

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

ENTERED
Office of Proceedings
June 4, 2021
Part of
Public Record

WASTE MANAGEMENT OF	)	
WASHINGTON, INC. AND WASTE	)	
MANAGEMENT DISPOSAL	)	Docket No. FD 36511
SERVICES OF OREGON, INC. –	)	
VERIFIED PETITION FOR	)	
DECLARATORY ORDER	)	

REPLY IN OPPOSITION TO PETITION FOR DECLARATORY ORDER

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HOLDINGS, INC., AND MURREY'S
DISPOSAL COMPANY, INC.

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Waste Connections US Holdings, Inc., together with its wholly-owned subsidiary, Murrey’s Disposal Company, Inc. (“Murrey’s”) (jointly, “Waste Connections”), hereby opposes the Petition for Declaratory Order (“Petition” or “Pet.”) that Waste Management of Washington, Inc., and Waste Management Disposal Services of Oregon, Inc. (individually and jointly, “Waste Management”), filed with the Surface Transportation Board (“Board” or “STB”) in the above-captioned proceeding on May 5, 2021.

INTRODUCTION AND SUMMARY

The State of Washington has chosen to address solid waste generated within its borders by assigning individual service territories to authorized waste collection providers, including Waste Connections and Waste Management, as part of a regulatory system administered by the Washington Utilities and Transportation Commission (“WUTC”) under RCW (Revised Code of Washington) Chapter 81.77. The WUTC action at issue regulates where Waste Management may collect solid waste, not how or where it can move the waste that it is authorized to collect. The WUTC does not

restrict Waste Management from transporting solid waste by rail or motor carrier, even through Waste Connections' service territory, only whether Waste Management is authorized to collect the waste in the first place.

Waste Management seeks to upend Washington's territorial allocation by contracting with customers to collect solid waste in Waste Connections' service territory, arranging for truck-rail intermodal movement of that solid waste via unauthorized third-party trucking companies, and then claiming that WUTC enforcement of the territorial allocation is preempted because the Board has exempted intermodal transportation. The WUTC, in an order dated May 3, 2021 ("WUTC Order," attached as the Appendix to the Petition), properly rejected Waste Management's preemption argument and ordered Waste Management "to immediately cease and desist" its unauthorized collection services. *Id.* at 15. Rather than comply, Waste Management has petitioned the Superior Court of Washington for review of the WUTC Order and moved for stay. Waste Management now also petitions the Board for a declaratory order, and ties its motion for court stay to Board action on its Petition, thus seeking to benefit from extended delay.

There is no procedural need for the Board to consider Waste Management's Petition. The matter is already pending in Washington. As the Board has repeatedly recognized, state agencies and courts have ample ability and equal jurisdiction to consider preemption claims. *E.g., Tesoro Refining & Marketing Co., LLC—Pet. for Decl. Order*, FD 36041 (STB served Nov. 16, 2016), at 4; *Hi Tech Trans, LLC v. New Jersey*, 382 F.3d 295 (3d Cir. 2004) ("*Hi Tech*"); *City of Gerard v. Youngstown Belt Ry.*, 979 N.E.2d 1273 (Ohio 2012); *In re Vermont Ry.*, 769 A.2d 648 (Vermont 2000).

Furthermore, the Board's resources are stretched thin; Waste Management could have sought Board intervention when the WUTC proceeding began or before contracting with the customers; and the Board's procedures should not be exploited for purposes of delay.

Waste Management's Petition also has no substantive merit. As a threshold matter, Waste Management has not established that the motor carrier portion of its service falls within the Board's intermodal exemption in the first place. Waste Management is an authorized motor carrier, not a railroad, and its activities at issue consist of contracting with customers to provide end-to-end transportation service using railroads only as its subcontractors or agents. Such service falls under intermodal Plan I, which the Board expressly excluded from its intermodal exemption for motor carrier service at 49 C.F.R. § 1090.2. Without the exemption, Waste Management's preemption theory has no factual predicate and, therefore, must fail.

