



Bob Ferguson
ATTORNEY GENERAL OF WASHINGTON

Utilities and Transportation Division
PO Box 40128 • Olympia WA 98504-0128 • (360) 664-1183

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302652

July 1, 2021

Ms. Cynthia T. Brown
Chief, Section of Administration
Surface Transportation Board
395 E Street SW
Washington, DC 20423

ENTERED
Office of Proceedings
July 1, 2021
Part of
Public Record

RE: *Waste Management of Washington, Inc. and Waste Management Disposal Services of Oregon, Inc. Verified Petition for Declaratory Order*
Finance Docket 36511

Dear Ms. Brown:

Enclosed for filing in the referenced docket are the Washington Utilities and Transportation Commission's Motion to Strike and Alternative Motion for Leave to File Surreply and Surreply. Please contact me if you have any questions.

Sincerely,

/s/ *Jeff Roberson*, WSBA No. 45550
Assistant Attorney General
Office of the Attorney General
Utilities and Transportation Division
P.O. Box 40128
Olympia, WA 98504-0128
(360) 664-1188
jeff.roberson@utc.wa.gov

LJR/emd

Enclosures

cc: All parties of record (by electronic service per agreement by the parties)

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

Docket No: FD 36511

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

MOTION TO STRIKE AND ALTERNATIVE
MOTION FOR LEAVE TO FILE SURREPLY

ROBERT W. FERGUSON
Attorney General of Washington

Jeff Roberson
Assistant Attorney General
Washington State Bar No. 45550
Washington State Office of the Attorney General
Utilities and Transportation Division
P.O. Box 40128
Olympia, WA 98504-0128
(360) 664-1188
jeff.roberson@utc.wa.gov

Attorneys for the Washington Utilities and
Transportation Commission

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

Docket No: FD 36511

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

I. INTRODUCTION

Petitioners Waste Management of Washington, Inc. and Waste Management Disposal Services of Oregon, Inc. (collectively WM) have asked the Board to waive 49 C.F.R. § 1104.13(c), which forbids a reply to a reply. The Washington Utilities and Transportation Commission (Commission) respectfully requests that the Board deny its request because it fails to show good cause for doing so. If the Board grants WM’s request in order to allow for a complete record, the Commission asks that the Board similarly provide it with leave and accept its surreply to WM’s reply, filed concurrently with this motion, in the interest of fairness.

II. ARGUMENT

The Board’s rules provide that “[a] reply to a reply is not permitted.” 49 C.F.R. § 1104.13(c). The Board, however, may waive 49 C.F.R. § 1104.13(c) for good cause or to allow the full development of the record. *Oakland Global Rail Enter. – Petition for Declaratory Order*, FD 36168, slip op. at 2 n.3. (served Aug. 1, 2018).

WM asks the Board to waive 49 C.F.R. § 1104.13(c) and grant it leave to reply to the Commission’s comments, claiming that good cause to do so exists because it could not have

foreseen the arguments advanced by the Commission and Waste Connections in reply to its petition. The Board should deny WM leave to do so based on good cause, for two reasons.

First, as intervenor Waste Connections has noted, the arguments put forth in opposition to WM's petition were developed before the Commission and relied on by the Commission in issuing the order that prompted this proceeding. *E.g., Waste Management of Washington, Inc. and Waste Management Disposal Services of Oregon, Inc. – Petition for Declaratory Order*, FD 36511, Petition at Appendix at 8-10, 11 ¶¶ 32-35, 37 nn. 24 & 31. As the order makes clear, the Commission: (1) noted that to succeed on its preemption claim, WM needed to show that it provided transportation by rail carrier, or that a rail carrier provided transportation through it, and that WM failed to do so, *id.* at 8 n. 24; (2) observed that nothing WM cited indicated that the Board had jurisdiction over the entirety of an intermodal movement if a rail carrier provided one leg, *id.* 8-9 ¶ 33; (3) determined that WM was more appropriately regulated as a motor carrier, *id.* at 11 ¶ 37; and (4) concluded that the Act did not preempt state regulation of motor carriers who provide solid waste collection service because the ICC determined that such carriers do not transport property, a determination that Congress later gave statutory force to. *Id.* at 10 n. 31, 11 ¶ 37. Waste Connections and the Commission deployed these same principles to defend the Commission's order before the Board, and WM cannot maintain that it should not have expected them to do so.

