unpredictable, and “unacceptably grasping” to comport with due process).

To be sure, *Daimler* did not completely foreclose any possibility that general jurisdiction could be found outside a corporation’s *formal* place of incorporation or principal place of business, as the Court explained in footnote 19 of the opinion: “We do not foreclose the possibility that in an *exceptional case*, see, e.g., *Perkins*, * * * a corporation’s operations in a forum other than its *formal* place of incorporation or principal place of business may * * * render the corporation at home in that State.” *Daimler*, 134 S Ct at 761 n 19 (emphasis added). Footnote 19 does not, however, establish an “exception” to the rule that corporations are subject to general jurisdiction only in their place of incorporation or principal place of business. At most, footnote 19 can be read to leave open a sliver of a possibility that a corporation could be subject to general jurisdiction in a state that has become the corporation’s *de facto*, if not formal, corporate headquarters, as was the case in *Perkins*.

The Court cited to *Perkins* as the example of an “exceptional case” in which a corporation might be “at home” somewhere other than its “formal” principal place of business because, in that case, Ohio had become the corporation’s “principal, if temporary, place of business” and the “center of the corporation’s wartime activities.” *Daimler*, 134 S Ct at 756 and n 8. *Perkins*

“turned” on the fact that all of the corporation’s activities “were directed by the company’s president from within Ohio.” *Id.* “Given the wartime circumstances, Ohio could be considered ‘a surrogate for the place of incorporation or head office.’” *Id.* (citation omitted). Put another way, Ohio could exercise general jurisdiction over the corporation in *Perkins* because Ohio had become the corporation’s *de facto* and *surrogate* principal place of business, while it had suspended its operations in its *formal* one.

In *Daimler*, by contrast, there was no evidence that the corporation’s operations in its formal principal place of business had been suspended or that the forum state had otherwise become the corporation’s *de facto* and surrogate principal place of business. *Daimler* involved an overseas corporation that was sued in California for conduct having no connection to California. The overseas corporation itself did not have a significant connection to California, but its subsidiary did. In fact, the subsidiary’s connections were quite substantial. It had multiple facilities, including a regional headquarters, in California, and billions of dollars in annual sales there. In response to the plaintiffs’ argument that the Court should impute the subsidiary’s substantial contacts to the parent, the Court held that, even if the contacts were “imputable,” they “plainly do not approach” the *Perkins* mark. *Daimler*, 134 S Ct at 760 and 761 n 19; *see also id.* at 760 (describing the contacts as “slim” and concluding that they “hardly” render the defendant “at home”); *Goodyear*, 564 US at 929 (similarly

concluding that the defendant corporation's contacts in North Carolina fell "far short" of those necessary to render it "at home" there).

Thus, while *Daimler* does not foreclose the possibility of establishing a corporation's "home" somewhere other than its place of incorporation and its *formal* principal place of business, *Daimler* does clearly establish that it is incredibly difficult to do so.⁶ In a post-*Daimler* world, the line for general jurisdiction does not lie somewhere on a continuum between *Helicopteros* and *Perkins*, as many lower courts once believed. The line is instead marked by *Perkins*. Under *Daimler*, there is no scenario in which due process would permit general jurisdiction in the three, four, or five states in which a corporation does the most business.

B. Union Pacific Is Not "At Home" in Oregon

In this case, there is no dispute that Union Pacific's place of incorporation is Delaware, and its principal place of business is in Omaha, Nebraska. Union Pacific's corporate offices, its rail traffic control center, and its highest concentration of employees are all in Nebraska. ER 9, 38, 39.

The undisputed evidence also reflects that Union Pacific's contacts with Oregon fall far short of the threshold set in *Perkins* for establishing general

⁶ See also *Brown v. Lockheed Martin Corp.*, 814 F3d 619, 629 (2d Cir 2016) ("[W]hen a corporation is neither incorporated nor maintains its principal place of business in a state, mere contacts, no matter how 'systematic and continuous,' are extraordinarily unlikely to add up to an 'exceptional case.'").

jurisdiction somewhere other than Union Pacific's place of incorporation and its formal principal place of business. Union Pacific employs more than four times as many people in Nebraska than it does in Oregon, and it generates significantly more revenue in Nebraska than it does in Oregon. ER 9, 38-39, 54, 65. Unlike the defendant in *Perkins*, whose sole wartime business activities were conducted in Ohio, Oregon is in no sense the center of Union Pacific's business activities or the surrogate or *de facto* principal place of business. To the contrary, Nebraska is Union Pacific's *formal* and *de facto* principal place of business, and it has been for over 150 years.

