

ORDINANCE NO. 650

CITY OF WILLAMINA ORDINANCE GRANTING UNION PACIFIC RAILROAD LICENSE TO USE CITY RIGHT OF WAY

RECITALS

WHEREAS, Union Pacific Railroad (UPRR) owns, and Willamette & Pacific Railroad, Inc. leases and operates a freight railroad on, branch line tracks that pass through the City of Willamina (City). The track runs in a generally east/west direction for 2,120 feet within the Water Street right-of-way from "A" Street (approximately Garden Spot Park) to the west line of Kershaw's first addition (approximately in line with Oaken Hills Drive). The tracks cross "C", "D" and "E" streets with a total of 202 feet of paved railroad crossing. The tracks run in and over a public right-of-way property owned by the City (Property). The Property is more specifically described as shown in Exhibit A.

WHEREAS, by its Ordinance Nos. 19 and 22, the City granted a franchise to lay track and operate and maintain a railroad on Water Street through the City.

WHEREAS, on May 10, 1909, the City enacted Ordinance No. 33, which repealed Ord. Nos. 19 and 22 and granted the Sheridan & Willamina Railroad Co. a franchise to construct, operate, and maintain a railroad. Such franchise was subject to no term or fee.

WHEREAS, on July 11, 1911, the City enacted Ordinance No. 50, which repealed Ord. Nos. 19 and 22 and granted the Portland & West Coast Railroad Co. a 99-year franchise to construct, operate, and maintain a railroad within City limits. Such franchise was subject to no fee.

WHEREAS, UPRR acquired the Portland & West Coast Railroad Co. and as a result of that transaction, UPRR became the Portland & West Coast Railroad Co.'s successor-in-interest to the franchise granted under Ordinance No. 50.

WHEREAS, the rights granted under Ordinance No. 50 expired on July 12, 2010. Since that date UPRR has had no right or authority to occupy or use the Property. Although the City and UPRR have exchanged views on the matter, they have been unable to reach agreement on terms under which UPRR, its successors and assigns, will be authorized by the City to use the Property.

WHEREAS, the City now finds it necessary to adopt this Ordinance granting UPRR a license to occupy and use the Property under the terms and conditions set forth in this Ordinance.

NOW, THEREFORE, THE CITY OF WILLAMINA, OREGON, ORDAINS AS FOLLOWS:

Section 1. Grant.

The City grants UPRR and its lessee a non-exclusive license to use the Property for railroad purposes, including but not limited to installing, operating, and maintaining railroad track and related facilities. UPRR's use of the Property must comply with all applicable and enforceable City, state, and federal laws. Any improvements installed or maintained on the Property within 15 feet of the centerline of the UPRR tracks by the

City or permittee must comply with UPRR clearance standards and must not interfere with railroad operations or maintenance requirements.

Section 2. Fiber Optics.

UPRR may install and permit others to install underground fiber optic communication lines on the Property. UPRR must cooperate with the City to identify the location and owner of all fiber optic lines on the Property. UPRR must work in good faith to assist the City to obtain agreements with any companies that currently have or wish to install fiber optic facilities on the Property.

Section 3. Grade Crossings.

Public railroad grade crossings exist on the Property at "C" Street, "D" Street, and "E" Street. UPRR and City will maintain and renew these and any future public crossings built on the Property during the term of this Agreement according to the requirements of then-current general orders or other official standards promulgated by the Oregon Department of Transportation and any current or future agreements related to such crossings.

Section 4. Hazardous Materials and Indemnity.

- a. As used in this Ordinance, "Hazardous Materials" means any chemical, substance or material that is now or in the future becomes listed, defined or regulated in any manner by any Environmental Law based upon, directly or indirectly, its properties or effects. As used in this Ordinance, "Environmental Law" means any federal, state or local environmental, health or safety-related laws, regulations, standards, decisions of the courts, permits or permit conditions, currently existing or as amended or adopted in the future that are or become applicable to the UPRR or the Property.
- b. If UPRR's use of the Property now or in the future involves the handling or transporting of Hazardous Materials, UPRR agrees fully to comply with all Environmental Laws. At City's request, UPRR will furnish City with proof satisfactory to City that UPRR is in such compliance. Should UPRR not comply fully with all Environmental Laws, City may terminate this license if:
 - i. City provides written notice to UPRR of its failure to comply with an Environmental Law; and
 - ii. UPRR fails to remedy such noncompliance within (thirty) 30 days of City's notice, or a longer period as City may grant in writing.
- c. UPRR must assume liability for and will save and hold harmless City from and against any and all injuries to any person, including wrongful death, and damage to Property, including without limitation, property of City and UPRR, and all related expenses, including without limitation attorneys' fees, investigators' fees and litigation expenses, resulting in whole or in part from UPRR's failure to