Second, the Board has previously declined to waive the rule and grant leave to reply to a reply where the issue in a declaratory proceeding is federal preemption. *California High-Speed Rail Authority – Petition for Declaratory Order*, FD 35861, slip op. at 5 (served Dec. 12, 2014). WM's petition concerns the preemptive effect of 49 U.S.C. § 10501. The Board should treat WM

no differently than it did the petitioner in *California High-Speed Rail Authority*, and it should deny it leave to file the reply to the Commission's reply.

WM also argues the Board should waive 49 C.F.R. § 110.13(c) in the interests of a complete record. If the Board does so, the Commission asks that the Board similarly grant it leave to file surreply to WM's comments. Doing so would ensure an efficient, just, and speedy resolution of this matter by bringing the Commission's response to the arguments WM makes in its reply before the Board at this stage of the proceeding. It would also allow the Board to decide WM's petition in light of adversarial testing of the arguments WM makes in its reply.

III. CONCLUSION

For the reasons stated above, the Commission asks the Board to either deny WM leave to file its reply to the replies to its petition or grant it leave to file surreply to WM's reply.

DATED this 1st day of July 2021.

ROBERT W. FERGUSON
Attorney General

/s/ Jeff Roberson, WSBA No. 45550
Assistant Attorney General
Office of the Attorney General
Utilities and Transportation Division
P.O. Box 40128
Olympia, WA 98504-0128
(360) 664-1188
jeff.roberson@utc.wa.gov

Counsel for the Washington Utilities and
Transportation Commission

CERTIFICATE OF SERVICE

I certify that I have this day served copies of the foregoing Motion to Strike and Alternative Motion for Leave to File Surreply of the Washington Utilities and Transportation Commission upon all parties of record in this proceeding by email as agreed to by the parties.

/s/ Elizabeth M. DeMarco
(signature)

July 1, 2021
(date)

(49 U.S.C. 721, 5 U.S.C. 553)

cc:

Michael F. McBride, DC Bar #243998
VAN NESS FELDMAN LLP
1050 Thomas Jefferson St. NW, 7th Floor
Washington, D.C. 20007
Tel: 202-298-1989
mfm@vnf.com

Jessica L. Goldman, WSBA #21856
Jesse L. Taylor, WSBA #51603
SUMMIT LAW GROUP PLLC
315 Fifth Avenue So., Suite 1000
Seattle, WA 98104
Tel: (206) 676-7000
Legal Asst: Sharon Hendricks
Legal Asst: Karen Lang
jessicag@summitlaw.com
jesset@summitlaw.com
sharonh@summitlaw.com
karenl@summitlaw.com

Robert Rosenberg
Slover & Loftus LLP
1224 Seventeenth Street NW
Washington, D.C. 20036
Tel: (202) 347-7170
rdr@sloverandloftus.com

Blair I. Fassburg, WSBA #41207
David W. Wiley, WSBA #08614
Sean D. Leake, WSBA #52658
WILLIAMS, KASTNER & GIBBS PLLC
601 Union Street, Suite 4100

Seattle, WA 98101-2380
Legal Asst: Maggi Gruber
dwiley@williamskastner.com
bfassburg@williamskastner.com
sleake@williamskastner.com
mgruber@williamskastner.com

Timothy J. Strafford
Association of American Railroads
425 Third Street, SW, Suite 1000
Washington, DC 20024
Tel: (202) 639-2506
Tstrafford@Aar.Org

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

Docket No: FD 36511

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

SURREPLY OF THE WASHINGTON
UTILITIES AND TRANSPORTATION COMMISSION
IN OPPOSITION TO THE PETITION FOR DECLARATORY ORDER

ROBERT W. FERGUSON,
Attorney General of Washington

Jeff Roberson
Assistant Attorney General
Washington State Bar No. 45550
Washington State Office of the Attorney General
Utilities and Transportation Division
P.O. Box 40128
Olympia, WA 98504-0128
(360) 664-1188
jeff.roberson@utc.wa.gov

Attorneys for the Washington Utilities and
Transportation Commission

**BEFORE THE
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Docket No: FD 36511

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

I. INTRODUCTION

In this proceeding, petitioners Waste Management of Washington, Inc. and Waste Management Disposal Services of Oregon, Inc. (collectively WM), who are neither rail carriers nor agents through whom a rail carrier provides rail transportation, seek a declaration that 49 U.S.C. § 10501 (§ 10501) preempts the application of chapter 81.77 of the Revised Code of Washington (RCW) to the collection and transport of solid waste in intermodal containers by motor vehicles.