A more apt comparator is *Daimler* itself. In *Daimler*, the defendant generated only 2.4 percent of its total revenue in California; similarly, Union Pacific generates only 2.7 percent of its total revenue in Oregon. *Compare Daimler*, 134 S Ct at 752, with ER 39; *see also* ER 35, 38-39, 54, 64 (indicating that only 3.6 percent of Union Pacific's workforce, 2.9 percent of its annual payroll, and 3.4 percent of its trackage (1,073 out of 32,000 miles of tracks) are in or generated from Oregon and that there are numerous other states in which Union Pacific's operations are more substantial than in Oregon); *Daimler*, 134 S Ct at 762 n 20 (suggesting that general jurisdiction "calls for an appraisal of a corporation's activities in their entirety, nationwide and worldwide").

As in *Daimler*, then, Union Pacific's affiliations with the forum state (*i.e.*, Oregon) represent a tiny fraction of its nationwide operations, and affiliations

that “slim” plainly do not “approach” the mark set in *Perkins* for establishing general jurisdiction. *Id.* at 760 and 761 n 19; *see also Goodyear*, 564 US at 929 (similarly concluding that the corporate defendant’s contacts in North Carolina fell “far short” of those necessary to render it “at home” there).⁷

Thus, while Union Pacific’s in-state operations may have been sufficient to subject it to general jurisdiction in Oregon under the far less demanding “substantial, continuous, and systematic contact” test many courts applied in the past, they do not approach the constitutional bar established in *Goodyear* and *Daimler*, which allows for general jurisdiction only in the one or two states in which the corporation is “at home.” As in *Goodyear* and *Daimler*, Union Pacific’s operations in Oregon fall far short of those necessary to render it “at home” here.

⁷ *Cf. Brown*, 814 F3d at 628-29 (court could not exercise general jurisdiction over aerospace corporation, even though the corporation had been operating in the forum state for more than 30 years and generated \$160 million in annual revenue there); *Martinez v. Aero Caribbean*, 764 F3d 1062, 1070 (9th Cir 2014) (court could not exercise general jurisdiction over airplane manufacturer even though the company conducted between \$225 and \$450 million worth of business in the forum state); *Lanham v. Pilot Travel Centers, LLC*, 2015 WL 5167268 at *1, 4 (D Or Sept. 2, 2015) (court could not exercise general jurisdiction over owner of 10 travel centers, which employ 500 people and generate \$424 million in income).

C. The “At Home” Rule Applies to All Corporations

In his response to Union Pacific’s motion to dismiss, plaintiff suggested that *Goodyear* and *Daimler* are distinguishable because those cases involved corporations based in foreign countries. ER 18-20. To the extent plaintiff claims that due process somehow affords internationally based companies greater protection from general jurisdiction than it does an out-of-state “domestic corporation,” there is nothing in *Goodyear*, *Daimler*, or any other United States Supreme Court case to support that proposition. Nothing in *Goodyear* or *Daimler* suggests that the “at home” standard for general jurisdiction over a corporate defendant applies only to corporations from foreign countries. *See Brown*, 814 F3d at 630 (finding “no sound basis for restricting *Daimler*’s (or *Goodyear*’s) teachings to suits brought by international plaintiffs against international corporate defendants”).

To the contrary, as the Court expressly held in *Goodyear*, the at-home test applies to foreign sister-state corporations in the same way it applies to foreign-country corporations:

“A court may assert general jurisdiction over foreign (*sister-state or foreign-country*) corporations to hear any and all claims against them when their affiliations with the State * * * render them essentially at home in the forum State.”

Goodyear, 564 US at 919 (emphasis added); *see also Daimler*, 134 S Ct at 754 (quoting, with approval, the passage from *Goodyear* quoted above); *id.* at 762-

63 (where the court addresses the “transnational context” of the dispute only after determining that the defendant was not “at home”).

In fact, in her concurring opinion in *Daimler*, Justice Sotomayor actually took issue with the Court’s *failure* to decide the case on narrower grounds, based on its international context, and she confirmed that “the principle announced by the majority would apply equally to preclude general jurisdiction over a U.S. company that is incorporated and has its principal place of business in another U.S. State.” *Daimler*, 134 S Ct at 764 and 773 n 12 (Sotomayor, J., concurring).

In short, under *Goodyear* and *Daimler*, a corporation like Union Pacific, which is incorporated in Delaware and has its principal place of business in Nebraska, is “foreign” to Oregon in exactly the same way that the overseas corporations in *Goodyear* and *Daimler* were foreign to North Carolina and California.

D. ORCP 4 A(4) Is Unenforceable

By now it should be clear that ORCP 4 A(4), which purports to allow Oregon courts to exercise general jurisdiction over corporate defendants that are “engaged in substantial and not isolated activities within this state,” cannot be applied as written. The comment to this rule attempts to qualify the rule to some extent:

“Subsection A.(4) covers a situation where a defendant engages in *such substantial activities* in this state, that it would be subject to jurisdiction in any action whether or not the action arose out of

activities in the state. See Perkins v. Benguet Consolidated Mining Co., 342 U.S. 437 (1952).”

