

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

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

**OPPOSITION TO REPLY IN SUPPORT OF
VERIFIED PETITION FOR DECLARATORY ORDER**

WASTE CONNECTIONS US
HOLDINGS, INC., AND MURREY'S
DISPOSAL COMPANY, INC.

Of Counsel:

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Dated: June 24, 2021

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Its Attorneys

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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 Reply in Support of Verified Petition for Declaratory Order 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 June 21, 2021 (“Surreply”).

As a threshold matter, no good cause exists for accepting the Surreply. Waste Management’s claim that the various arguments that Waste Connections and the Washington Utilities and Transportation Commission (“WUTC”) presented “could not have been anticipated” (Surreply at 2 n.1) is perfunctory. The principal points presented by Waste Connections and the WUTC largely reflect those advanced and adopted in the WUTC proceeding itself and basic preemption principles, *e.g.*, the WUTC-administered system that allows only authorized firms to collect solid waste in specified territories

does not interfere with railroad transportation in any way; preemption does not extend to rail-related activities, even for solid waste rail transfer facilities, unless they are carried out under a railroad's control, which is not the case here; and preemption does not bar the exercise of the local police power that is reasonably connected to the protection of public health and safety where, as here, there is no direct interference with or discrimination against railroad transportation. Even Waste Management's erstwhile ally, the Association of American Railroads ("AAR"), notes the exclusion of Plan I from the intermodal exemption, the requirement that related activities be carried out under the railroad's control for preemption to apply, and the local police power exception. Waste Management's failure or inability to address these matters in its Petition for Declaratory Order provides no justification for submission of a surreply.

Notably, the Surreply does not dispute Waste Connections' showing that the truck-rail transportation falls under intermodal Plan I, which has not been exempted, and that the preemption issues are being heard in Washington under proper jurisdiction.

Waste Management uses its Surreply to reiterate and amplify its claim that preemption applies because the WUTC regulation interferes with railroad transportation merely by reducing the volume of freight that would otherwise move by rail. Surreply at 6-7, 9, 13. Waste Management thus presents exactly the type of theory that the Third Circuit rejected: "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 Trans, LLC v. New Jersey*, 382 F.3d 295, 309 (3d Cir. 2004) (“*Hi Tech*”).

Hi Tech is but one of a number of precedents that Waste Management seeks to minimize by improperly limiting them to their facts or ignoring their context. Surreply at 8. For example, it seeks to dismiss *Valero Refining Co.*, FD 36036 (STB served Sept. 20, 2016), on the grounds that the denied permit “did not have the effect of regulating or infringing rail transportation.” Surreply at 9. However, the receiver’s proposed crude oil terminal would have resulted in increased rail volumes for Union Pacific Railroad, the same impact that Waste Management claims supports WUTC preemption. That impact on rail volumes in *Valero* was insufficient to support preemption, directly contrary to Waste Management’s position.

Waste Management also ignores key language and analysis in its own preferred authorities. For example, the Surreply cites *Oregon Coast Scenic Railroad, LLC v. Oregon Department of State Lands*, 841 F.3d 1069, 1072 (9th Cir. 2016), for “the direct and complete preemption of State economic regulation of railroads.” Surreply at 7. But Waste Management ignores several other aspects of the case that directly undermine its position. First, the Ninth Circuit explained that the issue of STB jurisdiction “is a separate question” from the issue of preemption. 841 F.3d at 1073. Waste Management fixates on jurisdiction and then conflates it with preemption: “The only issue presented to the Board is whether the STB has jurisdiction....” Surreply at 3 (original emphasis). Second, the Ninth Circuit examined whether the repairs at issue were done under the

railroad's control. 841 F.3d at 1073-74. In contrast, Waste Management dismisses the control requirement for preemption, especially in claiming that Plan I should be treated the same as other intermodal traffic. Surreply at 4-6. Third, the decision considered the need for the repairs and found them "integral to the functioning of a federally authorized track segment." 841 F.3d at 1076. In contrast, Waste Management identifies only a reduction in rail volume, which was insufficient to support preemption in *Valero* and other cases with transfer terminals (including solid waste transfer terminals) not controlled by railroads.

Waste Management further claims that the motor carrier leg of an intermodal movement qualifies for preemption protection because it immediately precedes the railroad leg and/or has been addressed by the intermodal exemption, notwithstanding the fact that Plan I was excluded from the exemption. *E.g.*, Surreply at 3-6, 7-8, 12-14. But rail terminal operations occur even more immediately before or after the rail leg and must meet the additional requirements to qualify for preemption.

In any event, the WUTC's regulation does not interfere with rail operations. The WUTC Order at issue restricts only where Waste Management can collect solid waste, and nothing more, in order to ensure that the waste is handled properly and safely. The WUTC does not address or regulate how the authorized provider ships the waste after collection. The provider can ship by truck or rail without interference, and the WUTC in no way impedes the ability of railroads to compete for transportation of solid waste after it is properly collected. Surreply at 6. As explained, activities qualify for

preemption when they are done by a railroad or under its control, and not simply because they may have an impact on a railroad's volume.

Because Waste Management's arrangements fall under Plan I, they do not satisfy the threshold requirement under 49 U.S.C. § 10501(b) of "transportation by rail carriers" to qualify for preemption. But even if the transportation occurred under some other Intermodal Plan, or if the requirement of railroad involvement under 49 U.S.C. § 10501(b) were met, the WUTC regulation would still fall within the long-established exception for exercise of the local police power to protect public health and safety, especially as the WUTC does not interfere with *railroad* operations or discriminate against railroad transportation. H.R. Rep. 104-311 at 95 (1995) ("exclusivity is limited to remedies with respect to rail regulation – not State and Federal law generally"). The preemption that Waste Management seeks is not needed to protect against inappropriate state intrusion into railroad operations or regulation, but would instead preclude Washington from protecting the public health and safety of its citizens.

At the end of the day, Waste Management is not seeking to protect railroad transportation. Indeed, the AAR avoids taking any position on the merits of the case, and the individual railroads with which Waste Management contracts have not even sought to intervene. Waste Management is simply seeking to subvert entirely legitimate WUTC regulation so that it can collect solid waste where it is not authorized. There is no reason for the Board to indulge Waste Management in such subversion, especially where its contentions are already being considered in the State of Washington.

Accordingly, the Board should deny Waste Management the relief that it seeks on procedural and/or substantive grounds.

Respectfully submitted,

WASTE CONNECTIONS US
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CERTIFICATE OF SERVICE

I hereby certify that on this 24th 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

