IN THE SUPREME COURT FOR THE STATE OF OREGON

CHRISTOPHER S. BARRETT, Plaintiff-Adverse Party, vs. UNION PACIFIC RAILROAD COMPANY, Defendant-Relator.	Multnomah County Circuit Court Case No. 15CV27317 Supreme Court Case No. S063914 **MANDAMUS PROCEEEDING**

PLAINTIFF-ADVERSE PARTY'S ANSWERING BRIEF

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

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August 2016

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I. STATEMENT OF THE CASE

A. Nature of the Proceeding and Relief Sought

Plaintiff-Adverse Party Christopher S. Barrett (hereinafter "Plaintiff") agrees with Defendant-Relator Union Pacific's statement that this mandamus proceeding does raise a basic constitutional question. However, that is where Plaintiff's agreement ends. The constitutional question presented by this matter is as follows: Is it a violation of due process rights under the U.S. Constitution for an interstate railroad corporation that has continuously and systematically engaged in extensive business throughout the State of Oregon for over 100 years, that employees almost 1700 employees and owns almost 1100 miles of track in Oregon (including the corresponding property rights), and that generates almost $650 million in revenue per year in Oregon, to defend a FELA lawsuit in Oregon brought by that interstate railroad's employee who is an Oregon resident, concerning a matter that arose as a direct result of that corporation's operations as an interstate railroad?

This matter involves a claim brought pursuant to the Federal Employers' Liability Act, 45 U.S.C. §§ 51-60 (hereinafter "FELA"), a statute enacted by Congress in the early 1900s, and which is applied uniformly in all Courts, State or Federal, throughout the country. This particular matter arises out of injuries Plaintiff suffered while working in Idaho in the course and scope of his employment with Defendant-Relator Union Pacific Railroad Company (hereinafter "UP"). Pursuant to the specific grant of authority by Congress in 45 U.S.C. § 56, Plaintiff initiated

his lawsuit in Multnomah County Circuit Court, a jurisdiction in which UP was doing business at the time of the commencement of the action. UP subsequently moved to dismiss for lack of personal jurisdiction. Plaintiff responded arguing that the Court did possess personal jurisdiction over UP and that the express terms of the FELA authorized the action in Oregon State Court. After hearing, the trial court denied UP's motion without explanation.

UP subsequently petitioned this Court for an alternative writ of mandamus directing the trial court to either dismiss the action or show cause for denying UP's motion. This Court issued an alternative writ. When the trial court did not respond to the alternative writ, UP initiated this proceeding, seeking a writ of mandamus ordering the trial court to vacate its prior order and to dismiss the case for lack of personal jurisdiction over UP.

B. Nature of the Order on Review

The Multnomah County Circuit Court entered an order denying UP's motion to dismiss for lack of personal jurisdiction pursuant to ORCP 21 A(2).

C. Basis of Appellate Jurisdiction

Plaintiff does not dispute UP's stated basis for appellate jurisdiction.

D. Relevant Dates for Mandamus Purposes

Plaintiff does not dispute UP's statement of the relevant dates for Mandamus purposes.

E. Questions Presented

1. Is it an unconstitutional violation of the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution to require UP, a railroad corporation engaged in operations in and throughout the State of Oregon for over 100 years, to defend a FELA claim in an Oregon state court?

2. In a claim brought pursuant to the FELA, enacted by Congress in recognition of the unique and "exceptional" nature of the rail industry and railroad operations, do Oregon courts have personal jurisdiction over UP in FELA claims, which admits it was and is "doing business" throughout the State of Oregon?

3. Does the Oregon Court have specific personal jurisdiction over the claim in this matter as a result of UP's activity of hiring and employing Plaintiff in Oregon, when his complained of injuries arose directly out of that employment relationship?

F. Summary of Argument

1. The U. S. Supreme Court has had occasion within the last several years to address the doctrine of general personal jurisdiction in two contexts that could not be more factually distinguishable from the present matter. In *Goodyear Dunlop Tire Operations, S.A. v. Brown*, 564 U.S. 915 (2011), and *Daimler AG v. Bauman*, ___ U.S. ___, 134 S. Ct. 746 (2014), the Court addressed whether a United States court could properly exercise general personal jurisdiction over corporations based and

operating wholly in foreign countries with very little or no connection of any type to the chosen forum, on claims arising out of acts and omissions which occurred wholly in foreign countries. In holding that general personal jurisdiction did not exist over those wholly foreign country corporations, the Supreme Court did not, as UP asserts, hold that the Due Process Clause prohibits states from exercising general personal jurisdiction over a corporation outside of its state of incorporation or the state of its principal place of business. Rather, the Supreme Court merely stated that a corporation's state of incorporation and its state of principal place of business are "paradigm all-purpose" forums, in which a corporation will always be subject to personal jurisdiction.

At no point did the Supreme Court ever foreclose the ability of forums outside of the "paradigm all-purpose" forums to exercise general personal jurisdiction. At no point did the Supreme Court ever state that there is a "sliver of a possibility of general jurisdiction" in a forum other than the paradigm all-purpose forums. And, at no point did the Supreme Court ever state that in order for a forum other than the paradigm all-purpose forums to exercise general jurisdiction, the state must have become the "corporation's *de facto*, if not formal, principal place of business." Rather, in its decisions in *Goodyear* and *Daimler*, the Supreme Court was attempting to reign it what it deemed as "such exorbitant exercises of all-purpose jurisdiction" in light of the "transnational context" of those claims and the "risks to international

comity" posed by such an expansive view of general personal jurisdiction. The concepts regarding the fundamental demands of due process in the exercise of adjudicatory authority remain unchanged.

UP is subject to personal jurisdiction in Oregon Courts for this FELA claim, without regard to whether the complained of injury occurred in Oregon. UP's admittedly extensive history of operating its railroad company throughout the State of Oregon is a prime of example of the type of continuous and systematic contacts with the State that are sufficient to render it "essentially at home" in Oregon. Further, Plaintiff is a resident of Oregon, employed by UP in Oregon and other states. In addition, UP has voluntarily complied with statutory and regulatory schemes and submitted to the jurisdiction of the Oregon Courts on countless occasions prior to this matter. UP's due process rights are in no manner violated by the exercise of jurisdiction in this matter.

2. The U.S. Supreme Court and Congress have recognized the unique and "exceptional" nature of the rail industry and the needs of its injured employees. Congress specifically fashioned a remedy for injured railroad employees, which intentionally departed from the common law in many respects. Further, Congress specifically authorized concurrent jurisdiction of FELA claims in both State and Federal courts in any state in which a railroad "shall be doing business" at the time of the commencement of the action.

The Supreme Court has also consistently recognized the unique and "exceptional" nature of FELA claims, recognizing the purpose and intent of the statute since its inception. It has rejected railroad's constitutional jurisdictional arguments under 45 U.S.C. § 56, specifically noting that the FELA does not create an undue burden on interstate commerce, and recognized the unfair burden of requiring rail employee plaintiffs to travel great distances to file a case. There is no dispute that the railroad industry is unique and exceptional, and the exercise of personal jurisdiction over UP under the FELA by Oregon Courts does not violate its constitutional right to due process.

