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May 5, 2021

By Electronic Filing

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

Re: Finance Docket No. 36511, Waste Management of Washington, Inc. and Waste Management Disposal Services of Oregon, Inc.; Verified Petition for Declaratory Order

Dear Ms. Brown:

Enclosed for filing in Finance Docket No. 36511 is a Petition for Declaratory Order of behalf of Waste Management of Washington, Inc. and Waste Management Disposal Services of Oregon, Inc. The filing fee has been paid by credit card through pay.gov. Please contact me if you have any questions.

Respectfully submitted,

A handwritten signature in blue ink that reads "Michael F. McBride".

Michael F. McBride

FILED
May 5, 2021
SURFACE
TRANSPORTATION BOARD

Enclosures

cc: Jessica L. Goldman, Esq.
Blair I. Fassburg, Esq.

FEE RECEIVED
May 5, 2021
SURFACE
TRANSPORTATION BOARD

**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

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May 5, 2021

**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

INTRODUCTION

Petitioners Waste Management of Washington, Inc. (“WMW”) and Waste Management Disposal Services of Oregon, Inc. (“WMDSO”) hereby respectfully petition the Surface Transportation Board (“STB” or “Board”) for a declaratory order to confirm, pursuant to its authority under 5 U.S.C. § 554(e) and 49 U.S.C. § 1321, that the STB has exclusive jurisdiction over Petitioners’ container-on-flat-car (“COFC”) transportation of solid waste from the McKinley Paper Company (“McKinley Paper”) and the Port Townsend Paper Company (“PTP”) in the State of Washington to the Columbia Ridge Landfill in the State of Oregon.

FACTUAL BACKGROUND

McKinley Paper and PTP are paper mills, located in Washington’s Olympic Peninsula, that generate solid waste in the form of old corrugated cardboard rejects (“OCC Rejects”). At issue in this Petition is the continuous intermodal transportation of OCC Rejects from McKinley Paper and PTP to the Columbia Ridge Landfill in Arlington, Oregon for disposal.

Under contract with Kitsap County, Washington, WMW operates the Olympic View Transfer Station (“OVTS”) outside of Bremerton, Washington. The Puget Sound and Pacific

Railroad (“PSAP”) owns and operates a rail line located near OVTS. PSAP provides rail car switching services at OVTS, whereby PSAP moves rail cars to and from the Kitsap rail siding to the nearby PSAP rail line for onward transportation. WMW transloads intermodal containers of solid waste from motor vehicles to rail cars owned by the Union Pacific Railroad (“UPRR”) that are staged on rail siding owned by Kitsap County and located at OVTS.

Likewise, North Mason Fiber Co. (“NMF”) owns and operates a recycling, organics and transload facility in Mason County, near Belfair, Washington. NMF transloads intermodal containers of solid waste from motor vehicles to rail cars owned by UPRR that are staged on rail siding owned by NMF and located at the NMF facility. PSAP provides rail car switching services at the NMF facility, whereby PSAP moves rail cars to and from the NMF facility rail siding to the nearby PSAP rail lines.

After loaded rail cars are switched to the PSAP rail line from either OVTS or NMF, the UPRR transports the intermodal containers to the Columbia Ridge Landfill in Oregon. WMDSO owns and operates the Columbia Ridge Landfill. The Columbia Ridge Landfill receives solid waste that is delivered by rail to the UPRR from numerous facilities, including OVTS and NMF.

Murrey’s Disposal Company, Inc. (“Murrey’s”) is a solid waste collection company holding Certificate G-009, issued by the Washington Utilities and Transportation Commission (“WUTC”), which authorizes Murrey’s to provide solid waste collection services in portions of Clallam and Jefferson Counties that include the areas in which McKinley Paper and PTP are located. Prior to June 2020, Murrey’s provided solid waste collection service to PTP. Prior to 2011, Murrey’s provided solid waste collection service to the prior owner and operator of McKinley Paper.