comply with any Environmental Laws. UPRR at its cost will assume the defense of all claims. Without limiting any of UPRR's obligations under this Agreement, UPRR will reimburse City for all costs of any kind City incurs as a result of UPRR's failure to comply with this section, including, but not limited to, fines, penalties, clean-up and disposal costs, and legal costs incurred as a result of UPRR's handling, transporting, or disposing of Hazardous Materials on the Property or any other property City owns.

Section 5. Railroad Flagging.

- a. Unless a shorter period of notice is agreed upon at the time of a request for a railroad flagman, the City will notify UPRR at least seven days prior to entering the Property to perform for any purpose any work at, above, or below grade during which any person, material, or equipment will be within 15 feet of any track, or will be near enough to any track that an equipment extension (such as a crane boom) may reach to within (fifteen) 15 feet of any track. No activity of any kind that meets this description may be performed at any time unless and until a railroad flagman is present and any additional safety measures required by UPRR have been met. Ordinary use of a public grade crossing does not require prior notice or the presence of a railroad flagman.
- b. City enforcement personnel are not required to request a flagman before entering the Property or coming within fifteen (15) feet of a track for purposes of enforcing criminal or City laws, including the pursuit of suspects involved in criminal activity on or about railroad property.
- c. The City may request a flagman when needed by contacting UPRR's Manager of Track Maintenance. The City will document all requests for a flagman by sending the Manager of Track Maintenance and the Director of Track Maintenance an email listing the day, time, and location where the flagman is needed. D. Unless otherwise agreed, UPRR will not charge the City for costs related to railroad flagging services.

Section 6. Liens.

UPRR will not permit to be placed against the Property or any other City-owned property, or any part thereof, any design professionals', mechanics', material men's, contractors' or subcontractors' liens with regard to UPRR's actions upon the Property. The UPRR will hold the City harmless for any loss or expense, including reasonable attorneys' fees and costs, arising from any such liens that might be filed against the Property or any other City-owned property.

Section 7. Maintenance and Repair.

UPRR will, at its own cost and subject to City's approval that will not be unreasonably withheld, repair and maintain the Property in an attractive, clean condition and so that it will not at any time be a source of danger to or interference with UPRR's tracks or the roadbed and property of City, or the safe and efficient operation of City's public right-of-

way or any other activities on the Property. UPRR will prosecute all repair and maintenance work to City's right-of-way in accordance with City's standards. UPRR will give the City at least 30 days written notice and must acquire all necessary approvals from City prior to UPRR's commencement of any such repair or maintenance work. If, at any time, UPRR fails to perform properly its obligations under this section, City may, in its sole discretion, perform such work itself as it deems necessary for the safe operation of the Property. In such event, UPRR must pay, within (fifteen) 15 days after a bill is rendered, City's incurred costs. However, City's decision to not perform UPRR's obligations will not release UPRR from liability for any loss or damage.

Section 8. Standards.

UPRR must comply with all federal, state and City statutes, ordinances, rules, regulations, orders and decisions (Standards), issued by any entity or agency with jurisdiction over UPRR's operations, including without limitation, the Interstate Railroad Commission and the Oregon Department of Transportation Rail Division (collectively Agency), relating to UPRR's use and operation of the Property. UPRR must comply at all times with all Standards, present or future, set by any Agency, including, but not limited to, Standards concerning air quality, water quality, noise, and Hazardous Materials. If UPRR fails to be in full compliance with Standards, City may, but will not be obligated to, after giving notice of the failure to UPRR, and if UPRR, within 15 days of such notice, fails to correct such non-compliance, take whatever action it determines in its sole discretion to be necessary to protect the Property, and City's right-of-way and other adjacent property. UPRR must reimburse the City for all costs (including but not limited to, consulting, engineering, clean-up and disposal, and legal costs) incurred by the City as a result of the UPRR's failure to comply with such Standards, and also such costs incurred by the City in abating a violation of such Standards, protecting against a threatened violation of such Standards, defending any claim of violation of such Standards in any proceeding before any Agency or court, and paying any fines or penalties imposed for such violations. UPRR must assume liability for and will save and hold harmless the City from any claim of a violation of the Standards regardless of the nature thereof or the Agency or person asserting such claim, which results from UPRR's use of Property, whether such claim arises in whole or in part from the negligence or alleged negligence of the City or otherwise. UPRR, at its cost, must assume the defense of all such claims.