3. The FELA is the sole remedy for employees of interstate railroads injured in the course and scope of their employment, and is available solely to said employees. Employment by the railroad is therefore an essential element of any claim pursuant to the FELA. UP affirmatively engaged in the activity of employing, overseeing and directing Plaintiff's work activities, an Oregon resident, in the State of Oregon. As a result, this claim arises out of and relates to UP's activities in the State of Oregon. The Oregon court may therefore exercise specific personal jurisdiction over UP in this matter.

G. Summary of Material Facts

Plaintiff brought this action pursuant to the provisions of the FELA for injuries he suffered on August 3, 2015. ER 28-33.[1] Plaintiff is a resident of Albany, Oregon. ER 28. On August 3, 2015, Plaintiff was working within the course and scope of his employment as a spike machine operator near Minidoka, Idaho, installing railroad spikes. ER 30. The spike machine was in a state of disrepair, which caused Plaintiff to be subjected to excessive vibration and jarring. *Id.* As a result, Plaintiff suffered injuries to his kidneys. ER 31. Plaintiff then initiated the underlying action.

UP is an interstate railroad carrier, operating in twenty-three states across the western portion of the United States. UP has been engaged in operations in the state of Oregon for over 125 years. ER 35, 38. UP employs almost 1700 persons in Oregon, including Plaintiff, with an annual payroll of $144.6 million. ER 35-39. By its own admission, it supports over 7600 jobs in Oregon. ER 35. UP owns and operates almost 1100 miles of track throughout the State. It owns and operates switching yards and locomotive facilities in Portland and a classification yard in Hinkle, and considers La Grande an important operation and crew change point. ER 35-36. It generates more than $645 million in revenue from its operations in Oregon. ER 39, 54. Further, according to 2014 statistics, UP lists its capital spending in Oregon in excess of $81 million and its in-state purchases in Oregon in

[1] All references in this Answering Brief are to the Excerpt of Record filed by Union Pacific with its Petition for Alternative Writ of Mandamus.

excess of $116 million. (ER – 65). By operating in Oregon, UP has consented to extensive regulation by the State of Oregon. UP is subject to and complies with substantial regulation regarding its operation as a railroad. ORS Ch. 824. In addition, in compliance with business registration regulations, UP has been registered to do business in Oregon since 1969,[2] and maintains an agent for service of process in the state.[3]

II. ASSIGNMENT OF ERROR

A. Preservation of Error

The issue of personal jurisdiction over UP is preserved, both as to general personal jurisdiction and specific personal jurisdiction. This Court has authority to affirm the lower court's ruling on any basis, including one not considered by the lower court. Although Plaintiff did not explicitly address the issue of specific personal jurisdiction below, the issue of personal jurisdiction is preserved and Plaintiff may therefore assert specific personal jurisdiction as a basis for jurisdiction on appeal.

B. Scope and Standard of Review

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[2] Originally registered as Southern Pacific Transportation Company, with name change to Union Pacific Railroad Company after acquisition in 1998.

[3] Pursuant to OEC 201(b), the Court is authorized to take judicial notice of UP's record of corporate filings maintained by the office of the Oregon Secretary of State.

Plaintiff agrees that this matter involves a question of law that the Court reviews for legal error. The Court liberally construes pleadings and affidavits in favor of jurisdiction if possible. *Boyer v. Interstate Prod. Credit Ass'n*, 127 Or. Ct. App. 182, 186, 872 P.2d 23 (1994); *Kotera v. Daioh Int'l U.S.A. Corp.*, 179 Or. App. 253, 40 P.3d 506 (2002).

III. ARGUMENT

General personal jurisdiction over a defendant in Oregon is authorized when the action against the defendant in Oregon is consistent with the Oregon Constitution or the Constitution of the United States. ORCP 4 L. Since there is no due process clause in the Oregon Constitution, the exercise of general jurisdiction by an Oregon court is therefore governed by the Due Process Clause of the Fourteenth Amendment to the United States Constitution. *Robinson v. Harley-Davidson Motor Co.*, 354 Or. 572, 577, 316 P.3d 287, 291 (2013).

The requirements of the Due Process Clause may be properly summed up in a single word: Fairness. The U.S. Supreme Court has consistently reiterated that due process demands "fair play and substantial justice." *Daimler*, 134 S. Ct. at 763, *citing Int'l Shoe v. Washington*, 326 U.S. 310, 316 (1945). UP has always recognized Oregon's authority to exercise general personal jurisdiction over it in FELA claims, and contrary to UP's contention, the U.S. Supreme Court's *Daimler* and *Goodyear* opinions do not alter this conclusion. The exercise of general

jurisdiction over UP in this matter fully comports with the due process demands of "fair play and substantial justice," and this Court should so hold.

A. A Corporation is Subject to General Personal Jurisdiction in Any State Where its Affiliations with the State are so Continuous and Systematic as to Render it "Essentially at Home in the Forum State"

The boundaries of a state court's authority to exercise personal jurisdiction over a defendant are established by the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution. *Goodyear*, 564 U.S. at 923. The U.S. Supreme Court has referred to the case of *International Shoe v. Washington*, 326 U.S. 310 (1945), as the "pathmarking" and "canonical" decision in this area. *Goodyear*, 564 U.S. at 919, 923. In *International Shoe*, the Supreme Court stated the guiding principal in determining personal jurisdiction: The exercise of *in personam* jurisdiction must "not offend 'traditional notions of fair play and substantial justice.'" *International Shoe*, 326 U.S. at 316 (*quoting Milliken v. Meyer*, 311 U.S. 457, 463 (1941)). The Court has reaffirmed this underlying principal: "The essence of the issue here, at the constitutional level, is a like one of general fairness to the corporation." *Perkins v. Benguet Consolidate Mining Co.*, 342 U.S. 437, 445 (1952).

As established by subsequent decisions, *International Shoe* laid the groundwork for what has since been differentiated as "specific personal jurisdiction" and "general personal jurisdiction." Specific personal jurisdiction exists when "the activities of the corporation [within the state] have not only been continuous and

systematic, but also give rise to the liabilities sued upon(.)" *Int'l Shoe*, 326 U.S. at 317 ("Presence" in the forum "has never been doubted" in such instances); *Daimler*, ___ U.S. at ___, 134 S. Ct. at 754. In contrast, general personal jurisdiction arises when "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." *Int'l Shoe*, 326 U.S. at 318. The Court continued by explaining:

> It is evident that the criteria by which we mark the boundary line between those activities which justify the subjection of a corporation to suit, and those which do not, cannot be simply mechanical or quantitative. The test is not merely, as has sometimes been suggested, whether the activity, which the corporation has seen fit to procure through its agents in another state, is a little more or a little less. . . . Whether due process is satisfied must depend rather upon the quality and nature of the activity in relation to the fair and orderly administration of the laws which it was the purpose of the due process clause to insure.

