

SERVICE DATE – FEBRUARY 2, 2022

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 36511

WASTE MANAGEMENT OF WASHINGTON, INC., AND WASTE MANAGEMENT
DISPOSAL SERVICES OF OREGON, INC.—PETITION FOR DECLARATORY ORDER

Digest:¹ The Board denies a request for a declaratory order on issues currently pending before a state court and declines to institute a proceeding.

Decided: February 1, 2022

On May 5, 2021, Waste Management of Washington, Inc. (WMW) and Waste Management Disposal Services of Oregon, Inc. (WMDSO) (jointly, Waste Management), filed a petition for declaratory order seeking preemption of a Washington Utilities and Transportation Commission (WUTC) order directing Waste Management to cease and desist from engaging in certain solid waste collection services within the State of Washington. Waste Management has also appealed the WUTC order to the Thurston County Superior Court in Washington (the Superior Court). For the reasons addressed below, the Board will deny the petition and decline to institute a proceeding.

BACKGROUND

WUTC regulates solid waste collection companies in Washington by, inter alia, issuing certificates of public convenience and necessity authorizing solid waste collection companies to operate in specific territories. (Pet., App. A, at 13-14.) In July 2020, WUTC received a complaint from Murrey's Disposal Company, Inc. (Murrey's) alleging that Waste Management was collecting solid waste in Murrey's service territories without the requisite certificate of authority from WUTC. (*Id.*, App. A, at 2.) In a response to the complaint, Waste Management argued that its service consists of trailer-on-flatcar (TOFC)/container-on-flatcar (COFC) intermodal transportation, the regulation of which by WUTC is preempted by 49 U.S.C. § 10501(b), as amended by the ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803. (*Id.*, App. A, at 8.)

In a May 3, 2021 order, WUTC rejected the argument that its regulation of Waste Management's service is preempted and found that Waste Management was collecting solid waste in Murrey's service territories without a certificate of authority. (*Id.*, App. A, at 8, 15.)

¹ The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. See Pol'y Statement on Plain Language Digs. in Decisions, EP 696 (STB served Sept. 2, 2010).

Accordingly, WUTC directed Waste Management to cease and desist from providing those services. (*Id.*, App. A, at 15.)

Two days later, Waste Management filed its petition for declaratory order with the Board. It then separately appealed the WUTC order to the Superior Court. See Waste Mgmt. of Wash., Inc. v. Wash. Utils. & Transp. Comm’n, No. 21-2-00870-34 (Thurston County Super. Ct. filed May 10, 2021). The Superior Court subsequently denied Waste Management’s motion to stay the court case pending Board resolution of Waste Management’s petition for declaratory order, see id.; the state court proceeding is ongoing.

In its petition, Waste Management argues that WUTC has encroached on the Board’s jurisdiction by regulating Waste Management’s services and asks the Board to find that it has exclusive jurisdiction over those waste collection services. (Pet. 9.) According to Waste Management, the services at issue always include COFC truck and rail transportation as part of the movement, and thus constitute intermodal transportation subject to the Board’s exclusive jurisdiction and exempt from regulation under 49 C.F.R. § 1090.2. (Pet. 12-13, 16-19.) Waste Management explains that it contracts with third-party trucking companies to transport intermodal cargo containers of solid waste from two paper mills in Washington to three transload facilities,² where the containers are loaded onto UP rail cars³ and transported by UP to the Columbia Ridge Landfill in Oregon⁴ pursuant to an agreement between UP and WMDSO. (*Id.* at 7.)

On May 25, 2021, WUTC filed in opposition to Waste Management’s petition.⁵ WUTC argues, among other things, that a declaratory order is unnecessary because the controversy is pending before the Superior Court, which has authority to address preemption. (WUTC Reply 4, May 25, 2021.) WUTC also argues that existing Board precedent “effectively addresses the question raised by the petitioners.” (*Id.* (citing Hi Tech Trans, LLC—Pet. for Declaratory Ord.—Hudson Cnty., N.J., FD 34192 (STB served Nov. 20, 2002)).)