Even assuming *arguendo* its service falls within the exemption, Waste Management's preemption claim still fails. Waste Management conflates the express preemption provision in 49 U.S.C. § 10501(b) and the exemption of the motor carrier leg of intermodal transportation under the predecessor of 49 U.S.C. § 10502(a). Section 10501(b) preemption is unavailable because the motor carrier transportation at issue is not being provided by, under the control of, on behalf of, or for a common carrier railroad. *E.g., Valero Refining Co.—Pet. for Decl. Order*, FD 36036 (STB served Sept. 20, 2016), at 4 (“*Valero*”). Furthermore, “if [Waste Management’s] reasoning is accepted, any nonrail carrier’s operations would come under the exclusive jurisdiction of

the STB if, at some point in a chain of distribution, it handles products that are eventually shipped by rail by a railcarrier.” *Hi Tech*, 382 F.3d at 309.

There is also no implied preemption, as the WUTC’s actions do not conflict with the intermodal exemption or other Board action. As stated above, Washington, through the WUTC, regulates only the collection and handling of solid waste, not interstate motor carrier transportation. Decisions such as *I.C.C. v. Texas*, 479 U.S. 450 (1987), finding state regulation of exempted motor carrier portions of intermodal movements to be preempted, have no bearing because the WUTC Order does not address rates. Nor does the WUTC Order infringe upon any actual Board action. Beyond that, nothing suggests that the Board or its predecessor, the Interstate Commerce Commission (“ICC”), intended for the intermodal exemption to disrupt how states oversee the handling of solid waste.

Even if preemption might somehow otherwise apply, the WUTC’s actions would still be permissible under the local police power exception. The WUTC’s actions do not unreasonably interfere with railroad operations or the Board’s regulatory programs, nor do they discriminate against rail service, as the unauthorized collection of solid waste is prohibited, regardless of whether it later moves by intermodal or only by truck. *E.g., In re Vermont Ry.* Waste Management completely ignores this key limitation that governs even where express § 10501(b) preemption is otherwise applicable.

In addition, Waste Management could have sought, and still can seek, a WUTC certificate for authority to provide “overlapping” service in Waste Connections’ territory under RCW 81.77.040. Its failure to exhaust its administrative remedies is yet

another reason for the Board not to intervene in this dispute of Waste Management's own making. *E.g., United States v. L. A. Tucker Truck Lines, Inc.*, 344 U.S. 33 (1952).

Accordingly, the Board should dismiss and reject Waste Management's Petition as soon as possible. To the extent the Board wishes to offer guidance or otherwise address the merits, it should confirm the WUTC's determination that preemption does not apply. Most of all, the Board should not help Waste Management benefit from further delay.

FACTUAL BACKGROUND

The relevant factual background is straightforward and not meaningfully disputed.

Washington, through the WUTC, grants certificates of public convenience and necessity that authorize a solid waste collection company to provide waste collection services in a specified territory. RCW 81.77.040. Waste Management and Waste Connections, the first and third largest waste collection companies nationally, both have (through certain wholly-owned subsidiaries) assigned solid waste collection service territories in Washington. While Waste Management chooses not to mention it, Waste Management of Washington, Inc., is a certificated interstate motor carrier (USDOT 1967746 and MC003330587), as is Waste Management Disposal Services of Oregon, Inc. (USDOT 387252 and MC00252804).

The underlying dispute began when Waste Management arranged to serve two customers, McKinley Paper Company and Port Townsend Paper, located in Waste Connections' exclusive service territory in Clallam and Jefferson Counties, Washington,

without obtaining prior WUTC authorization. Waste Management subcontracted with two third-party trucking companies (MJ Trucking & Contracting, Inc., and Daniel Anderson Trucking and Excavation, Inc.) to collect old corrugated cardboard rejects (“OCC Rejects”) from the two paper companies in containers, then deliver the containers to transload facilities (the Olympic View Transfer Station, operated by Waste Management, and a facility owned and operated by North Mason Fiber Company), for transloading on to the Puget Sound and Pacific Railroad for later interchange with the Union Pacific Railroad Company (“UP”) for delivery to the Columbia Ridge Landfill in Oregon. Pet. at 2-8; WUTC Order at 4-6.

Waste Management’s key contention is that because the OCC Rejects move in sealed containers from the paper companies to the railroads and then the landfill, any exercise of WUTC authority is preempted. Pet. at 9. Waste Connections and the WUTC maintain that whether the container of OCC Rejects remained closed from collection of the OCC Rejects to disposal is irrelevant because Waste Management is not authorized to serve the paper companies located in Waste Connections’ exclusive service territory in the first place. WUTC Order at 8.