Id. at 319 (citations omitted).

Subsequent decisions by the Supreme Court brought further clarity to the rationale underlying the requirements of due process, while affirming the underlying concept of fairness. In *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437 (1952), the defendant was a corporation organized and existing in the Philippine Islands. The claim resulted from activities and operations of the mining company which occurred solely in the Philippine Islands. *Id.* at 447. The operations of the mining company were shut down during occupation of the islands in World War II, at which

time the president of the company came to Ohio and carried on administrative activities of the company. *Id.* at 447-48. In holding that maintaining a claim in Ohio satisfied due process requirements, the Supreme Court affirmed the principal underlying the Due Process Clause: "The essence of the issue here, at the constitutional level, is a like one of general fairness to the corporation." *Id.* at 445.[4]

In *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408 (1984), the plaintiff brought a wrongful death action against a Texas state court against a Columbian corporation. It was conceded that the claims did not arise out of or relate to any activity of the corporation in Texas. *Id.* at 415. The foreign country corporation did not maintain a place of business and was never licensed to do business in Texas. Contacts were alleged based upon a single trip to Houston, Texas by the chief executive officer of the corporation, as well as accepting checks from a Texas back, and purchase of some equipment from Texas which included training of some corporate personnel in Texas. *Id.* at 415-16. In holding these contacts insufficient to support personal jurisdiction, the Supreme Court determined that the case was factually similar and therefore controlled by its prior ruling in 1923, which

[4] As early as 1957, the Supreme Court had begun to recognize the effect of "modern" interstate commerce on the jurisdictional analysis. "At the same time modern transportation and communication have made it much less burdensome for a party sued to defend himself in a State where he engages in economic activity." *McGee v. Int'l Life Ins. Co.*, 355 U.S. 220, 223 (1957).

held that simply making purchases, as well as related trips associated with those purchases, is not a sufficient basis for a State's assertion of all-purpose jurisdiction. *Id.* at 417, *citing Rosenberg Bros. & Co. v. Curtis Brown Co.*, 260 U.S. 516 (1923).

In another decision rendered shortly after *Helicopteros*, the Court again reaffirmed the general underlying principal of fairness. "(T)he Due Process Clause 'gives a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit.'" *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 471-72 (1985) (*quoting World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980)).

It was against this backdrop that the Supreme Court decided *Goodyear*.

In *Goodyear*, two people were killed in a bus accident near Paris, France. *Goodyear*, 564 U.S. at 918. The plaintiffs brought suit in North Carolina state court against four distinct corporate entities. The plaintiffs filed claims against Goodyear USA, which was incorporated in Ohio and did not maintain its principal place of business in North Carolina, but did maintain plants and regularly engaged in commercial activity within the jurisdiction. *Id.* at 918, 920. As specifically noted by the Supreme Court, Goodyear USA did not contest the ability of the North Carolina court to exercise general personal jurisdiction over the corporation. *Id.* at 921. The parties objecting to the court's exercise of jurisdiction were the three independent

subsidiaries of Goodyear USA that were international foreign corporations, each organized and operating in separate countries: Turkey, France and Luxembourg. *Id.* at 920-21. The tire that failed in France and allegedly cause the accident was manufactured by the international foreign subsidiary in Turkey. *Id.* at 918. The North Carolina court, "confusing or blending" aspects of general and specific jurisdiction, held that general jurisdiction existed because some of the tires manufactured abroad by the international foreign corporations had "reached" North Carolina through the "stream of commerce." *Id.* at 919-20.

In ruling that the three foreign subsidiary companies were not subject to general personal jurisdiction in North Carolina courts, the Supreme Court noted:

> [The international foreign corporate defendants] are not registered to do business in North Carolina. They have no place of business, employees, or bank accounts in North Carolina. They do not design, manufacture, or advertise their products in North Carolina. And they do not solicit business in North Carolina or themselves sell or ship tires to North Carolina customers. . . . [T]he type of tire involved in the accident, a Goodyear Regional RHS tire manufactured by Goodyear Turkey, was never distributed in North Carolina. . . .
>
> Nothing in the record, the court observed, indicated that petitioners 'took any affirmative action to cause tires which they had manufactured to be shipped to North Carolina.'

Id. at 921-22 (Citations omitted). The Supreme Court continued, noting that tires from the international foreign corporations "reached" North Carolina through the "stream of commerce" not because of the direct actions of the three foreign

international subsidiaries but rather through a "highly-organized distribution process" which only involved other Goodyear USA subsidiaries. *Id.* at 922.

The Court correctly determined that these "attenuated connections" fell short of the "continuous and systematic general business contacts" that would satisfy due process requirement. *Id.* at 929. In doing so, the Court set forth the language that UP now seizes upon: "general personal jurisdiction exists when 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) (*quoting International Shoe*, 326 U.S. at 317). This language, combined with the language used by the *Daimler* Court in a footnote to its opinion, has been seized upon in an attempt to argue that general personal jurisdiction cannot now exist under circumstances where it was never previously questioned; circumstances like the present matter where it still should not be properly questioned, even in the wake of *Goodyear* and *Daimler*.

Three years after its decision in *Goodyear*, the Supreme Court was faced with the jurisdictional issues raised by *Daimler*. In *Daimler*, the plaintiffs were victims of the Argentine "dirty war" and asserted claims under the Alien Tort Statute and Torture Victim Protection Act, as well as under Argentine and California law. The plaintiffs sued Daimler, a German corporation headquartered in Germany, in federal court in California, alleging that Daimler's wholly-owned Argentinian subsidiary, MB Argentina, had collaborated with the Argentinian state security forces to kidnap,

torture and kill certain of MB Argentina's workers, including plaintiffs. Stated succinctly, Argentinian citizens were suing a German corporation in a U.S. District Court in California, for acts committed against them in Argentina by the German corporation's Argentinian subsidiary. The Plaintiffs asserted that jurisdiction over Daimler in the California federal court was based upon the California contacts of Mercedes-Benz USA (MBUSA).

MBUSA, an "indirect subsidiary" and "independent contractor" of Daimler, was incorporated in Delaware, had its principal place of business in New Jersey, and was Daimler's importer and distributor of Mercedes automobiles. MBUSA had substantial facilities and operations in California. *Daimler*, 134 S. Ct. at 752. However, the Supreme Court identified only "sporadic contacts" between Daimler, the actual defendant, and California. *Id.* at 758. Therefore, the exercise of jurisdiction over Daimler in the California federal court would have been based upon the contacts within the state of Daimler's "indirect subsidiary," which was in no manner alleged to have been involved in way manner in the commission of the tortious acts.