The Washington Utilities and Transportation Commission (the Commission) filed comments seeking dismissal of WM's petition, or, alternatively, entry of a declaratory order providing that WM's service does not fall within the Surface Transportation Board's (Board) exclusive jurisdiction over transportation by rail carrier under § 10501. WM has filed a reply to those comments. The arguments that WM advances in that reply are largely unsupported by authority, or directly contrary to it: nothing in the text of the Interstate Commerce Act (the Act), the Interstate Commerce Commission's (ICC) or the Board's precedent, or the ICC's and the Board's intermodal exemption rules provide that the Board does, or the ICC did, regulate motor

carriers providing intermodal service as rail carriers. The ICC and the Board have instead always regulated those motor carriers as motor carriers. WM's service, which consists of transportation by motor carrier, thus does not fall within the Board's exclusive jurisdiction over transportation by rail carrier under § 10501.

Accordingly, the Commission again respectfully asks the Board to either dismiss WM's petition or enter an order declaring that § 10501 does not preempt the application of chapter 81.77 RCW to WM's collection and transport of solid waste by motor vehicle.

II. ARGUMENT

§ 10501(a) vests in the Board jurisdiction over "transportation by rail carrier that is . . . only by railroad." § 10501(b) generally makes that jurisdiction exclusive, preempting otherwise applicable state law.

WM invokes the Board's exclusive jurisdiction to attempt to shield its collection and transportation of solid waste by motor vehicle from regulation by Washington state. To obtain the relief it seeks under § 10501, WM must show that its service is effectively treated as "transportation by rail carrier that is . . . only by rail" under the Act, precedent issued by the ICC or the Board, or the intermodal exemption rules promulgated by the ICC and now administered by the Board. It cannot do so because: (1) its argument about § 10501 ignores the plain text of the provision and the remainder of the Act by making a statutory purpose argument similar to one that the Board has already rejected, (2) the ICC's precedent consistently treated motor carriers providing intermodal service as motor carriers, and the Board has not done otherwise, and (3) the intermodal rules do not show that the ICC or the Board consider motor carriers providing intermodal service as rail carriers. Because WM fails to show that the law treats it as a rail carrier, the Board should deny it the relief it seeks.

Further, as noted above, the Board has recognized that its exclusive jurisdiction over transportation by rail carrier does not preempt state police power enactments if they do not unreasonably burden rail operations. The state laws at issue here, which apply to the collection and transport of solid waste by entities who are neither rail carriers nor agents of rail carriers, are paradigmatic examples of the types of laws the Board has stated survive preemption by § 10501. Alternatively, the Board should deny WM the relief it seeks on that basis.

A. WM Is A Motor Carrier, Not A Rail Carrier

WM contends that the Board regulates its service as transportation by rail carrier based on arguments about statutory purpose, the Board's precedent, and the ICC's and the Board's intermodal exemption rules. None of those support WM's claim. Therefore, the Board should follow the decision it made in the first *Hi Tech Trans, LLC* declaratory order proceeding and conclude that § 10501 does not preempt state regulation of WM's collection and transport of solid waste by motor vehicle. FD 34192, slip op. at 1-6 (served Nov. 20, 2002) (*Hi Tech Trans I*).

1. Neither § 10501 nor the remaining provisions of the Act treat WM as providing transportation by rail carrier.

Beginning with WM's statutory arguments, it contends that § 10501 "protect[s] COFC service from state regulation" because, without the trucking service, a railroad cannot provide rail service. Reply in Support of Verified Petition for Declaratory Order; Expedited Consideration Requested (Reply) at 6, 7, 9. The Board should reject this argument for four reasons.

First, WM's argument is unsupported by the plain language of § 10501. The provision, as noted above, vests in the Board exclusive jurisdiction over transportation by rail carrier that is only by railroad. WM admits that it is not a rail carrier or operating under the auspices of one.

Given those concessions, the fact that WM's operations benefit a rail carrier does nothing to bring them within the Board's exclusive jurisdiction.