To that end, Waste Connections filed complaints with the WUTC against Waste Management and the two subcontracted trucking companies on July 15, 2020. *Id.* at 1-2. On May 3, 2021, the WUTC granted summary judgment in Waste Connections’ favor and ordered Waste Management “to immediately cease and desist” its unauthorized waste collection services. *Id.* at 15. Waste Management filed its instant Petition with the Board on May 5, 2021, and its petition for review and motion for stay of the WUTC

Order in Washington Superior Court in Case No. 21-2-00870-34 on May 11, 2021 (although the filings are dated May 10, 2021).

Waste Management's unauthorized service in Waste Connections' exclusive territory has now continued for over ten months. If the Superior Court grants the requested stay, Waste Management could continue its unauthorized service indefinitely, at least until the Board ruled on the declaratory petition, and perhaps longer if Waste Management were to seek reconsideration or judicial review.

ARGUMENT

A. NO DECLARATORY ORDER OR PROCEEDING IS NEEDED OR APPROPRIATE

Declaratory orders are discretionary. 5 U.S.C. § 554(e). Here, there is no need for the Board to exercise that discretion to grant Waste Management its requested relief and compelling reasons that it should not.

Board and judicial precedent both recognize that federal and state courts, and even state agencies, can address issues of preemption, and the Board often uses its discretion to abstain from preemption disputes when the issues have been decided or are pending elsewhere. “As we have explained, questions of federal preemption under 49 U.S.C. § 10501(b) can be decided by the Board or the courts.” *CSX Transp., Inc.—Pet. for Decl. Order*, FD 35832 (STB served July 31, 2015), at 3; *see also* cases cited at 2, *supra*. *Hi Tech* itself began as an enforcement proceeding brought by the New Jersey Department of Environmental Protection against an unauthorized solid waste rail transfer facility. 382 F.3d at 297.

Waste Management provides no support for its claim that “the WUTC does not have the authority to determine the STB’s jurisdictional reach” (Pet. at 8), and there is none. But even if there were, the Superior Court can consider the issue or apply its own independent jurisdiction. “The Board is not the proper forum for deciding the extent of a court’s jurisdiction.” *Jimmy Lee Waneck and Starr Swearingen Waneck, et al.—Pet. for Decl. Order*, FD 36167 (STB served May 25, 2018), at 4 (citations omitted). If Waste Management found the WUTC proceeding so offensive, it should have petitioned the Board when the proceeding commenced, rather than wait until it lost to seek Board intervention.

Nothing warrants Board involvement at this time. The WUTC and the Washington Superior Court are capable of handling and, indeed, currently are handling, the matter. As explained *infra*, the WUTC’s rejection of Waste Management’s preemption theory is not only permissible, but compelled. The WUTC is not interfering with motor carrier transportation or transportation rates, only which solid waste collection companies are authorized to collect waste in a particular territory. *Hi Tech* and numerous other agency and court precedents make clear that § 10501(b) preemption applies only to activities conducted by, on behalf of, or under the auspices of railroad common carriers. By its own admission, Waste Management and its trucking subcontractors are not rail carriers, and there is no preemption. *E.g.*, WUTC Order at 6, n.15 (quoting Waste Management’s statement that “Respondents **do not** claim they are rail carriers or should be treated as rail carriers”) (original emphasis). As explained *supra*, the two Waste Management subsidiaries are instead certificated interstate motor carriers.

As noted, the timing of the Petition appears designed to allow Waste Management to benefit from further administrative delay. The Board should not reward such tactics, and should instead reject the Petition expeditiously on either procedural or substantive grounds.

B. THE WUTC'S ASSIGNMENT OF SOLID WASTE SERVICE TERRITORIES IS NOT PREEMPTED

Waste Management's theory is essentially that: (a) Waste Management uses truck-rail intermodal transportation to ship solid waste that the WUTC has not authorized it to collect; (b) the Board or its predecessor has exempted intermodal transportation, including the motor carrier leg, from regulation under the predecessor of § 10502(a); (c) under § 10501(b), the Board's remedies and jurisdiction, including its exemptions, are exclusive and preemptive; and, therefore, (d) the exemption of the motor carrier portion of intermodal truck rail transportation preempts the enforcement of Washington's system of assigning service territories against Waste Management's intermodal transportation of containerized solid waste. Pet. at 9-21.