In rendering its decision, the Court noted that it had previously, in *Goodyear*, addressed the question of whether "foreign subsidiaries of a United States parent corporation [are] amenable to suit in state court on claims unrelated to any activity of the subsidiaries in the forum State." *Id.* at 757. In *Daimler*, the Court again

explicitly set forth the question it was answering: "We granted certiorari to decide whether, consistent with the Due Process Clause of the Fourteenth Amendment, Daimler is amenable to suit in California courts for claims involving only foreign plaintiffs and conduct occurring entirely abroad." *Daimler*, 134 S. Ct. at 753. The Court made clear that the rationale of the Ninth Circuit – its determination that MBUSA's services were "important" to Daimler – could not stand for "it will always yield a pro-jurisdiction answer," *Id.* at 759, twice calling such exercise of jurisdiction "exorbitant."[5] It subsequently affirmed the "test" it outlined in *Goodyear*. The Court held that general personal jurisdiction exists when a corporation's "affiliations with the State are so 'continuous and systematic' as to render [it] essentially at home in the forum State.'" *Id.* at 761 (*quoting Goodyear*, 564 U.S. at 919). It then completed the language now seized upon by UP by stating in a footnote that in an "exceptional" case, a corporation may be at home in a forum other than the paradigm forums. *Id.* at 761 n. 19.

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[5] "Exercises of personal jurisdiction so exorbitant, we hold, are barred by due process constraints on the assertion of adjudicatory authority." *Daimler*, 134 S. Ct. at 751.
"Such exorbitant exercises of all-purpose jurisdiction would scarcely permit out-of-state defendants 'to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit.'" *Daimler*, 134 S. Ct. at 761-62, *quoting Burger King Corp.*, 471 U.S. at 472.

The language of another footnote in *Daimler*, though not often cited by defendants seeking to avoid a court's jurisdiction, is instructive. As the Court noted, specific personal jurisdiction has come to the forefront of contemporary personal jurisdiction basis while general personal jurisdiction has "come to occupy a less dominant place." *Daimler*, 134 S. Ct. at 758. The Court did not state general jurisdiction is the "exception, not the rule" as contended by UP, but merely that specific jurisdiction has come to occupy a more prominent role. General jurisdiction remains, as it always has, a wholly viable basis for jurisdiction.

In the footnote cited after this comment, the Court stated, "As the Court made plain in *Goodyear* and repeats here, general jurisdiction requires affiliations 'so 'continuous and systematic' as to render [the foreign corporation] essentially at home in the forum State.' (citation omitted) *i.e.*, comparable to a domestic enterprise in that State." *Daimler*, 134 S. Ct. at 758 n. 11 (emphasis added). The list of domestic enterprises in Oregon that can be said to have maintained "affiliations so continuous and systematic" equivalent to UP, over the time period for which UP has maintained these affiliations, must be very small indeed. UP's presence in Oregon dwarfs the vast majority of the State's domestic enterprises.

What must be noted is what the Supreme Court did not do in deciding *Goodyear* and *Daimler*. The Court did not repudiate its long-held conclusion about what is ultimately demanded by the Due Process Clause: Fairness. The Court

reiterated that "fair play and substantial justice" is what due process demands. *Daimler*, 114 S. Ct. at 763 (*citing Int'l Shoe*, 326 U.S. at 316). It further reiterated that due process must be such as to allow "out-of-state defendants 'to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit.'" *Id.* at 761-62 (*quoting Burger King Corp.*, 471 U.S. at 472). The principles underlying the jurisdictional limits of the Due Process Clause remain as they have always been, and the language used by the Supreme Court in *Goodyear* and *Daimler* did nothing to repudiate these long-standing principles.

The Supreme Court also did <u>not</u> set forth a "test" to be applied in all cases whereby a corporation may only be "at home" in its state of incorporation and its principal place of business. The *Goodyear* Court, in using the "at home" language, specifically typed these two places as the "paradigm" bases for the exercise of general personal jurisdiction. *Goodyear*, 564 U.S. at 924. "Paradigm" is defined as "example", "pattern."[6]; *see State v. Ritter*, 280 Or. App. 281, 287, ___ P.3d ___ (2016) (resorting to dictionary definition to determine plain meaning of word that is a term of common usage). The Supreme Court emphasized this point in *Daimler*: "*Goodyear* did not hold that a corporation may be subject to general jurisdiction *only* in a forum where it is incorporated or has its principal place of business; it simply

[6] *Webster's Third New Int'l Dictionary* 1635 (unabridged ed. 1993)

typed those places paradigm all-purpose forums." *Daimler*, 134 S. Ct. at 760 (emphasis in original). The Supreme Court never indicated that all-purpose jurisdiction may exist only in these two forums, and UP's contention in this regard is simply wrong.

Goodyear and *Daimler* cannot be separated from their international context. The *Daimler* Court specifically noted this context, recognizing the "transnational context" of the dispute, and the fact that recent decisions of the Supreme Court had rendered the plaintiffs' claims under the Alien Tort Statute and Torture Victim Protection Act infirm. 134 S. Ct. at 762-63. The Court further noted that other nations do not share the approach advanced by the Ninth Circuit, stating that the lower court had "paid little heed to the risks to international comity" that would arise out of its "uninhibited" approach. *Id.* at 763. While the holdings of *Goodyear* and *Daimler* are not, on their face, limited to only international foreign corporations, the holdings cannot be divorced from their international context.

This Court has recently had occasion to delineate the due process parameters of personal jurisdiction subsequent to the U.S. Supreme Court's decision in *Goodyear*. In *Robinson v. Harley-Davidson Motor Co.*, 354 Or. 572, 316 P.3d 287 (2013), this Court stated: "[A]n exercise of jurisdiction over a nonresident defendant comports with due process if there exists 'minimum contacts' between the defendant and the forum state such that maintaining suit in the state would 'not offend

traditional notions of fair play and substantial justice.'" 354 Or. at 577-78, 316 P.3d at 291 (*quoting World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 291-92 (1980)). Relying upon the Supreme Court's decision in *Goodyear*, the *Robinson* Court stated that "general jurisdiction is present in 'instances in which the continuous operations within a state [are] so substantial and of such a nature as to justify suit against [the defendant] on causes of actions arising from dealings entirely distinct from those activities.'" 354 Or. at 578, 316 P.3d at 292-93 (*quoting Goodyear*, 564 U.S. at 924).

Against this backdrop, only one conclusion is appropriate: UP is subject to the general jurisdiction of Oregon Courts in this matter.

B. Union Pacific is "At Home" in Oregon, a Forum State Where it has been Continuously Operating for Over 100 Years, and is Not a "Foreign" Corporation Analagous to those in *Daimler* or *Goodyear*.

There is no dispute that UP is incorporated in Delaware and has its principal place of business in Nebraska, and therefore Oregon is not a "paradigm" forum for all-purpose jurisdiction. However, a proper analysis of the factors set forth above results in the conclusion that general jurisdiction over UP in this matter fully comports with due process requirements.

