

*Easement—CSX Transp., Inc.*, FD 35661 (STB served Sept. 12, 2012).

Under the procedural schedule we are adopting in this case: any person who wishes to participate in this proceeding as a POR must file a notice of intent to participate no later than September 26, 2012; all comments, protests, requests for conditions, and any other evidence and argument in opposition to the application, including filings by DOJ and DOT, must be filed by November 9, 2012; comments on the Draft EA also must be filed with OEA by November 9, 2012; and responses to comments, protests, requests for conditions, and other opposition on the transportation merits of the Acquisition, as well as Applicant's rebuttal in support of the Application, must be filed by November 29, 2012. The Board plans to issue its Final EA on or before January 14, 2013, and its final decision by February 8, 2013, and to make any such approval effective by March 10, 2013. The Board reserves the right to adjust the schedule as circumstances may warrant. For further information respecting dates, see Appendix A (Procedural Schedule).

Additionally, discovery may begin immediately. Requests for discovery from CSXT are due on September 26, 2012. CSXT responses are due on October 11, 2012. The parties are encouraged to resolve all discovery matters expeditiously and amicably.

*Notice of Intent to Participate.* Any person who wishes to participate in this proceeding as a POR must file with the Board, no later than September 26, 2012, a notice of intent to participate, accompanied by a certificate of service indicating that the notice has been properly served on the Secretary of Transportation, the Attorney General of the United States, and Steven C. Armbrust and Louis E. Gitomer (counsel for CSXT).

If a request is made in the notice of intent to participate to have more than one name added to the service list as a POR representing a particular entity, the extra name will be added to the service list as a "Non-Party." The list will reflect the Board's policy of allowing only one official representative per party to be placed on the service list, as specified in Press Release No. 97-68 dated August 18, 1997, announcing the implementation of the Board's "One Party-One Representative" policy for service lists. Any person designated as a Non-Party will receive copies of Board decisions, orders, and notices but not copies of official filings. Persons seeking to change their status to a Party of Record must accompany that request with a written certification that he or she has complied with the service

requirements set forth at 49 CFR 1180.4 and any other requirements set forth in this decision.

*Service List Notice.* The Board will serve, as soon after September 26, 2012, as practicable, a notice containing the official service list (the service list notice). Each POR will be required to serve upon all other PORs, within ten days of the service date of the service-list notice, copies of all filings previously submitted by that party (to the extent such filings have not previously been served upon such other parties). Each POR also will be required to file with the Board, within ten days of the service date of the service-list notice, a certificate of service indicating that the service required by the preceding sentence has been accomplished. Every filing made by a POR after the service date of the service list notice must have its own certificate of service indicating that all PORs on the service list have been served with a copy of the filing. Members of the United States Congress (MOCs) and Governors (GOVs) are not parties of record and need not be served with copies of filings, unless any MOC or GOV has requested to be, and is designated as, a POR.

*Service of Decisions, Orders, and Notices.* The Board will serve copies of its decisions, orders, and notices only on those persons who are designated on the official service list as either POR, MOC, GOV, or Non-Party. All other interested persons are encouraged to obtain copies of decisions, orders, and notices via the Board's Web site at "[www.stb.dot.gov](http://www.stb.dot.gov)" under "E-LIBRARY/Decisions & Notices."

*Access to Filings.* Under the Board's rules, any document filed with the Board (including applications, pleadings, etc.) shall be promptly furnished to interested persons on request, unless subject to a protective order. 49 CFR 1180.4(a)(3). The application and other filings in this proceeding are available for inspection in the library (Room 131) at the offices of the Surface Transportation Board, 395 E Street SW., in Washington, DC, and will also be available on the Board's Web site at "[www.stb.dot.gov](http://www.stb.dot.gov)" under "E-LIBRARY/Filings." In addition, the application may be obtained from Messrs. Armbrust and Gitomer at the addresses indicated above.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

*It is ordered:*

1. The application and notices of exemption in the related subdockets are accepted for consideration.

2. The parties to this proceeding must comply with the procedural schedule adopted by the Board in this proceeding as shown in Appendix A.

3. The parties to this proceeding must comply with the procedural requirements described in this decision.

4. This decision is effective on September 12, 2012.

By the Board, Chairman Elliott, Vice Chairman Mulvey, and Commissioner Begeman.