Waste Management has not even established that its motor carrier service is covered under the intermodal exemption in the first place. By its own description, Waste Management provides the end-to-end transportation for the OCC Rejects by subcontracting with the trucking companies and the railroads to provide the service, whereby the railroads serve as Waste Management's agent. The service thus falls under Plan I, meaning the class exemption does not extend to the motor carrier service. 49 C.F.R. § 1090.2; *Improvement of TOFC/COFC Regulations (Pickup and Delivery)*, EP

230 (Sub-No. 7), 6 I.C.C.2d 208 (1989) (excluding the motor carrier portion of Plan I service from the class exemption). If there is no exemption, then there can be no preemption under Waste Management's theory.

Even if Waste Management's service is covered by the exemption, Waste Management's syllogism is still defective because it conflates the Board's exemption authority under § 10502(a) with the express preemption under § 10501(b). Section 10501(b) preemption extends only to rail carriers or entities operating for them or under their control. *E.g., Valero* at 4; *Hi Tech*, 382 F.3d at 308-09. Neither Waste Management nor its truck subcontractors are so affiliated, which renders § 10501(b) preemption inapplicable. WUTC Order at 9. Even if some form of implied preemption may flow from the Board's or ICC's exemption of intermodal transportation, its scope is more limited and also inapplicable. Unlike the situation in *I.C.C. v. Texas*, the WUTC's Order focuses not on any aspect of rail transportation, only which companies can collect solid waste in designated areas. There is no conflicting regulation or other Board action, and thus no preemption.

In addition, Waste Management's Petition wholly ignores the established exception from preemption for the legitimate exercise of the local police power in areas of public health and safety that does not directly block or interfere with railroad operations or Board regulation and is not discriminatory. The WUTC's regulation of solid waste territories addresses vital public health and safety interests, does not directly interfere with any aspect of railroad operations or the Board's regulation of railroads, and is not discriminatory since it applies equally to pure truck and intermodal movements.

As explained in more detail below, there is no preemption of the Washington and WUTC regulation.

1. Waste Management’s predicate, that its service is covered by the intermodal exemption in the first place, lacks factual support.

The key factual predicate for Waste Management’s theory is that its motor carrier service is covered under the Board’s class exemption for intermodal service at 49 C.F.R. Part 1090 because it entails a combination of truck and rail service for sealed containers. Pet. at 9. However, Waste Management has misconstrued the nature of the Board’s exemption for the motor carrier portion of intermodal service. Where, as here, the motor carrier arranges and provides the transportation for the customer, and the rail carrier serves as the motor carrier’s agent, then the service falls under intermodal Plan I, and the class exemption for motor carrier service related to rail carrier service is inapplicable. 49 C.F.R. § 1090.2; *Improvement of TOFC/COFC Regulations (Pickup and Delivery)*, 6 I.C.C.2d at 208, 216-17.

That the Board has exempted the rail portion of an intermodal movement is not disputed. The issue here is whether the exemption extends to the motor carrier portion. The key decision relied upon by Waste Management, *Improvement of TOFC/COFC Regulations (Pickup and Delivery)*, makes clear that Plan I was excluded from the exemption. 6 I.C.C.2d at 208 (“‘Plan I’ service ... is not being exempted as a class at this time.”), 217 (“[W]e again decline to exempt Plan I services generically.”). The exclusion is reflected in the Board’s regulations. “The exemption does not apply to a

motor carrier service in which a rail carrier participates only as the motor carrier's agent (Plan I TOFC/COFC)” 49 C.F.R. § 1090.2.

What Waste Management provides amounts to Plan I service. Waste Management, a certificated motor carrier but not a Washington certificated solid waste collection company in the pertinent territory, is the only entity contracting and interfacing directly with the two paper mill customers, and Waste Management then makes its own arrangement with its various subcontractors, including the two railroads. The railroads function only as agents of Waste Management. As the service described by Waste Management falls under Plan 1, its motor carrier activities, including pickup, have not been exempted by the Board. Since there is no exemption, there is no preemption, and Waste Management's theory must fail.