As this Court has concluded, in reliance upon the Supreme Court's holding in *Goodyear*, "general jurisdiction is present in 'instances in which the continuous operations within a state [are] so substantial and of such a nature as to justify suit

against [the defendant] on causes of actions arising from dealings entirely distinct from those activities." *Robinson*, 354 Or. at 578, 316 P.3d at 291-92 (*quoting Goodyear*, 564 U.S. at 924). This is the requirement of the Due Process Clause of the Fourteenth Amendment. "Due process is thus satisfied if '[UP's] conduct and connection with [Oregon] are such that [it] should reasonably anticipate being haled into court there." *Id.* at 578, 316 P.3d at 291 (*quoting World-Wide Volkswagen*, 444 U.S. at 297).

While UP accurately asserts that its presence in Nebraska is greater than its presence in Oregon, that fact is simply not determinative. UP cannot dispute that its continuous operation and presence within Oregon is very substantial. UP employs almost 1700 persons in Oregon, including Plaintiff, with an annual payroll of $144.6 million, and supports over 7600 jobs in Oregon; owns and operates almost 1100 miles of track throughout the state, with the corresponding property ownership rights, including switching yards, locomotive facilities, classification yards, and other important operation centers; and generates in excess of $645 million in revenue from its Oregon operations. ER 35-39, 54. Further, it lists its capital spending in Oregon in excess of $81 million and its in-state purchases in Oregon above $116 million. ER 65. While this does not equal its concentrated presence in Nebraska, this presence is "substantial" and of "such a nature" as to make the exercise of

general jurisdiction fully in compliance with due process principles, particularly in a case brought pursuant to the FELA, 45 U.S.C. §§ 51-60.[7]

Plaintiff does not maintain that the holdings of *Goodyear* and *Daimler* are applicable only to "foreign-country" corporations. The *Goodyear* Court specifically stated otherwise. *Goodyear*, 564 U.S. at 919. However, UP's attempt to analogize itself with the foreign-country corporations in those cases is simply inapt. If UP must be analogized to the parties in those matters, the only conclusion is that it is closer to the sister-state corporations, Goodyear USA and MBUSA. Goodyear USA, admittedly organized in and with principal place of business in states other than North Carolina, did have plants in North Carolina and regularly engaged in commercial activity there, a statement that more than fairly applies to UP's status in Oregon. *Id.* at 918. Goodyear USA was the "sister-state" corporation, and did not even challenge the authority of the North Carolina court's ability to exercise personal jurisdiction in that matter, a matter occurring abroad and involving only the conduct of foreign-country indirect subsidiaries of Goodyear USA. *Id.* In *Daimler*, MBUSA, the "sister-state" corporation, was incorporated in Delaware with principal place of business in New Jersey, but did maintain substantial facilities and operations in California. *Daimler*, 134 S. Ct. at 752. Daimler did not challenge the California trial

[7] The Court is directed to Section III(C) for the full discussion of how FELA claims are "exceptional" and satisfy the due process requirements necessary to assert personal jurisdiction.

court's authority to exercise personal jurisdiction over MBUSA, a corporation with no connection of any type to any of the activities complained of in that matter. *Id.* at 758.[8]

While UP attempts to "do the math" to align itself with Daimler, it cannot credibly claim that it is "foreign" to Oregon in "exactly the same manner" as the overseas defendants. The three foreign defendants in *Goodyear* were companies that were organized and operated overseas, were being sued for an injury that occurred overseas, and had taken no affirmative action to have any presence of any type in North Carolina. In *Daimler*, Daimler was a German corporation, headquartered in Germany, that was being sued by Argentinian plaintiffs for activity allegedly conducted by its Argentinian subsidiary in Argentina. The *Goodyear* and *Daimler* defendants were foreign-country corporations that were being sued for injuries that occurred in foreign countries as a result of the actions of those foreign country corporations that were perpetrated in foreign countries.

In contrast, UP is an interstate railroad operating throughout the western and central United States, engaged in very substantial activity within Oregon. It is being sued by a resident of Oregon who was injured in Idaho while employed by UP in the course and scope of its interstate railroad operations. A due process analysis is, at

[8] The Supreme Court did note that there was a "suggestion" in *Daimler's* brief that in light of *Goodyear*, MBUSA "may not" be subject to general personal jurisdiction in California. *Daimler*, 134 S. Ct. at 758

its heart, an assessment of fundamental fairness. In no manner can UP be properly and fairly analogized to the foreign-country defendants in those cases.

The *Daimler* Court made clear that it was attempting to clarify the difference between specific and general jurisdiction, a distinction that had troubled courts, including the North Carolina court in *Goodyear*. *Daimler*, 134 S. Ct. at 757. What the Supreme Court did not do is repudiate the long-standing essence of the due process requirements for the exercise of jurisdiction; an essence recognized by the Court even prior to its "pathmarking" and "canonical" decision in *International Shoe*.

Focused on the "essentially at home" wording of the *Goodyear* decision, and the use of the word "exceptional" in a footnote of the *Daimler* decision, UP now challenges jurisdiction in the exact Court to which is has routinely submitted to jurisdiction in the past without a moment's hesitation. It argues the "home" language can only mean its state of incorporation or principal place of business, and the "exceptional" language "only leaves open a sliver of a possibility" of all-purpose jurisdiction, and only in a state "that has become the corporation's *de facto*" principal place of business.

These decisions of the Supreme Court did not create new law; they did not change the jurisdictional analysis. The decisions merely restated the difference and clarified the distinction between specific and general jurisdiction, a distinction which

the Supreme Court acknowledged had been blurred somewhat by lower courts. They did not wholly obliterate the long-standing principles guiding this determination as UP contends. The Supreme Court reiterated that the demands of due process are "fair play and substantial justice." *Daimler*, 114 S. Ct. at 754 (*citing Int'l Shoe*, 326 U.S. at 316). And it reiterated that due process must be such as to allow "out-of-state defendants 'to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit.'" *Id.* at 762 (*quoting Burger King Corp.*, 471 U.S. at 472). These overarching principles have not changed.

If UP's argument were correct, it would fully comport with the due process requirements of "fair play and substantial justice" for UP to defend this matter in Delaware, as state in which it has no operational presence of any type, yet "unconstitutional" for the claim to be brought in Oregon. Surely such an absurd result cannot be a proper interpretation of due process requirements.

UP is properly considered to be "at home" in Oregon and is fairly subject to general personal jurisdiction in Oregon in this matter. It maintains a massive presence as an interstate railroad throughout the State of Oregon. Plaintiff, an Oregon resident, was injured while working for UP in its interstate railroad operations. Fair play and substantial justice dictate that it is not a violation of UP's constitutional right to due process for it to defend that claim in Oregon. This

conclusion becomes even more apparent in light of the "exceptional" nature of claims brought pursuant to the FELA.