Section 9. Tests and Inspections.

City has the right at any time to inspect the Property and UPRR's use of it in order to monitor compliance with this Ordinance. If any installation on, or use or condition of the Property may have an adverse effect on the Property, adjacent property (whether or not owned by City) or City's operations, City may conduct any tests or assessments, including but not limited to environmental assessments, of, on or about the Property and UPRR's use of it as City determines to be necessary or useful to evaluate the condition of the Property and its use by UPRR. UPRR must cooperate with City in any tests or inspections that City deems necessary. If a test or inspection recommends corrections or improvements to the Property or UPRR's use of the Property, UPRR must bear the costs of such corrections or improvements.

Section 10. Subordinate Rights.

This license is subject and subordinate to the prior and future rights and obligations of City, its successors and assigns, to use the Property as public right-of-way, including those as a road authority and as a provider of various municipal services including water and sewer service. Accordingly, City reserves and retains the right to construct, reconstruct, maintain and use existing and future facilities and appurtenances, including those relating to transportation, communication, sewer, water and other utilities in, upon, over, under, across and along the Property, and in connection therewith, the right to grant and convey to others rights and interests to the Property in, on and around the Property. This license is subject to all other licenses, leases, easements, restrictions, conditions, covenants, encumbrances, liens, claims and other matters of title (Title Exceptions) that may affect the Property, and the words "grant" or "convey" will not be construed as a covenant against the existence of any such Title Exceptions.

Section 11. Processing Fee.

UPRR must reimburse City for all reasonable costs that City incurs in developing and processing this Agreement, including attorney fees. UPRR must deposit \$10,000 on or about January 1, 2013 (Deposit) for processing costs. Such reimbursements will be made first out of the Deposit made by UPRR for such purpose. UPRR must reimburse City for any processing costs exceeding that amount within 30 days of City's request. Any remaining balance will be refunded by City to UPRR.

Section 12. Annual License Fee.

- a. **Base Fee.** UPRR will pay City as license fees under this Ordinance a Base Fee of \$10,000 per annum. This amount is due and payable on the first day of the month following the effective date of this Ordinance (Payment Date). On that same date during each succeeding year for as long as this Ordinance is in effect UPRR will pay City an Adjusted Fee as defined below.
- b. **Adjusted Fee.** The Adjusted Fee is a prior year's fee increased by five percent.
- c. **Late Payment.** UPRR's late payment of any payment owed to City under this Ordinance will cause City to incur costs not contemplated by this Ordinance, the exact amount of such costs being extremely difficult and impracticable to calculate. Therefore, if any payment due from UPRR is not received by City within fifteen (15) days of when due, UPRR will pay to City an additional sum of ten percent of the overdue payment as a late charge. This late charge represents a fair and reasonable estimate of the administrative and other costs that City will incur by reason of a late payment by UPRR. City's acceptance of any late payment charge will not constitute a waiver of its right to exercise any other rights and remedies afforded to City under this Ordinance.

Section 13. Indemnification.

UPRR will indemnify, defend, and hold harmless the City and its council boards, officers, agents, employees, assigns, and successors in interest from and against all fines, claims, lawsuits, judgments, awards, liabilities, losses, damages, and expenses, including but not limited to attorney fees and costs (including all actual litigation costs incurred, including but not limited to costs of experts and consultants) (collectively Claims) for injury or death to all persons, including City employees and representatives, and for loss or damage to property belonging to any person or entity, including the City, occurring by reason of any acts or omissions of UPRR or others acting in its behalf in connection with activities performed under this Ordinance

Section 14. Defense.