**Jeffrey Herzig,**  
*Clearance Clerk.*

## Appendix A

### Procedural Schedule

August 13, 2012 CSXT's application, protective order, and notices of exemption filed with the Board.  
September 26, 2012 Notices of intent to participate due to the Board. Discovery requests due to CSXT.  
October 5, 2012 OEA issues Draft EA.  
October 11, 2012 CSXT responds to discovery requests.  
November 9, 2012 Comments due from all parties, including the Attorney General and the Secretary of Transportation, on the transportation merits of the Acquisition. Comments on Draft EA due to OEA.  
November 29, 2012 Responses to comments on the transportation merits of the Acquisition due. Applicant's rebuttal in support of the application due.  
December 26, 2012 Close of record.  
On or before January 14, 2013 OEA issues Final EA.  
February 8, 2013 Final decision served.\*

\*The Board reserves the right to modify this schedule as circumstances may warrant.

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## DEPARTMENT OF TRANSPORTATION

### Surface Transportation Board

[Docket No. FD 35625]

#### City of Milwaukie—Petition for Declaratory Order

The City of Milwaukie, Or. (the City), filed a petition for declaratory order on June 29, 2012 (Petition), requesting that the Board declare that 49 U.S.C. 10501(b) does not preempt certain municipal regulations regarding the scattering of rubbish and the blocking of vehicular and pedestrian traffic along the border of the Oregon Pacific Railroad Company's (OPRC) train maintenance facility and in a public right-of-way. For the reasons discussed below, the request to institute a declaratory order proceeding will be granted.

On June 29, 2012, the City filed a petition for declaratory order. On July 3,

2012, OPRC filed a letter with the Board noting its opposition to the Petition and requesting 30 days to prepare its case in opposition should the Board institute a proceeding. OPRC's letter included no substantive support for why it opposed the Petition and, to date, OPRC has not submitted anything more to the Board.

The Petition requests that the Board find the City is not preempted from enforcing two municipal regulations that the City claims protect the public and ensure the public's health and safety. The regulations prohibit (1) scattering rubbish, and (2) obstructing vehicular and pedestrian traffic. Milwaukie, Or. Mun. Code §§ 8.04.120, 10.44.030 (2011). According to the City, OPRC owns a train maintenance facility on approximately 0.78 acres within the City. The City claims that along the border of OPRC's property, and in the public right of way, OPRC stores rails, railroad ties, piles of gravel, and other large "debris." The City argues that this debris is a hazard for drivers, pedestrians, and cyclists and violates the two above regulations; the City has cited OPRC at least twice.

The City argues that it should be permitted to enforce the regulations for the safety of its citizens and that there is no reason why the regulations should be preempted by federal law. It claims the ordinances are of general applicability, are not directed at or limited to railroads operating within the City, and are not directed at OPRC's use of its own property. It further claims that the regulations are within its traditional police power and that their enforcement will not affect transportation by a rail carrier.

In a letter to the City, OPRC claims "[m]unicipal interference with railroad operations is pre-empted by USC 10501 (b); therefore, the City has no jurisdiction over these matter [sic] as they apply to Interstate Commerce."<sup>1</sup> The record shows that OPRC has contested the second set of citations in the Municipal Court for the City of Milwaukie and that a trial was set for July 23, 2012. No update has been filed with the Board since the scheduled trial date. OPRC has also indicated it intends to appeal the fine for the first set of citations.

The Board has discretionary authority under 5 U.S.C. 554(e) and 49 U.S.C. 721 to issue a declaratory order to eliminate a controversy or remove uncertainty in a matter related to the Board's subject matter jurisdiction.<sup>2</sup> Questions of

preemption are often fact specific determinations, particularly when addressing whether land use restrictions interfere with railroad operations.<sup>3</sup>

The Interstate Commerce Act, as revised by the ICC Termination Act of 1995, vests in the Board broad jurisdiction over "transportation by rail carrier," 49 U.S.C. 10501(a)(1), which extends to property, facilities, instrumentalities, or equipment of any kind related to that transportation, 49 U.S.C. 10102(9). The preemption provision in the Board's governing statute states that "the remedies provided under [49 U.S.C. 10101–11908] with respect to regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law." 49 U.S.C. 10501(b).