**2. Waste Management's activities are not protected by
express preemption under 49 U.S.C. § 10501(b) in any event.**

Waste Management contends that the WUTC actions at issue are expressly preempted under 49 U.S.C. § 10501(b). Pet. at 13-16. To that end, Waste Management maintains that “STB jurisdiction over transportation by rail carriers ‘is exclusive.’” *Id.* at 14.

As explained *supra*, Waste Management's activities do not fall within the scope of the exemption, and preemption cannot apply for that reason. However, assuming *arguendo* that the exemption applies, what Waste Management ignores is that the Board's “exclusive” jurisdiction under 49 U.S.C. § 10501(b) applies only for “transportation by rail carriers.” “[T]he remedies provided under this part with respect to

regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law.” *Id.* (emphasis added). Only transportation provided by, on behalf of, or under the auspices of a rail common carrier qualifies. Transportation provided by others is not covered or protected by preemption. WUTC Order at 11.

The Board explained this distinction in *Valero*, where it denied Valero’s petition for a declaratory order that a city’s denial of a conditional use permit for a rail-served crude oil off-loading facility was preempted because Valero was not a railroad. Finding there was no preemption, the Board first stated the general principle that the preemption extends only to the rail carrier:

The Board finds here that there is no preemption because the Planning Commission’s decision does not attempt to regulate transportation by a “rail carrier.” The Board’s jurisdiction extends to rail-related activities that take place at transloading (or, as here, off-loading) facilities if the activities are performed by a rail carrier, the rail carrier holds out its own service through a third party that acts as the rail carrier’s agent, or the rail carrier exerts control over the third party’s operations. The record presented to the Board in this case, however, does not demonstrate that Valero is a rail carrier or that it is performing transportation-related activities on behalf of UP or any other rail carrier at its off-loading facility.

Id. at 4-5 (footnote omitted). The Board then clarified that preemption did not apply merely because the customer would receive or benefit from rail service.

Relying on Boston & Maine Corp.—Petition for Declaratory Order (Winchester), FD 35749 (STB served July 19, 2013), Valero argues that the Planning Commission’s actions have deprived it of the right to receive common carrier rail service and are, thus, federally preempted under § 10501(b). Winchester, however, involved a local regulation that would have stopped a rail carrier from operating its existing common carrier rail service over the line in question.

The Board determined that § 10501(b) preempted this regulation because it prevented the rail carrier from conducting its operations in interstate commerce. Unlike the facts in Winchester, Valero has not identified an attempt by the Planning Commission to regulate *UP*'s operations. Here, Valero's challenge involves the Planning Commission's decisions regarding *Valero's* off-loading facility, and Valero is not a rail carrier, nor is it acting under the auspices of a rail carrier.

Id. at 5 (original emphasis). The Board further distinguished preemption as applied to a different transload facility that operated under the rail carrier's auspices.

Valero also cites Norfolk Southern Railway v. City of Alexandria (Alexandria), 608 F.3d 150 (4th Cir. 2010), for the premise that a locality cannot indirectly regulate rail transportation by regulating noncarriers. Alexandria is inapposite, however, as it involved an ethanol transload facility constructed and owned by Norfolk Southern Railway Company and operated under its auspices. As noted above, Valero makes no allegation that it is a rail carrier or that it would be performing offloading under the auspices of a rail carrier at the facility at issue here.

Id. at 5.

The *Valero* discussion is exactly on point: Waste Management and its trucking subcontractors are not railroads and are not providing service on behalf of railroads; and the WUTC is not interfering with railroad services in any way or with a facility constructed and operated under a railroad's auspices. The same principle extends to transloading facilities. *E.g., Fla. E. Coast Ry. v. City of Palm Beach*, 110 F. Supp. 2d 1367 (S.D. Fla. 2000), *aff'd*, 266 F.3d 1324 (11th Cir. 2001) (third-party noncarrier rail/truck transloading activities are not exempt from local zoning and occupational licensing ordinances).