Second, WM's argument impermissibly reads Part B's motor carrier provisions out of the Act. The Act separately defines the terms "rail carrier," 49 U.S.C. § 10102(5), and "motor carrier," 49 U.S.C. § 13102(14), and sets out separate regulatory structures for each. 49 U.S.C. §§ 10101 – 11908 (rail carriers); 49 U.S.C. §§ 13101 – 14916 (motor carriers). WM asks the Board to ignore the directly applicable motor carrier provisions and instead apply the rail carrier provisions. But "the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *Roberts v. Sea-Land Servs., Inc.*, 566 U.S. 93, 101 (2012). Faithfully interpreting the Act here requires the Board to apply to WM the motor carrier provisions of Part B, which specifically apply to it, rather than the rail carrier provisions of Part A, which do not.

Third, to the extent that WM argues that the Board should treat it like a rail carrier rather than a motor carrier because its operations benefit a rail carrier, that argument is inconsistent with the Act. Where Congress intended the Board or the ICC to treat a motor carrier as a rail carrier, it explicitly stated so in statute. In 1940, Congress exempted from Part II of the Act motor vehicle terminal operations when performed by a rail carrier or a motor carrier agent of one. Interstate Commerce Act of 1940, Pub. L. 76-785, 54 Stat. 898, 920, § 17. In those limited cases, Congress explicitly directed the ICC to regulate the operations as transportation by rail carrier. *Id.* Congress recodified this exemption when enacting the Interstate Commerce Commission Termination Act, and it remains codified at 49 U.S.C. § 13503. No similar provision required the ICC or requires the Board to treat motor carriers who provide services that

benefit rail carriers, or are a prerequisite to transportation by rail carrier, as rail carriers. The Board should read that statutory absence as telling.

Fourth, the Board has already considered and rejected arguments like the one WM makes here. In the second declaratory order proceeding before the Board concerning Hi Tech Trans, LLC, the company argued that the Board's exclusive jurisdiction extended to its transloading activities because they benefitted a rail carrier and were a prerequisite to transportation by rail carrier. *Hi Tech Trans, LLC – Petition for Declaratory Order – Hudson County, NJ*, FD No. 34192 (Sub-No. 1), slip op. at 6 (STB decided Aug. 14, 2003) (*Hi Tech Trans II*). The Board rejected those arguments, noting that under them “any third party or noncarrier that even remotely supports or uses rail carriers would come within the statutory meaning of transportation by rail carrier.” *Id.*

The Board should reject WM's argument, just as it rejected Hi Tech Trans's. A railroad cannot effectively compete for the business of carrying goods unless someone manufactures or distributes them. Nor can a railroad compete effectively for the business of carrying food unless someone grows it. But that does not mean that the Board's jurisdiction under § 10501 extends to manufacturers, wholesalers or retailers whose supply chains touch a railroad, or farmers. “Preemption” by § 10501 “clearly does not go that far; nor does the Board's jurisdiction.” *Hi Tech Trans I* at 3.

2. ICC precedent does not provide that motor carrier intermodal service is regulated as transportation by rail carrier.

WM argues that its service is regulated as transportation by rail carrier based on longstanding ICC precedent. Specifically, it contends that “COFC service is an integral part of modern-day railroading that has long been subject to STB jurisdiction as transportation by rail carrier, regardless of whether the trailers are owned or operated by railroads, shippers, or motor

carriers,” parenthetically citing an ICC opinion for support for that statement. Reply at 3 (parenthetically quoting *Movement of Highway Trailers by Rail*, 293 I.C.C. 93, 106 (1954)) (*New Haven*); see *id.* at 9 (citing *New Haven*). *New Haven* did not hold that the ICC treated motor carriers providing intermodal service as rail carriers, and, in fact, the ICC consistently treated motor carriers providing intermodal service as motor carriers under the Act.