Comment to Rule 4, Final Rule, Oregon Rules of Civil Procedure, Council on Court Procedures, Dec. 2, 1978, at 13 (emphasis added) (App 7). But this qualification, to the extent it is one, fails to adequately capture the due process constraints on general jurisdiction that are described in *Goodyear* and *Daimler*. Even if the comment itself captured the due process test, it does not somehow “fix” the obvious problems with the bare use of the term “substantial” in the rule itself.

Because Oregon courts cannot exercise general jurisdiction if doing so violates due process, ORCP 4 A(4) is unenforceable. See *Goodyear*, 564 US at 918 (“A state court’s assertion of jurisdiction exposes defendants to the State’s coercive power, and is therefore subject to review for compatibility with the * * * Due Process Clause.”); *id.* at 923 (“The Due Process Clause * * * sets the outer boundaries of a state tribunal’s authority to proceed against a defendant.”). If the court enforces ORCP 4 A(4) at all, it should construe it narrowly to allow general jurisdiction over a foreign corporation only if the corporation is “at home” in Oregon as defined in *Goodyear* and *Daimler*. See *State v. Stoneman*, 323 Or 536, 558, 920 P2d 535 (1996) (“a court will give a statute such an interpretation as will avoid constitutional invalidity”). And, for the reasons set forth above, Union Pacific is not “at home” here.

E. The FELA Does Not Create Personal Jurisdiction (Nor Can It)

In his response to Union Pacific's motion to dismiss, plaintiff also argued that Oregon courts can exercise personal jurisdiction over Union Pacific pursuant to Section 56 of the FELA, which provides:

“Under this chapter an action may be brought in a district court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action. The jurisdiction of the courts of the United States under this chapter shall be concurrent with that of the courts of the several States.”

45 USC § 56; *see* ER 14. Plaintiff did not raise this argument in his response to defendant's petition for an alternative writ of mandamus, so he appears to have abandoned it. If he reprises it in his answering brief, this court should easily dispose of it.

By its terms, Section 56 addresses two things. The first sentence governs venue in federal courts. More specifically, it gives FELA plaintiffs the “right to establish venue in the federal court.” *Pope v. Atl. Coast Line R. Co.*, 345 US 379, 385, 73 S Ct 749, 97 L Ed 1094 (1953).⁸ Plaintiff brought this case in state court, not federal court, so the first sentence in Section 56 does not apply here. *See Miles v. Illinois*, 315 US 698, 62 S Ct 827, 86 L Ed 827 (1942) (Section 56 leaves “venue of state court suits * * * to the practice of the forum”).

⁸ *See also Boyd v. Grand Trunk W. R. Co.*, 338 US 263, 265, 70 S Ct 26, 94 L Ed 55 (1949) (Section 56 gives plaintiffs “the initial choice of venue”); *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”).

The second sentence of Section 56 does not really add much. It refers to the “concurrent jurisdiction” of state and federal courts, which merely confirms that state and federal courts have concurrent *subject matter* jurisdiction over FELA claims. See Bryan A. Garner, *A Dictionary of Modern Legal Usage* 195 (2d ed 1995) (“concurrent jurisdiction” means “jurisdiction exercised by more than one court at the same time over the same *subject matter*”) (emphasis added).

Neither sentence, however, speaks to the issue of personal jurisdiction, as a number of courts, including the Supreme Court, have recognized. See, e.g., *Mondou v. New York, New Haven & Hartford R.R. Co.*, 223 US 1, 56, 32 S Ct 169, 56 L Ed 327 (1912) (holding that the FELA does not attempt “to enlarge or regulate the jurisdiction of state courts”); *Fraley v. Chesapeake & Ohio Ry. Co.*, 397 F2d 1, 4 (3d Cir 1968) (noting that parties had “mistakenly treated [Section 56] * * * as a jurisdictional statute instead of a venue provision”); *Imm v. Union Railroad Company*, 289 F2d 858, 859 (3d Cir 1961) (“[Section 56] is a venue provision only,” not a personal jurisdiction statute); *S. Pac. Transp. Co. v. Fox*, 609 So2d 357, 362-63 (Miss 1992) (“Nothing in the [FELA] addresses the matter of personal jurisdiction in the state court. * * * Section 56 speaks to venue of actions in federal courts, not personal jurisdiction in state courts.”).