Waste Management then turns to various cases involving preemption of solid waste rail transfer facilities. Pet. at 16-20. It focuses on cases such as *Town of Babylon and Pinelawn Cemetery—Petition for Declaratory Order*, FD 35057 (STB served Oct. 16, 2009), and the reduction in the Board’s exemption power for such facilities under the Clean Railroads Act of 2008, 49 U.S.C. §§ 10908-10 (“CRA”). Waste Management’s invocation of those sources is puzzling, as they do not help its cause. The Board found in the *Town of Babylon* proceeding that the transfer facilities did not qualify for preemption because the activities of the operator, Coastal, were not under the control of the New York and Atlantic Railway Company (“NYAR”), the carrier on whose property the facility was located.¹ Similarly, land-use-exemption permits are available under the CRA only for “a facility owned or operated by or on behalf of a rail carrier.” 49 U.S.C. § 10908(e)(1)(H)(i); *Brookhaven Rail LLC—Const. & Op. Exempt.—In Suffolk Cty., NY*, FD 36398 (STB served Oct. 23, 2020), at 7 (affirming that “the CRA did not intend to expand the Board’s jurisdiction” and that the pre-CRA railroad control requirements applied in *Town of Babylon* and upheld on review continue to apply).²

¹ “[W]e do not find the changes sufficient to make Coastal NYAR’s agent. Nor are Coastal’s activities under the Amended Agreement an integral part of NYAR’s operation as a rail carrier.” *Town of Babylon* at 4; *aff’d sub nom. N.Y. & Atl. Ry. v. STB*, 635 F.3d 66, 73-75 (2d Cir. 2011).

² Waste Management is correct that a CRA permit is not needed or available for a waste transfer facility that handles sealed intermodal containers. 49 U.S.C. § 10908(e)(1)(H)(i) (CRA applies to transfer of waste “when the activity takes place outside of original shipping containers”). But that is irrelevant. If the transfer activities are not conducted by, for, or under the control or auspices of the rail carrier, there is no § 10501(b) preemption. *Fla. E. Coast Ry., supra*.

Waste Management completely fails to address, and cannot satisfy, this mandatory “rail carrier” element for § 10501(b) preemption. The principal component of Waste Management’s preemption theory thus fails.

3. The WUTC’s actions do not conflict with the exemption for intermodal transportation, and there is no implied preemption.

Waste Management’s presentation focuses on the express preemption protection available for rail carriers (but not Waste Management and its trucking subcontractors) under § 10501(b). However, its discussion of the Board’s exemption of intermodal transportation, including the motor carrier leg, under § 10502(a), may indicate that it may seek to advance a claim of implied preemption to evade the preemption limits of § 10501(b).

The Board’s exemption authority under § 10502(a) can be broader than the scope of preemption under § 10501(b). The text of § 10501(b) limits preemption to “transportation by rail carriers,” as *Valero* and other decisions explain, whereas exemptions under § 10502(a) can apply “[i]n a matter related to a rail carrier providing transportation subject to the jurisdiction of the Board.” The Board’s predecessor focused on that wider reach in its successive orders deregulating and exempting the motor carrier portion of intermodal transportation, as Waste Management recounts at some length. Pet. at 9-13. The intermodal exemption carried with it some preemptive effect, as examined in *I.C.C. v. Texas*, which predates the current version of § 10501(b).³ However, any

³ The exemption at issue in the *Texas* case was in regard to Plan II TOFC/COFC service, where “the railroad holds out to provide a complete door-to-door service under a single bill of lading.” 479 U.S. at 457 (original source omitted). The Supreme Court also

implied preemption is not broader than, and does not expand the breadth of, the express exemption under § 10501(b). In particular, if “related to a rail carrier providing transportation” were enough to qualify for preemption, then *Valero* and numerous other cases finding no preemption would have been decided differently. Indeed, Waste Management focuses its Petition on express § 10501(b) preemption.