The Board will institute a declaratory order proceeding and establish a procedural schedule for the filing of pleadings. This will ensure that the record is complete on the issue of whether the activities occurring in the right-of-way are part of "transportation" by a "rail carrier" and therefore could be preempted by § 10501(b).

The Board will consider this matter under the modified procedure rules at 49 CFR part 1112. The City's detailed Petition will serve as its opening statement. Replies will be due 30 days from the date of service of this decision. The City's rebuttal will be due 45 days from the service date of this decision.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

*It is ordered:*

1. A declaratory order proceeding is instituted.
2. Replies are due by October 10, 2012.
3. The City's rebuttal statement is due by October 25, 2012.
4. This decision is effective on its service date.

Decided: September 7, 2012.

By the Board, Rachel D. Campbell,  
Director, Office of Proceedings.

**Jeffrey Herzig,**  
Clearance Clerk.

[FR Doc. 2012–22452 Filed 9–11–12; 8:45 am]

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1984); *Delegation of Auth.—Declaratory Order Proceedings*, 5 I.C.C. 2d 675, 675 (1989).

<sup>3</sup> See *Borough of Riverdale—Petition for Declaratory Order—The N.Y. Susquehanna & W. Ry.*, FD 33466, slip op. at 2 (STB served Feb. 27, 2001); *Borough of Riverdale—Petition for Declaratory Order—The N.Y. Susquehanna & W. Ry.*, 4 S.T.B. 380, 387 (1999) ("whether a particular land use restriction interferes with interstate commerce is a fact-bound question").

## DEPARTMENT OF TRANSPORTATION

### Surface Transportation Board

[Docket No. FD 35674]

#### CSX Transportation, Inc.—Temporary Trackage Rights Exemption—Alabama Great Southern Railroad Company and Meridian Speedway, LLC

Pursuant to a written trackage rights agreement dated August 31, 2012, Alabama Great Southern Railroad Company (AGS) has agreed to grant CSX Transportation, Inc. (CSXT) temporary overhead trackage rights over: (1) AGS South District between the connection of AGS and CSXT in Birmingham, Ala., near 14th Street at milepost 143.5 and the connection with the trackage of The Kansas City Southern Railway Company (KCSR) near 27th Avenue in Meridian, Miss., at milepost 295.4; (2) AGS NO & NE District between the connection with the trackage of Meridian Speedway, LLC (Meridian Speedway) at Meridian, Miss., 27th Avenue, milepost NO–0.4, and New Orleans, La., Oliver Junction, milepost 194.1; and (3) New Orleans Terminal Back Belt Line between New Orleans, La., Oliver Junction, milepost 7.9–NT, and East City Junction at milepost 3.8–NT and between East City Junction at milepost 3.5–A and CN/IC connection in Shrewsbury, La., milepost 0.0–A, a distance of 352.8 miles. Pursuant to a second written trackage rights agreement, Meridian Speedway has agreed to grant CSXT temporary overhead trackage rights over the connection between AGS and Meridian Speedway near 27th Avenue in Meridian, Miss., at milepost 295.4 and the connection between Meridian Speedway and AGS NO & NE District at milepost NO–0.4, a distance of 0.4 miles. The lines in question total 353.2 miles of track.

CSXT explains that the temporary trackage rights will permit it to resume overhead rail service between Pascagoula, Miss., and New Orleans, La., in the aftermath of Hurricane Isaac. CSXT states that as a result of Hurricane Isaac, portions of its track along the Gulf Coast have been damaged and put out of service between Pascagoula, Miss., and New Orleans, La., and CSXT does not expect the line to be operable in the immediate future.

In addition to this verified notice of exemption, CSXT concurrently filed a petition requesting that the Board waive the requirement of 49 CFR 1180.4(g) so that the exemption could become effective immediately. By decision served September 7, 2012, the Board granted CSXT's request. As a result, this

<sup>1</sup> Petition, V.S. Salyers, Exh. I.

<sup>2</sup> See *Bos. & Me. Corp. v. Town of Ayer*, 330 F.3d 12, 14 n.2 (1st Cir. 2003); see also *Intercity Transp. Co. v. United States*, 737 F.2d 103, 106–07 (DC Cir.