First, *New Haven* did not address the question before the Board, which is whether motor carriers providing intermodal service are regulated as rail carriers under the Act. It instead addressed the opposite question, whether rail carriers performing intermodal service were regulated as motor carriers under the Act. *E.g.*, *New Haven* at 93 (the petition at issue “presented for our consideration 20 questions concerning the legal relations, limitations, and obligations incident to the *transportation of highway trailers on railroad flatcars*.” (emphasis added)).¹ The ICC addressed the issue because some had claimed that rail carriers needed motor carrier operating authority to perform substitute service for motor carriers under Plan I TOFC/COFC service. *Id.* at 97. The ICC rejected that argument after concluding that a rail carrier transporting containers by rail was performing activity regulated under the rail carrier provisions of the Act. *Id.* at 101 (“we are of the view, and so find, that the operations referred to constitute carriage by railroad, subject to part I of the act.”).² *New Haven* in no way holds or even suggests that motor carriers performing intermodal service are treated as rail carriers.

¹ See *id.* at 99 (“[t]he rail carriers and their supporting interests contend, however, that when this vehicle, laden with freight, is on a flatcar, coupled in a train being drawn over steel rails by a locomotive, the transporting vehicle is the flatcar, a component of the train, that the trailer serves only as a container; and that the way being traversed is a private railroad right-of-way, not a public highway.”).

² Accord *id.* at 100 (the rail carriers “assert that the motor carriers, in taking a position that part II certification is needed in order to operate loaded trailers on flatcars over railroad tracks, must make a case that this is an operation of a motor vehicle upon a public highway, and that the motor common carriers’ argument fails to come to grips with that requirement. There is merit in this criticism.”).

Second, contrary to WM's argument, ICC precedent consistently shows the agency regulating motor carriers providing intermodal transport as motor carriers. This is true in *New Haven* as well as orders entered before and after it. *E.g.*, *Substituted Service – Charges and Practices of For-Hire Carriers and Freight Forwarders, (Piggyback Service)*, Ex Parte No. 230, 322 I.C.C. 301, 361-64 (1964) (*Ex Parte 230*) (restricting motor carriers' use of intermodal rail service to eliminate circuitous routes so as to prevent the motor carrier from "negat[ing] the certificate and permit requirements of the [A]ct"); *id.* at 352-54 (forbidding motor and rail carriers from publishing joint tariffs governing intermodal service for commodities exempt from the Commission's regulation of motor carriers under Part II of the Act); *New Haven* at 107 (instructing rail carriers that they should verify that the motor carriers for whom the performed substitute service had motor carrier authority for the commodities and points substituted for); *Substituted Freight Service – In re Substitution of Motor Vehicle Service for Rail or Water Service and of Rail or Water Service for Motor Vehicle Service*, Ex Parte No. 129, 232 I.C.C. 683, 687 (1939) (noting concerns that motor carriers would use substitute intermodal rail service to abandon the points of service listed in their certificates and warning that doing so would cause the Commission to cancel the motor carrier's certificate under Part II of the Act).

3. The ICC's and the Board's intermodal exemption rules do not treat WM's service as transportation by rail carrier.

WM also argues that the ICC's (now the Board's) intermodal exemption rules show the Board's exclusive jurisdiction over its service, for two reasons. First, WM contends that "federal regulations . . . protect COFC service from state regulation" because the service benefits rail carriers as a necessary prerequisite to intermodal rail service. Reply at 6. Second, WM argues that intermodal motor carrier service is effectively transportation by rail carrier under the intermodal rules. Reply at 4-8. The Commission's surreply addresses the question begged by

WM's arguments, whether the intermodal exemption rules apply to its service, before addressing those arguments on the merits.

a. The intermodal exemption rules do not show that WM's service subject to the Board's regulation because the Board does not regulate the transportation and collection of solid waste by motor vehicle

WM argues that the intermodal exemption rules show the Board's jurisdiction over intermodal motor carrier services, preempting state laws applicable to such service, "regardless of the contents of the intermodal containers." Reply at 9 (capitalization omitted). However, the ICC determined that it lacked jurisdiction over solid waste collection services before it promulgated the intermodal rules. Reply of the Washington Utilities and Transportation Commission in Opposition to the Petition for Declaratory Order (Commission Reply) at 12-13. As the Commission has noted, nothing in the rulemakings adopting the intermodal rules or the rules themselves indicate that the ICC considered the rules as abrogating that determination. *Id.* at 16-18. The Board's rules are thus inapplicable to the motor vehicle collection and transport of solid waste at issue here and do not show the Board's jurisdiction over WM's service.