C. Since its Inception, the United States Supreme Court and Congress have Recognized the "Exceptional" Nature of the Rail Industry and Oregon Courts have Personal Jurisdiction over Union Pacific in FELA Claims

The United States Congress long ago recognized the unique and "exceptional" nature of the railroad industry, and the unique and "exceptional" needs of its employees. As a result, Congress specifically crafted a remedy for them unlike any remedy that existed. This new remedy, the FELA, abrogated universally accepted tort law principles rooted in the common law.

The jurisdictional and venue provision of the FELA, 45 U.S.C. § 56, states:

> 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 several states.

No legislative enactment can grant authority if the exercise of such authority does not comport with the requirements of the Due Process Clause. However, Section 56 is properly read as the intention of Congress to recognize the reality that an interstate railroad is "at home" in any jurisdiction in which it is "doing business." Congress recognized the unique and exceptional nature of a railroad's interstate operations which necessitates interstate travel by employees of the railroad in the performance of their duties. The Supreme Court has consistently recognized the unique and

exceptional nature of this industry and these claims, consistently striking down constitutional challenges based upon any alleged burden on interstate commerce. This Court should do likewise and hold that claims brought pursuant to the FELA are exactly the type of "exceptional" case that fully satisfies the due process principles annunciated by the Supreme Court from *International Shoe* through *Daimler*.

The Federal Employers' Liability Act, 45 U.S.C. §§ 51-60, was enacted in the early 1900s after Congress determined that the railroad industry owed a duty to its employees who daily exposed themselves to extreme hazards. Congress concluded that this "human overhead" factor was to be another cost of doing business. There is no question that "the general Congressional intent was to provide liberal recovery for injured workers." *Kernan v. American Dredging Company*, 355 U.S. 426, 432 (1958). Congress intended the FELA to be a broad, remedial statute, and courts have consistently adopted a standard of liberal construction to facilitate Congress' objectives. *Urie v. Thompson*, 337 U.S. 163, 180 (1949).

The FELA provides for a radical departure from the traditional concept of tort liability and imposes a heightened standard of care on railroads. The Supreme Court described the elevated standard of care under the FELA in *Rogers v. Mo. Pac. R.R.*, 352 U.S. 500, 507-08 (1956):

> The law [FELA] was enacted because the Congress was dissatisfied with the common-law duty of the master to his servant. The statute

> supplants that duty with the far more drastic duty of paying damages for injury or death at work due in whole or in part to the employer's negligence. The employer is stripped of his common-law defenses and for practical purposes the inquiry in these cases today rarely presents more than the single question whether negligence of the employer played any part, however small, in the injury or death which is the subject of the suit. The burden of the employee is met, and the obligation of the employer to pay damages arises, when there is proof, even though entirely circumstantial, from which the jury may with reason make that inference.

There is no dispute in this matter that UP is subject to the provisions of the FELA, that it was doing business in Oregon as a common carrier by rail in interstate commerce, and that Plaintiff was employed by UP and was working in the course and scope of that employment in Idaho at the time of the complained of incident. Further, there should be no dispute that the FELA is Plaintiff's exclusive remedy in this matter, as this issue was firmly settled almost 100 years ago by the Supreme Court. *N.Y. Cent. R.R. Co. v. Winfield*, 244 U.S. 147 (1917).

In addition to radically altering the common-law conception of proximate cause, Congress adopted a pure comparative fault scheme, whereby the injured employee may recover for any percentage of fault on the part of the railroad, no matter how small. 45 U.S.C. § 53. In enacting this provision, Congress went one step further and abolished the defense in its entirety in any case where the railroad's violation of a statute enacted for the safety of employees contributed in any manner to the complained of injury. *Id.* It further abolished the defense of assumption of

risk, banning it in its entirety in any FELA claim, and declared void any "contract, rule, regulation, or device whatsoever" that had the purpose or intent of enabling the railroad to exempt itself from liability under the FELA. 45 U.S.C. §§ 54, 55.

The Supreme Court has repeatedly recognized the unique aspects of the FELA, giving full weight to the statutory provisions and reaffirming the unique causation standard applicable in FELA claims. *See Rogers v. Mo. Pac. R.R.*, 352 U.S. at 507-08. To this day, the Supreme Court acknowledges these fundamental elements that separate FELA claims from other tort claims. *See, CSX Transp., Inc. v. McBride*, 563 U.S 685, 700 (2011) ("While some courts have said that *Rogers* eliminated the concept of proximate cause in FELA cases, we think it 'more accurate ... to recognize that *Rogers* describes the test for proximate causation applicable in FELA suits.'") (*quoting Norfolk So. Ry. Co. v. Sorrell*, 549 U.S. 158, 178 (2007)).

However, Congress truly recognized the unique and "exceptional" nature of interstate railroads in enacting 45 U.S.C. § 56. Not only does the Section vest both state and federal courts with jurisdiction of these claims, but Congress further acted to prevent the removal of FELA actions from a state court. 28 U.S.C. § 1445(a). In enacting Section 56, an amendment to the original version of the FELA, Congress saw fit to remedy what it discovered to be a flaw in the original enactment. *Balt. & Ohio R.R. Co. v. Kepner*, 314 U.S. 44, 49 (1941) ("Litigation promptly disclosed what Congress considered deficiencies in such a limitation of the right of railroad

employees to bring personal injury actions, with the result that the present language was added."). These deficiencies were in general venue provision, which required an FELA plaintiff to bring a claim in the district in which the defendant railroad was an "inhabitant." *Id.* Congress determined that an injured FELA plaintiff would be subject to "injustice . . . [by] compelling him to go to the possibly far distant place of habitation of the defendant with consequent increased expense for the transportation and maintenance of witnesses, lawyers and parties away from their homes." *Id.* at 49-50.

The intent of Congress in enacting Section 56 is instructive. This intent was expressed by Senator Borah of Idaho, who delivered Senate Report Number 432, H.R. 17263, 61st Congress, Second Session, 45th Congressional Record 4034 (1910), "The bill enables the Plaintiff to find a corporation at any point or place or State where it is actually carrying on business and there lodge his action if he chooses to do so." Congress therefore saw fit to remedy the injustice of requiring a Plaintiff to bring his claim only where the defendant railroad was an "inhabitant," and the U.S. Supreme Court has continually and repeatedly recognized this right in FELA claims, treating a defendant railroad in a FELA case as "at home" in any jurisdiction where it is doing business.

In *Baltimore & Ohio R.R. Co. v. Kepner*, 314 U.S. 44 (1941), the employee plaintiff was a resident of Ohio. He was injured in Ohio during the course of his

employment. He filed his FELA claim in Federal court in the Eastern District of New York. The employer railroad sought an injunction in Ohio to prohibit the further prosecution of the action in New York. In affirming the dismissal of the railroad's action by the Ohio Supreme Court, the Court reaffirmed prior decisions ruling Section 56 did not impose an undue burden on interstate commerce and determined that Section 56 was "deliberately chosen to enable the plaintiff, . . . 'to find the corporation at any point or place or State where it is actually carrying on business, and there lodge his action, if he chooses to do so.'" *Kepner*, 314 U.S. at 50 *quoting* Congressional Record, 61st Cong., 2d Sess., Vol. 45, Part 3, p. 2253. The Supreme Court has repeatedly reached this same conclusion. *See Miles v. Ill. Cent. R.R. Co.*, 315 U.S. 698 (1942) (overruling Tennessee Court enjoinment of action in Missouri against Illinois railroad corporation for death of Tennessee employee that occurred in Tennessee); *Pope v. Atl. Coast Line R.R. Co.*, 345 U.S. 379 (1953) (overruling Georgia Supreme Court injunction prohibiting action in Alabama by Georgia resident against Virginia railroad corporation for injury occurring in Georgia).