Nor would one expect Section 56 to speak to personal jurisdiction in state courts, which is normally a question of *state* law, subject to federal due process constraints. *North Pacific*, 293 Or at 351-52, 356; *Goodyear*, 546 US at 918, 923. Moreover, personal jurisdiction has nothing to do with venue or subject matter jurisdiction. “The question of personal jurisdiction * * * goes to the court’s power to exercise control over the parties [and] is typically decided *in advance of venue*.” *Leroy v. Great W. United Corp.*, 443 US 173, 180, 99 S Ct 2710, 61 L Ed 2d 464 (1979) (emphasis added). “Proper venue” thus “does not eliminate the requisite of personal jurisdiction over the defendant.” *Robertson v. R.R. Labor Bd.*, 268 US 619, 623, 45 S Ct 621, 69 L Ed 1119 (1925). When a federal statute establishes venue, it merely reflects Congress’s “intent that venue should always lie in *some federal court whenever federal courts have personal jurisdiction* over the defendant.” *Atlantic Marine Const. Co., Inc. v. U.S. Dist. Court for Western Dist. of Texas*, ___ US ___, ___, 134 S Ct 568, 578, 187 L Ed 2d 487 (2013) (emphasis added); *see also Action Embroidery Corp. v. Atl. Embroidery, Inc.*, 368 F3d 1174, 1178-79 (9th Cir 2004) (“competence to exercise personal jurisdiction over a defendant is distinct from the question of whether venue is proper”). “Subject-matter and personal jurisdiction” also “serve different purposes,” which “affect the legal character of the two requirements.” *Ins. Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 US 694, 701, 102 S Ct 2099, 72 L Ed 2d 492 (1982).

For these reasons, Section 56 cannot and should not be read to allow state courts to exercise personal jurisdiction over a railroad employer. Even if it could plausibly be read this way, the court should reject plaintiff’s proposed construction because due process constraints on personal jurisdiction apply to any jurisdiction-granting statute, whether state or federal.⁹ When a “statute’s constitutionality is in doubt,” courts “have an obligation to interpret the law, if possible, to avoid the constitutional problem.” *Johnson v. U.S.*, ___ US ___, 135 S Ct 2551, 2578, 192 L Ed 2d 569 (2015). If a court cannot interpret the law to avoid the constitutional problem, then it has “no choice but to enforce the paramount commands of the Constitution.” *Trop v. Dulles*, 356 US 86, 104, 78 S Ct 590, 2 L Ed 2d 630 (1958) (plurality opinion); *see also Hagan v. Gemstate Manufacturing, Inc.*, 328 Or 535, 545, 982 P2d 1108 (1999) (“When this court construes a federal statute * * *, we follow the methodology prescribed by federal courts.”). As explained above, the Due Process Clause precludes Oregon courts from exercising specific or general personal jurisdiction over Union Pacific in this case.

⁹ In *Tyrrell v. BNSF Railway Co.*, ___ P3d ___, 2016 WL 3067430 (Mont May 31, 2016), the Montana Supreme Court held that the FELA gives state courts “general jurisdiction” over railroad employers. The court should decline to follow this decision, which is based on a misreading of *Daimler*, Section 56, and the Supreme Court cases construing it, none of which even mentions personal jurisdiction.

IV. CONCLUSION

For the reasons set forth above, 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: June 30, 2016

Respectfully submitted,

COSGRAVE VERGEER KESTER LLP

s/Wendy M. Margolis

Wendy M. Margolis, OSB No. 945675

s/Julie A. Smith

Julie A. Smith, OSB No. 983450

For Defendant-Relator
Union Pacific Railroad Company

**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 5,989 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: June 30, 2016

s/Julie A. Smith

Julie A. Smith

CERTIFICATE OF FILING AND MAILING

I hereby certify that I electronically filed the foregoing brief with the State Court Administrator by using the Oregon Appellate eFiling system on the 30th day of June, 2016.

I further certify that I electronically-served the foregoing brief upon the persons listed below that are registered efilers, by using the Oregon Appellate eFiling system on the 30th day of June, 2016.

Any person listed below that is not a registered efiler was served by depositing in the United States Post Office, at Portland, Oregon on the 30th day of June, 2016, a true and correct copy, in a sealed envelope with the postage pre-paid, addressed to the said persons at the addresses shown below:

by electronic service

James K. Vucinovich
Rossi Vucinovich PC
1000 Second Avenue, Suite 1610
Seattle, WA 98104

and

Paul S. Bovarnick
Rose Senders & Bovarnick, LLC
1205 NW 25th Avenue
Portland, OR 97210

Attorneys for Plaintiff

by U.S. Mail

Honorable Kenneth R. Walker
Multnomah County Circuit Court
1021 SW Fourth Avenue
Portland, OR 97204

DATED: June 30, 2016

s/Julie A. Smith
Julie A. Smith