WM nevertheless contends that the Board, the courts, and Congress have abandoned the relevant ICC decisions, *Joray Trucking Corp.*, 99 M.C.C. 109 (1965), by ignoring it and its progeny when addressing the Board's jurisdiction under § 10501, Reply at 9-11. WM is flatly incorrect, for three reasons.

First, *Joray* concerned motor, rather than rail, carriers. 99 M.C.C. at 110 ("we find that the proposed operations, as described in the report, are not within the purview of part II of the Interstate Commerce Act."). It is unsurprising that the ICC, the Board, and the courts have looked elsewhere when interpreting the Act's rail carrier provisions. The cases WM asks the Board to follow instead of *Joray* all concern transportation activities performed by a rail carrier

or an agent under its control, as the Commission has already explained. Commission Reply at 9-11. And, as also explained earlier, the Clean Rail Act governs the operation of transloading facilities by rail carriers or their agents, meaning activities deemed to be transportation by a rail carrier. *Id.* at 22-23. Those authorities are inapplicable here because WM is a motor carrier rather than a rail carrier.

Second, while WM characterizes the ICC's decisions about solid waste collection as "conflicting," Reply at 10, it offers no support or evidence for that claim. And it can offer none. While the ICC reversed itself as to whether its jurisdiction over motor carriers extended to nuclear waste, *e.g.*, *Nuclear Diagnostic Laboratories, Inc., Contract Carrier Application*, 131 M.C.C. 578, 580 (1979), it never wavered as to the conclusion it reached in *Joray*. It repeatedly affirmed that it lacked jurisdiction over the collection and transport of solid waste by motor vehicle. *E.g.*, *Long Island Nuclear Serv. Corp., Common Carrier Application*, 110 M.C.C. 398, 403-04. Those determinations remain good law under the Interstate Commerce Commission Termination Act's savings clause. Pub. L. 104-88, 109 Stat. 803, 941, § 204(a).

Third, the Board never explicitly overruled *Joray*, and Congress has incorporated its holding into the Act. *AGG Enterp. v. Washington County*, 281 F.3d 1324, 1329-30 (9th Cir. 2002). Congress drafted Title 49's motor carrier preemption provision after considering and acquiescing to *Joray's* holding. *AGG*, 281 F.3d at 1329-30 (quoting H.R. Conf. Rep. No. 103-677, at 85 (1994), *reprinted in* 1994 U.S.C.C.A.N. 1715, 1757). In doing so, Congress signaled its intent not to preempt state regulation of the motor vehicle collection and transport of solid waste. *Id.* at 1330 ("Congress'[s] intent *not* to preempt the area of solid waste collection is unambiguous.") (emphasis in original). As preemption turns on congressional intent, *Medtronic*

v. *Lohr*, 518 U.S. 470, 485 (1996), Congress’s manifest intent to avoid preempting state regulatory over operations like WM’s should control the disposition of WM’s petition.

b. WM is incorrect that the intermodal rules show that the Board regulates motor vehicle solid waste collection and transport as transportation by rail carrier.

Turning now to the merits of WM’s arguments, it first contends that the intermodal rules apply to WM’s service because the service benefits a rail carrier. That argument fails for the reasons described above. The Board lacks, and the ICC lacked, regulatory jurisdiction over the collection and transport of solid waste by a motor carrier, and therefore could not have exempted the service from regulation. *Cent. States Motor Freight Bureau v. ICC*, 924 F.2d 1099, 1102 (D.C. Cir. 1991) (noting that an exemption presupposed jurisdiction). That WM’s service benefits a rail carrier does not change that analysis.

The Board should similarly find WM’s second argument, that the intermodal rules show that it provides transportation by rail carrier, unpersuasive. WM assumes that intermodal service is synonymous with transportation by rail carrier such that a motor carrier providing intermodal service provides transportation by rail carrier. Reply at 13-14 (contending that WM’s service “fits squarely within the STB’s exclusive jurisdiction over ‘motor carrier TOFC/COFC pickup and delivery services arranged independently with the shipper or receiver (or its representative/agent) and performed immediately before or after a TOFC/COFC movement provided by a rail carrier’”) (citation omitted). But the ICC’s and the Board’s exemption authority does not create jurisdiction; it simply allowed or allows the ICC or the Board to exempt from regulation services already falling within their jurisdictions. *Cent. States Motor Freight Bureau*, 924 F.2d at 1102. And the law has always recognized the bimodal nature of intermodal service. *Improvement of TOFC/COFC Regulations (Pickup and Delivery)*, Ex Parte No. 230 (Sub-No. 7),