The Supreme Court has consistently upheld the jurisdiction of courts in FELA cases even though those jurisdictions are in states different from the location of an injury, or the headquarters or place of incorporation of the defendant railroad. It has consistently done so because of the "exceptional" nature of interstate railroads. The

decisions in *Goodyear* and *Daimler* do not upend multiple decades of U.S. Supreme Court jurisprudence regarding the FELA.

The Montana Supreme Court very recently confronted this exact issue, albeit with a different railroad. In *Tyrell v. BNSF Ry. Co.*, 383 Mont. 417, 373 P.3d 1 (2016), the Montana Court heard two separate FELA claims consolidated for appeal. Neither plaintiff was a resident of Montana nor alleged that any injury occurred in Montana. 383 Mont. at 419-20, 373 P.3d at 2-3. Both plaintiffs filed FELA claims in Montana's Thirteenth Judicial District, and BNSF filed motions to dismiss in both claims asserting lack of personal jurisdiction based upon *Goodyear* and *Daimler*. One such motion was denied by the trial court, the other was granted, and the Montana Supreme Court consolidated the appeals of the matters. *Id.*

The *Tyrell* Court highlighted the unique and "exceptional" nature of interstate railroads and the FELA, and Congress' intent in its enactment. It then engaged in an analysis of the legislative history and intent of Section 56, including the holdings of cases cited hereinabove. In holding the Montana courts have general jurisdiction over BNSF, the Court made specific mention of the question presented by *Daimler,* using the exact language of the U.S. Supreme Court. 383 Mont. at 424, 373 P.3d at 6. It then stated:

> "Unlike the cases before us, *Daimler* did not involve a FELA claim or a railroad defendant. Likewise, none of the cases BNSF cites to support its position that *Daimler* precludes state court jurisdiction over FELA claims against railroads involved FELA claims or involved railroad

> defendants. In *Daimler*, the U.S. Supreme Court did not address personal jurisdiction under the FELA, nor did it need to(.) ”

Id.

In addition, the *Tyrell* Court recognized how a railroad is “at home” for purposes of FELA claims:

> “Moreover, *Daimler* did not present novel law. Rather, the U.S. Supreme Court emphasized prior holdings that general jurisdiction requires foreign corporations to have affiliations so “continuous and systematic” as to render them “at home” in the forum state. *Daimler*, __ U.S. at ___, 134 S.Ct. at 749 (citing *Goodyear*, 564 U.S. at 919, 131 S.Ct. at 2851). Congress drafted the FELA to make a railroad “at home” for jurisdictional purposes wherever it is “doing business.” *See Kepner*, 314 U.S. at 49-50, 62 S.Ct. at 8 (citing 45 Cong. Rec. at 4034). Therefore, *Daimler* did not overrule decades of consistent U.S. Supreme Court precedent dictating that railroad employees may bring suit under the FELA wherever the railroad is “doing business.”

383 Mont. at 424-25, 373 P.3d at 6. The *Tyrell* Court recognized and acknowledged the “exceptional” nature of claims under the FELA, and that railroads are “at home” in any district in which it is doing business for the purposes of such claims.[9]

In addition to the unique and exceptional nature of claims under the FELA, the rail industry is unique and exceptional in relation to other business activities. The very nature of operating a railroad requires an extensive, physical presence within the forum. Unlike another business whose contacts may only be shipping

[9] The doctrine of *forum non conveniens* is available to defendant railroads in FELA claims if it believes another forum is available and more convenient for the claim. *Mo. Ex rel So. Ry. Co. v. Mayfield*, 340 U.S. 1 (1950).

goods into the forum, or soliciting business from residents of the forum, UP's operation involves ownership, installation and maintenance of the over 1100 miles of track, as well as corresponding property ownership. It is constantly moving trains across Oregon, 24 hours per day, 7 days per week. Whether servicing one of the numerous industries across the state by delivering and removing rail cars required by customers, classifying a train in one of its yards that will traverse Oregon with cars ultimately destined for other states, or bringing cars into the forum from other states for delivery to Oregon, UP is actively operating around the clock, at all times of the day and night. Unlike businesses which direct action by others from foreign locations, UP's business requires that it have an extensive physical presence throughout the state.

One additional distinguishable characteristic of the FELA bears specific mention and makes it "exceptional" in comparison to other tort claims. The U.S. Supreme Court has consistently stated that an overriding purpose of the Due Process Clause is to allow a defendant to have "fair warning" that it may be subject to the jurisdiction of a court. "[T]he Due Process Clause 'gives a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit.'" *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 471-72 (1985) (*quoting World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980)).

The FELA is a federal statute, applied uniformly throughout the country. Actions under the FELA are entirely creatures of Federal law, and Federal law is controlling. *Chi., Milwaukee & St. Paul Ry. Co. v. Coogan*, 271 U.S. 472 (1926).[10] "State laws are not controlling in determining what the incidents of this Federal right shall be." *Dice v. Akron Canton & Youngstown R.R. Co.*, 342 U.S. 359, 361 (1952).

Unlike other claims which may expose a defendant to the individual laws of the various states, UP has exact "predictability" as to the legal principles governing its conduct which allows great certainty in structuring that conduct. The substantive law in a claim under the FELA is identical, without regard to whether the claim is brought in Oregon, Nebraska or Delaware.

By definition, interstate railroads require an extensive, active physical presence in numerous jurisdictions. By necessity, the employees of interstate railroads are required to travel and work in numerous jurisdictions. The only remedy for such employees of interstate railroads is the FELA. FELA claims are exactly the type of "exceptional" claims that meet due process requirements for all-purpose jurisdiction under any interpretation of *Goodyear* and *Daimler*.

D. Since Plaintiff's Employment Relationship with Union Pacific Relates to and Arises out of Union Pacific's activities in Oregon, the Oregon Court has Specific Personal Jurisdiction over Union Pacific in this Matter

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[10] "By the federal Employes' (sic) Liability Act, Congress took possession of the field of employers' liability to employees in interstate transportation by rail, and all state laws upon that subject were superseded." *Coogan*, 271 U.S. at 474.