On June 4, 2021, Waste Connections US Holdings, Inc., together with Murrey’s (its wholly owned subsidiary) (jointly, Waste Connections), replied to the petition, echoing WUTC’s argument that the Board need not exercise its discretion to issue a declaratory order because the preemption issue is pending before the Superior Court, which is “capable of handling and, indeed, currently [is] handling, the matter.” (Waste Connections Reply 7-8, June 4, 2021.) Alternatively, Waste Connections urges the Board to reject the petition. (See id. at 11-18; see

² Those facilities are: (1) The Olympic View Transfer Station (OVTS), which is operated by WMW; (2) a facility owned by North Mason Fiber Co. (NMF); and (3) a Union Pacific Railroad Company (UP) facility known as the Argo Yard. (Pet. 2-4.)

³ Waste Management states that the Puget Sound and Pacific Railroad (PSAP) provides rail car switching at OVTS and the NMF facility.

⁴ WMDSO owns and operates the landfill. (Pet. 3.)

⁵ WUTC filed a concurrent petition for leave to intervene under 49 C.F.R. §§ 1112.4 and 1113.7, which the Board will grant. (WUTC Pet. for Leave 1.)

also *id.* at 10 (arguing that the WUTC Order “focuses not on any aspect of rail transportation,” and merely addresses “which companies can collect solid waste in designated areas”).)

Waste Management filed a surreply on June 21, 2021, arguing that Waste Connections and WUTC mischaracterized Waste Management’s petition.⁶ (Waste Mgmt. Reply 3, June 21, 2021.) In its surreply, Waste Management also requests expedited consideration of its petition. (*Id.*)

Thereafter, Waste Connections responded that Waste Management failed to present good cause for filing a surreply. (Waste Connections Reply 1-2, June 24, 2021.) Similarly, on July 1, 2021, WUTC filed a motion to strike Waste Management’s surreply or, in the alternative, for leave to file a surreply, along with a surreply in which it argues that the Board should deny Waste Management’s petition. (WUTC Mot. to Strike 3.) In response to WUTC’s motion to strike, Waste Management argues that its surreply was necessary to complete the record because “there were significant factual developments” following its filing of the petition and because WUTC and Waste Connections raised unanticipated arguments. (Waste Mgmt. Reply 2, July 12, 2021.)

The Association of American Railroads (AAR) filed comments taking no position on the merits of the petition but urging the Board to “take no action that opens the door for states to regulate intermodal transportation.” (AAR Comments 2.)

In the interest of compiling a complete record, the Board will deny WUTC’s motion to strike, grant WUTC’s motion for leave to file a surreply, and accept all filings submitted to date. See, e.g., City of Alexandria, Va.—Pet. for Declaratory Ord., FD 35157, slip op. at 2 (STB served Nov. 6, 2008).

DISCUSSION AND CONCLUSIONS

Under 5 U.S.C. § 554(e) and 49 U.S.C. § 1321, the Board may issue a declaratory order to terminate a controversy or remove uncertainty. The Board has broad discretion in determining whether to issue a declaratory order. See Bos. & Me. Corp. v. Town of Ayer, 330 F.3d 12, 14 n.2 (1st Cir. 2003); Delegation of Auth.—Declaratory Ord. Proc., 5 I.C.C.2d 675 (1989). Here, the issues raised in Waste Management’s petition are currently pending before a state court, which has concurrent jurisdiction to decide § 10501(b) preemption questions in the first instance, and the Superior Court has already denied Waste Management’s motion to stay the WUTC order pending Board resolution of the petition for declaratory order. In these circumstances, and because the factual record does not persuade the Board that it is necessary to exercise its discretionary authority, the Board will deny Waste Management’s request for a declaratory order and decline to institute a proceeding. See, e.g., Tesoro Ref. & Mktg. Co.—Pet. for Declaratory Ord., FD 36041, slip op. at 3-5 (STB served Nov. 16, 2016) (declining to institute a proceeding

⁶ Waste Management recognizes that the Board’s regulations prohibit a reply to a reply, see 49 C.F.R. § 1104.13(c), but argues that the Board should waive that provision for good cause shown. (Waste Mgmt. Reply 2, June 21, 2021.)

and denying related petitions where a district court had concurrent jurisdiction and had denied a motion to refer the issues to the Board).

It is ordered:

1. Waste Management's petition for declaratory order is denied.
2. WUTC's petition for leave to intervene is granted, WUTC's motion to strike is denied, and all filings submitted to date are accepted.
3. This decision is effective on its service date.

By the Board, Board Members Fuchs, Hedlund, Oberman, Primus, and Schultz.