More generally, the Board’s power to exempt the truck portion of a railroad intermodal movement can be analogized to its power to determine, *i.e.*, regulate, the reasonableness of a cross-border joint rate and to order reparations, even though part of the movement occurs outside of the Board’s direct jurisdiction. *Can. Packers, Ltd. v. Atchison, Topeka & Santa Fe Ry.*, 385 U.S. 182, 183-84 (1966). The Board’s ability to exempt the regulation of actual rates for the trucking portion of intermodal (or cross-modal) movements thus rests on firmer ground than an attempt to regulate, or preempt other regulation of, other aspects of the truck portion of the movement. For example, the Board’s ability to determine whether a cross-border rate is reasonable does not begin to authorize the Board to grant terminal trackage or reciprocal switching rights in Canada. Yet, Waste Management claims the equivalent in arguing that the intermodal exemption entitles it to collect solid waste outside of its assigned territories in Washington.

relied on then § 10505(f) (now § 10502(f)), which provided that “[t]he Commission may exercise its authority under this section to exempt transportation that is provided by a rail carrier as part of a continuous intermodal movement.” *Id.* at 456. Such service might arguably fall under § 10501(b), as the motor carrier service under Plan II is provided under the control and at the behest of the rail carrier. As explained *supra*, Waste Management’s arrangements involve a motor carrier that holds out to provide complete door-to-door service, using the railroads as its subcontractors.

In any event, implied preemption does not apply. The WUTC Order holds that Waste Management, and its trucking subcontractors, cannot provide unauthorized solid waste collection service in Waste Connections' exclusive service territory. There is no conflict between this regulation and the Board's actions, and thus no basis for preemption to apply. Furthermore, nothing in the ICC's *Improvement of TOFC/COFC Regulations (Pickup and Delivery)* intermodal exemption decision remotely suggests that the ICC or the STB ever imagined, much less intended, to disrupt solid waste territorial assignments in Washington or anywhere else. For example, the environmental analysis in focused on the Environmental Assessment's assumptions as to traffic diversions from motor to rail, terminal area congestion, and motor carrier safety. 6 I.C.C.2d at 217-22. There is no hint that overriding local regulation of solid waste collection, or any other product such as food that might move via intermodal transportation, was at stake. In that regard, the ICC declined to assert motor carrier authority over the transportation of solid waste by motor carrier, *Joray Trucking Corp. Common Carrier Application*, 99 M.C.C. 109 (1965), which is further indication that the exemption was not intended to extend to solid waste.

The only permissible conclusion is that Waste Management is seeking to stretch the intermodal exemption far beyond its intended and proper reach. "[I]f [Waste Management's] reasoning is accepted, any nonrail carrier's operations would come under the exclusive jurisdiction of the STB if, at some point in a chain of distribution, it handles products that are eventually shipped by rail by a railcarrier." *Hi Tech*, 382 F.3d at 309.

4. Even if preemption might somehow apply, the WUTC’s actions would still be permissible under the local police power exception.

Even if the exemption and related express or implied preemption somehow applied, the WUTC territorial assignments would still survive. While Waste Management does not discuss it, the Board and the courts have repeatedly ruled that “[n]ot all state and local regulations that affect rail carriers are preempted by § 10501(b). Rather, state and local regulation is appropriate where it does not interfere with rail operations, and localities retain their reserved powers to protect the public health and safety so long as their actions do not unreasonably burden interstate commerce.” *Wash. & Idaho Ry.—Pet. for Decl. Order*, FD 36017 (STB served Mar. 17, 2017), at 5 (citations omitted). The WUTC’s actions fall well within this framework.

Soon after § 10501 was enacted as part of the ICC Termination Act of 1995 (“ICCTA”), the Board stated that “the ICCTA does not usurp the right of state and local entities to impose appropriate public health and safety regulation on interstate railroads.” *King County, WA—Pet. for Decl. Order—Burlington N. R.R.—Stampede Pass Line*, 1 S.T.B. 731, 735 (1996). Local regulation may be blocked where it prohibits or unreasonably burdens or interferes with an aspect of railroad operation, but mere economic impact is not sufficient to support preemption. *In re Vermont Ry.*, 769 A.2d at 503. In *Vermont*, the Vermont Supreme Court upheld conditions imposed on trucks serving the rail facility, as the conditions “do not interfere with *railway* operations; they merely address traffic issues and concerns with environmental contamination, matters

properly within the province of municipalities by virtue of the state’s delegation of its traditional police powers.” *Id.* at 504 (original emphasis).