6 I.C.C.2d 208, 213 (1989). As discussed above, in regulating those two separate modes, the ICC always drew upon its separate regulatory authority over both legs of the transport, and nothing suggests that the Board has done differently through the rules. Doing otherwise would impermissibly create jurisdiction, rather than applying it, by including within the Board's rail carrier jurisdiction those motor carriers providing intermodal service or within its motor carrier jurisdiction those rail carriers similarly performing an intermodal movement. *See* 5 U.S.C. § 706(2); 49 U.S.C. § 10102(5) (defining "rail carrier"); 49 U.S.C. § 13102(14) (defining motor carrier).

WM nevertheless contends that "if the STB's jurisdiction did not extend beyond transportation arranged 'by rail carriers' . . . the STB would not have had the authority to exempt" only the motor carrier leg of various intermodal services. Reply at 7. Again, the ICC had, and the Board has, jurisdiction over modes of transportation other than rail, including jurisdiction over motor carrier transportation. 49 U.S.C. § 13501; former 49 U.S.C. § 10521 (1994 main ed.). And the Board has, and the ICC had, the authority to exempt services under their jurisdiction related to transportation by rail carrier, even when not performed by a rail carrier. *Improvement of TOFC/COFC Regulations*, 6 I.C.C.2d at 213. But the fact that the ICC's jurisdiction included, and the Board's jurisdiction includes, other modes of transport under the Act does not suggest that the ICC regulated or the Board regulates those other modes under their rail carrier jurisdictions. As discussed above, they did not and do not.

4. Because WM is a motor carrier, the Board should apply *Hi Tech Trans I*.

As discussed in the Commission's reply comments, the Board determined in *Hi Tech Trans I* that § 10501 does not preempt state regulation of motor carriers bringing waste to rail yards for transloading and shipment by rail. FD 34192, slip op. at 3-5. WM attempts to

distinguish *Hi Tech Trans I* by contending that it does not concern intermodal service.³ Reply at 8. But as discussed in both the Commission’s initial and instant replies, WM is a motor carrier who collects and transports solid waste. *Hi Tech Trans* concerned § 10501’s applicability to motor carriers who collect and transport solid waste. The Board should simply follow *Hi Tech Trans I* here and deny WM the relief it seeks.

B. Chapter 81.77 RCW Does Not Manage, Govern, Or Unreasonably Burden Railroad Operations And Thus § 10501 Does Not Preempt Its Application To WM

Finally, WM contends that Washington’s regulation of its service burdens rail transportation, and thus falls within § 10501’s preemptive sweep, because it regulates “the collection and highway transportation of closed intermodal containers performed immediately before the Union Pacific’s performance of the rail leg of COFC service.” Reply at 13.⁴ The Board should reject this argument, for three reasons.

First, the Board has recognized that § 10501 does not preempt all exercises of the states’ police powers to protect “public health and safety.” *Borough of Riverdale – Petition for Declaratory Order – The New York and Susquehanna and Western Railway Corporation*, FD 33466, slip op., at 6 (served Sept. 10, 1999). Such “state and local regulation is permissible where it does not interfere with interstate rail operations.” *Id.* Chapter 81.77 RCW does not apply to *rail operations* at all - it applies to the operations of motor carriers who collect and transport solid waste, *see generally* RCW 81.77.010 -.210, and therefore does not unreasonably burden rail operations.

³ WM distinguishes a related Third Circuit opinion in a related *Hi Tech* case. Because its argument is equally applicable to the Board’s decision, the Commission addresses it.

⁴ WM addresses this portion of its response to the reply of Waste Connections, but the Commission made similar arguments in its reply comments and thus addresses WM’s reply. Commission Reply at 14-16.