Upon City's written notice, UPRR must assume the defense of any lawsuit, administrative action or other proceeding brought against City by any public body, individual, partnership, corporation, or other legal entity, relating to any matter covered by this Ordinance for which UPRR has an obligation to assume liability or to indemnify or save and hold harmless the City. UPRR must pay all costs incident to such defense, including, but not limited to, attorneys' fees, investigators' fees, litigation expenses, settlement payments, and amounts paid in satisfaction of judgments. Any and all lawsuits or administrative actions brought or threatened on any theory of relief available at law, in equity or under the rules of any administrative agency will be covered by this section, including, but not limited to, the theories of intentional misconduct, negligence, breach of statute or ordinance, or upon any theory created by statute or ordinance, state or federal law.

Section 15. Force Majeure.

UPRR will be temporarily excused from the performance of any of its obligations under this Ordinance, except obligations involving indemnification and defense and the payment of money to the City, during the time when such nonperformance is caused by a force majeure event. For purposes of this Ordinance, a "force majeure event" means government regulation or order, including without limitation, a court order, legislative enactment, or executive regulation or decree; acts of terrorism, riots, insurrection or war; strikes or lockouts by third parties providing labor, material, or services under contract to a party; delays caused by the other party to this agreement; derailments, wrecks, or freight embargoes; inability to procure critical materials; unforeseen catastrophic railroad emergencies anywhere within the UPRR system; and earthquake, flood, cloudburst, tornado, or other phenomena of nature beyond the power of UPRR to foresee or to make preparation in defense against, but not including rain, windstorm, or other natural phenomena of normal intensity based on U.S. Weather Bureau reports for the particular locality and for the particular season of the year in which the work is being performed.

Section 16. Term.

This license will become effective upon the effective date of this Ordinance and continue in effect for a period of twenty (20) years from that effective date.

Section 17. Miscellaneous.

- a. **Governing Law.** Except on subjects preempted by federal law, this Ordinance is governed by and construed in accordance with the laws of Oregon. Nothing herein is meant to be or will be interpreted to be a waiver of principles of legal preemption or preclusion that may apply to UPRR because of its status as a common carrier regulated by the federal government.
- b. **Headings.** The section headings in this Ordinance are for convenience only and will not be used for any purpose in the interpretation of this Ordinance.
- c. **Severability.** If any clause or provision of this Ordinance is illegal, invalid, or unenforceable under applicable present or future laws, then the City intends that the remainder of this Ordinance will not be affected and will remain in full force and effect.
- d. **Exhibits.** All of the exhibits attached to this Ordinance are incorporated by this reference.
- e. **Notices.** Any communication, notice, or demand of any kind that is required or mentioned must be in writing and delivered by personal service (including express or courier service) or by registered or certified mail, postage prepaid, return receipt requested, addressed as follows:

If to City: Attention: City Recorder
 City of Willamina
 411 NE C Street
 Willamina, OR 97396
 (503) 876-2242

If to UPRR: Union Pacific Railroad Company
 Real Estate Department
 ATTN: AVP Real Estate
 1400 Douglas Street, STOP 1690
 Omaha, NE 68179-1690
 Telephone: (402) 544-5000

- f. **Assignment.** This License is binding upon and inures to the benefit of UPRR, W&P and their authorized successors and assigns. UPRR may not assign its rights or obligations under this License to a third party without the written consent of the City, except where assignment is to a railroad that is buying or leasing the rail line that runs through the City, or where the assignment occurs as a result of a sale or transfer of all or substantially all of UPRR's assets pursuant to merger, sale, consolidation, combination, or order or decree of governmental authority.

First Reading: 01/10/13 Second Reading: 09/12/13

PASSED AND ADOPTED by the City Council of the City of Willamina this **12th** day of **September, 2013**, by the following votes:

YEAS	<u>BALLER, HILL, SKYBERG, ST ONGE</u>
NAYS	<u>None</u>
ABSTAIN	<u>None</u>
ABSENT	<u>BRAMALL, TONEY</u>





 Corey Adams, Mayor

ATTEST:


 Sue C Hollis, City Recorder

Approved as to form:

By: _____
 Thomas Sponsler
 City Attorney

Accepted this ___ day of _____, 2013.

Union Pacific Railroad Company

By _____

Its _____