The WUTC’s actions likewise do not interfere with actual rail operations, but only address where solid waste collectors can serve customers, which is a more than reasonable exercise of the local police power with respect to public health and safety. As quoted by the WUTC:

One could hardly imagine an area of regulation that has been considered to be more intrinsically local in nature than collection of garbage and refuse, upon which may rest the health, safety, and aesthetic well-being of the community. The historic responsibility of local governments to ensure safe and comprehensive garbage collection posts a strong caution against the possibility that Congress lightly would preempt local regulation in this field.

WUTC Order at 8, n.26 (quoting *AGG Enter. v. Wash. Cty.*, 281 F.3d 1324, 1328 (9th Cir. 2002) (additional authorities omitted)). Furthermore, Congress has found that “the collection and disposal of solid wastes should continue to be primarily the function of State, regional, and local agencies.” 49 U.S.C. § 6901(a)(3). The bar for application of preemption is raised further when the law at issue has a federal component. *E.g., Joint Pet. for Decl. Order—Bos. & Me. Corp.*, 5 S.T.B. 500, 509 n.28, *recons. denied*, 5 S.T.B. 1041 (2001). Because this recognition of the importance of the local role in the handling of waste is a matter of federal, not merely state, law, it is even less likely to be subject to preemption.

The WUTC’s regulation is also not discriminatory against rail: the certification requirement for solid waste collection companies does not apply any

differently depending on whether the solid waste will eventually be moved by rail. *E.g.*, *Wash. & Idaho Ry.* at 6 (police powers not to be used to discriminate against rail operations). The WUTC treats unauthorized collection of solid waste destined for intermodal transfer the same as unauthorized collection of solid waste that moves solely by truck.

In addition, the preemption that Waste Management seeks would wreck considerable havoc on Washington State's management of waste collection. Allowing unauthorized, *i.e.*, unsupervised, entry would lead to traffic diversions, certificated providers would be deprived of economies of density and scale, their ability to provide quality service levels for remaining customers would be compromised, and the WUTC's ability to discharge its duties would be threatened. *See* WUTC Order at 11-12. There is no reason to think that Congress or the ICC ever intended to threaten Washington's system for handling solid waste collection in the manner sought by Waste Management. *Id.* at 10.

Again, Waste Management made no mention of the well-established limitation on preemption for the exercise of the local police power in a non-discriminatory manner that does not interfere directly with railroad operations, which is another reason to deny the Petition promptly.

C. WASTE MANAGEMENT HAS NOT EXHAUSTED ITS ADMINISTRATIVE REMEDIES

Waste Management fails to mention that Washington law affords it another means to obtain the legal ability to serve the two paper companies. Specifically, it could have sought authorization to provide “overlapping” service in Waste Connections’ territory under RCW 81.77.040 (“When an applicant requests a certificate to operate in a territory already served by a certificate holder...”). Pursuing this remedy would allow the WUTC to consider any claims that Waste Connections’ service is unsatisfactory, as Waste Management has belatedly and incorrectly claimed before the Superior Court.

Rather than pursue this administrative remedy, Waste Management instead contracted with customers it was not authorized to serve and improperly claimed that the WUTC could not restrict its actions because Waste Management arranged for the collected waste to eventually be moved by rail. The result is that Waste Management has been able to continue its unauthorized service for nearly a year, and is seeking to extend its illegal activities further by asking the Superior Court to stay the WUTC’s cease and desist order while Waste Management seeks a declaratory order from the Board.

Under the circumstances, the Board need not expend its constrained resources to address an issue that Waste Management may be able to avoid. Waste Management has a potential administrative remedy that it chose to ignore rather than exhaust. *L. A. Tucker Truck Lines, Inc.*, 344 U.S. 33. The matter should be left to the WUTC and the Washington courts, which have shown every indication that they will address Waste Management’s arguments, such as they are, promptly and appropriately.

CONCLUSION

Waste Management's Petition fails on both procedural and substantive grounds and appears timed to maximize the opportunities for delay. The Board should act quickly to deny the Petition, as its mere pendency may lead to unwarranted delay and further violation of Washington law.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of June 2021, I have caused true and accurate copies of the foregoing pleading to be served upon all parties on the service list in FD 36511 by first class mail, postage prepaid, or by more expeditious means.

/s/ Robert D. Rosenberg