The exercise of specific personal jurisdiction over UP in this matter is also proper and fully comports with due process requirements. This Court may affirm a trial court's order for reasons not raised or relied upon by the trial court if those reasons provide a basis to affirm the ruling and are supported by the record. *State v. Rogers*, 330 Or. 282, 295, 4 P.3d 1261, 1269-70 (2000); *Outdoor Media Dimensions Inc. v. State*, 331 Or. 634, 659-60, 20 P.3d 180, 195-96 (2001). "To conclude otherwise could result in reversal of a correct action of a trial court, which would warp the law and waste judicial resources." *Rogers*, 330 Or. at 295, 4 P.3d at 1270. *See also Columbia Boat Sales, Inc. v. Island Packet Yachts*, 105 Or. App. 85, 87, 803 P.2d 282, 284 (1990) (holding that alternate bases for personal jurisdiction not argued in trial court may be raised on appeal as long as issue of personal jurisdiction is raised and preserved below). The exercise of specific jurisdiction in this case is appropriate because UP has purposefully directed its activities toward Oregon residents and Plaintiff's injuries arise out and relate UP's activities in Oregon.

Pursuant to ORCP 4 L, Oregon courts may exercise personal jurisdiction to the fullest extent permitted by the U.S. Constitution. Service upon UP was accomplished through CT Corporation, its appointed Oregon Registered Agent for service of process, in compliance with ORCP 7. Therefore, Oregon may exercise personal jurisdiction in this matter as long as it comports with federal due process requirements for specific jurisdiction.

Specific jurisdiction depends upon some type of "affiliation[n] between the forum and the underlying controversy." *Robinson*, 354 Or. at 579, 316 P.3d at 292 (*quoting Goodyear*, 564 U.S. at 919). It "'aris[es] out of or relate[s] to the defendant's contacts with the forum.'" *Daimler*, ___ U.S. ___, 134 S. Ct. at 754 (*quoting Helicopteros*, 466 U.S. at 414).

This Court has recently outlined the analytical framework for determining specific personal jurisdiction in *Robinson v. Harley-Davidson Motor Co.* In *Robinson*, the Court stated that the determination of whether specific personal jurisdiction exists involves a three-part test. Initially, a "defendant must have 'purposefully avail[ed] itself of the privilege of conducting activities within the forum State." *Robinson*, 354 Or. at 579, 316 P.3d at 292 (*quoting Hanson v. Denckla*, 357 U.S. 235, 253 (1958)). Second, there must be some relationship between the defendant, the forum and the claim; it must "'arise out of or relate to'" the defendant's "'activities in the forum State.'" *Id.* (*quoting Helicopteros Nacionales de Columbia, S.A. v. Hall*, 466 U.S. 408, 414 (1984)). Finally, jurisdiction must comport with notions of fair play and substantial justice. *Id.* (*citing Asahi Metal Industry Co. v. Superior Court*, 480 U.S. 102, 113 (1987)); *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476-77 (1985). When a non-resident defendant creates continuing obligations and relationships with citizens of another state, such a

defendant is subject to personal jurisdiction in the other state for the consequences of their activities. *Burger King*, 471 U.S. at 473.

The U.S. Supreme Court has recently addressed the framework for determining specific personal jurisdiction. In *Walden v. Fiore*, ___ U.S. ___, 134 S. Ct. 1115 (2014), the Court stated that the inquiry for specific jurisdiction over a non-resident defendant focuses on "the relationship among the defendant, the forum and the litigation." 134 S. Ct. at 1121 (*quoting Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 775 (1984)). The first requirement is that the relationship with the forum must arise out of contacts that the defendant itself has created with the forum state. 134 S. Ct. at 1122. This requirement is fully subsumed within the first and second prongs of the *Robinson* analysis. Second, the *Walden* Court emphasized that the analysis must look to the defendant's contacts with the forum itself, not the contacts with individual persons within the forum. *Id.* This requirement confirms that the plaintiff cannot be the only connection to the forum. It is the defendant's activities and conduct that must form the basis of the connection. *Id.*

A very recent decision by the U.S. District Court of Kansas found that specific personal jurisdiction existed based upon facts similar to those in the present matter. In *Overfelt v. BNSF Ry. Co.*, No. 15-1239-EFM/KGG, 2016 WL 1045477 (D. Kan. March 15, 2016), the plaintiff was a Kansas resident injured during the course of his employment with the defendant in Texas. The defendant railroad, a Delaware

corporation with principal place of business in Texas, filed a motion to dismiss similar to the present matter arguing that it was not subject to personal jurisdiction because it was not at home in Kansas. In holding that the Court had specific personal jurisdiction in the matter, the Court stated that "substantial" connections existed that were related to the plaintiff's case. *Id.* at *3. The railroad hired the plaintiff in Kansas, employed him in Kansas, oversaw him in Kansas, and assigned him work in and from Kansas. The Court determined that the railroad itself "created the contact with Kansas" as it trained, employed and directed the plaintiff's work activity in Kansas. *Id.* at *3. The Court stated, "the nexus between Plaintiff's claim and Defendant's contact with Kansas is that Defendant employed Plaintiff in Kansas and Plaintiff was injured on the job due to the alleged negligence of Defendant." *Id.* at *9.

For the same reasons, the exercise of specific personal jurisdiction over UP fully comports with these due process requirements in the present matter.[11] UP has substantial connections with Oregon and Plaintiff's injuries relate to and arise out of those connections. As previously stated, UP has purposefully availed itself of the privilege of conducting substantial activities as an interstate railroad throughout

[11] In the present matter, the Order of the trial court was entered on January 16, 2016, prior to UP's Answer being filed or and discovery being conducted in the case. Therefore, the factual record in regard to specific personal jurisdiction is not fully developed.

Oregon for many years. Just as in *Overfelt*, UP employs Plaintiff in Oregon, oversees his employment in Oregon, and assigns him to work in and from Oregon. UP assigned Plaintiff to travel from Oregon to Idaho to engage in his work, where his injuries occurred. Just as in *Overfelt*, "Plaintiff's injuries arise out of his employment relationship with Defendant and the injuries he sustained during his employment with Defendant and while on the job." *Overfelt*, at *4.

Finally, for the same reasons as those set forth hereinabove, the exercise of specific personal jurisdiction fully comports with notions of fair play and substantial justice. Therefore, the Oregon court may properly exercise specific personal jurisdiction over UP in this matter.

IV. CONCLUSION

For the reasons set forth above, Plaintiff respectfully requests this Court deny the Writ of Mandamus and dismiss the petition filed by UP.

Dated: August 29, 2016

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

I hereby certify that the brief complies with the length provisions of ORAP 5.05(2) in that it contains 11,331 words, and I relied on the word count of the word processing system used to prepare the brief. The type face is proportionally spaced and is 14-point.

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CERTIFICATE OF SERVICE

I hereby certify that on August 29, 2016 I electronically filed the foregoing brief with the State Court Administrator by using the Oregon Appellate eFiling system.

I hereby certify that on August 29, 2016 I electronically-served the foregoing brief upon the persons listed below who are registered efilers, by using the Oregon Appellate eFiling system.

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