Second, WM appears to argue that preemption under § 10501 can turn on whether a state or local law incidentally affects what can be shipped by rail. But § 10501 does not preempt state regulations that incidentally touch rail transportation. *E.g., Tex. Cent. Bus. Lines Corp. v. City of Midlothian*, 669 F.3d 525, (5th Cir. 2012) (§ 10501 preempts “[t]hose enactments that have the effect of managing or governing, and not merely incidentally affecting, rail transportation” (internal citation omitted)); *Fla. E. Coast Ry Co. v. City of W. Palm Beach*, 266 F.3d 1324, 1331 (11th Cir. 2001) (§ 10501 preempts “those state laws having the effect of managing or governing rail transportation while permitting the continued application of laws having a more remote or incidental effect on rail transportation” (internal quotation and citation omitted)). Any effect on rail transportation here is incidental to the regulation of a motor carrier collecting and transporting solid waste. § 10501 does not preempt chapter 81.77 RCW as applied.

Third, to the extent that WM suggests that because chapter 81.77 RCW regulates conduct performed “immediately before the rail leg” of intermodal service § 10501 preempts it, WM’s argument suffers from two flaws.

Initially, WM does not explain why immediacy matters for purposes of § 10501. If WM’s argument is that preventing something from being shipped burdens rail transportation, that same burden falls on the rail carrier regardless of whether the regulation governs activity performed minutes or feet from the rail carrier or days or miles from it. WM’s argument impermissibly gives § 10501 unlimited preemptive effect. *Altria Group, Inc. v. Good*, 555 U.S. 70, 77 (2008) (preemption provisions interpreted narrowly).

Further, as Waste Connections has noted, there are activities more proximate to the rail leg than WM’s collection and transport of solid waste, namely the loading of the containers WM transports onto a rail car. But the Board has held that states may regulate services like

transloading if not performed by a rail carrier or an agent acting under the auspices of one. *Hi Tech Trans I* at 7. Preemption under § 10501 does not turn on the temporal proximity of the activity to rail carriage; it turns on whether the person performing it is a rail carrier or an agent acting under the auspices of one. And WM, by its own admission, is not a rail carrier, and it does not act under the auspices of one.

III. CONCLUSION

For the reasons stated in this and its initial replies, the Commission respectfully requests that the Board either (1) dismiss WM's petition or (2) enter an order declaring the WM's service is not subject to the Board's exclusive jurisdiction under § 10501.

DATED this 1st day of July 2021.

ROBERT W. FERGUSON
Attorney General

/s/ Jeff Roberson, WSBA No. 45550
Assistant Attorney General
Office of the Attorney General
Utilities and Transportation Division
P.O. Box 40128
Olympia, WA 98504-0128
(360) 664-1188
jeff.roberson@utc.wa.gov

Counsel for the Washington Utilities and
Transportation Commission

CERTIFICATE OF SERVICE

I certify that I have this day served copies of the foregoing Surreply of the Washington Utilities and Transportation Commission upon all parties of record in this proceeding by email as agreed to by the parties.

/s/ Elizabeth M. DeMarco
(signature)

July 1, 2021
(date)

(49 U.S.C. 721, 5 U.S.C. 553)

cc:

Michael F. McBride, DC Bar #243998
VAN NESS FELDMAN LLP
1050 Thomas Jefferson St. NW, 7th Floor
Washington, D.C. 20007
Tel: 202-298-1989
mfm@vnf.com

Jessica L. Goldman, WSBA #21856
Jesse L. Taylor, WSBA #51603
SUMMIT LAW GROUP PLLC
315 Fifth Avenue So., Suite 1000
Seattle, WA 98104
Tel: (206) 676-7000
Legal Asst: Sharon Hendricks
Legal Asst: Karen Lang
jessicag@summitlaw.com
jesset@summitlaw.com
sharonh@summitlaw.com
karenl@summitlaw.com

Robert Rosenberg
Slover & Loftus LLP
1224 Seventeenth Street NW
Washington, D.C. 20036
Tel: (202) 347-7170
rdr@sloverandloftus.com

Blair I. Fassburg, WSBA #41207
David W. Wiley, WSBA #08614
Sean D. Leake, WSBA #52658
WILLIAMS, KASTNER & GIBBS PLLC
601 Union Street, Suite 4100

Seattle, WA 98101-2380
Legal Asst: Maggi Gruber
dwiley@williamskastner.com
bfassburg@williamskastner.com
sleake@williamskastner.com
mgruber@williamskastner.com

Timothy J. Strafford
Association of American Railroads
425 Third Street, SW, Suite 1000
Washington, DC 20024
Tel: (202) 639-2506
Tstrafford@Aar.Org