In 2020, McKinley Paper and PTP each contracted with WMDSO to provide solid waste COFC transportation and disposal services for OCC Rejects. Pursuant to this arrangement, WMDSO contracts with third-party trucking companies to transport intermodal cargo containers of OCC Rejects from McKinley Paper and PTP to OVTS or NMF. McKinley Paper and PTP

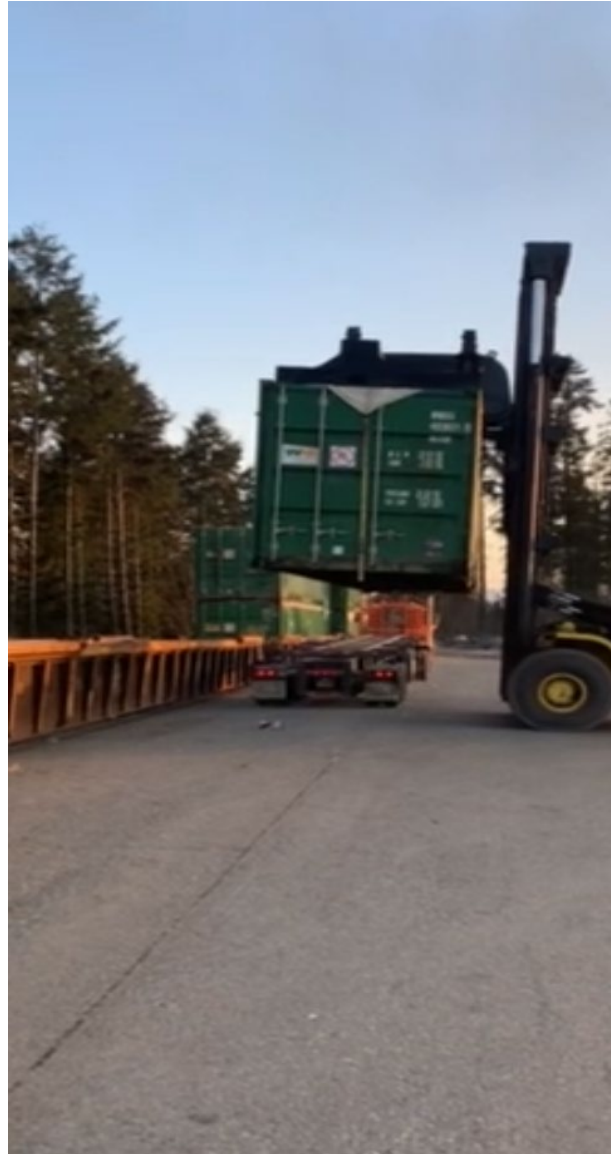
load the intermodal cargo containers with the OCC Rejects and such containers are closed at the time they are picked up by the third-party trucking companies for intermodal transport.

Recently, WMDSO has revised its arrangements with McKinley whereby its OCC Rejects are also transported in intermodal containers to UPRR's transload facility located in Seattle, Washington, known as the "Argo Yard."

Once these intermodal cargo containers of OCC Rejects arrive at OVTS, NMF or the Argo Yard by truck, the containers are loaded onto rail cars owned and operated by UPRR. These intermodal containers remain closed for the duration of their transport, including during the transloading process. Below is a photograph of a closed intermodal container of OCC Rejects being transloaded in COFC service from a truck directly to the rail line at OVTS.



The photographs below show a closed intermodal container of OCC Rejects from PTP being offloaded from the truck to the UPRR train at North Mason Fiber Company's rail spur, bound for WMDSO's Columbia Ridge Landfill in Oregon.





And, below is a photograph of a closed PTP-loaded intermodal container of OCC Rejects being offloaded at the end of the COFC service from North Mason Fiber Company's rail spur at WMDSO's Columbia Ridge Landfill in Oregon.



WMDSO and UPRR have a prior-existing agreement by which UPRR transports intermodal containers of solid waste to Columbia Ridge Landfill. All intermodal containers holding OCC Rejects generated by PTP or McKinley Paper and delivered to OVTS or NMF are transported by the UPRR under this agreement. WMDSO and UPRR also have a prior-existing agreement by which UPRR loads the intermodal containers of solid waste from the Argo Yard to the Columbia Ridge Landfill. All intermodal containers holding OCC Rejects generated by McKinley Paper and delivered to the Argo Yard are transported by UPRR under this agreement.

WMW uses continuous intermodal transportation to transport OCC Rejects from PTP and McKinley Paper that **always** includes **both** a rail and a trucking segment. The closed intermodal containers are not unloaded during the continuous intermodal service to the Columbia Ridge Landfill.

On July 14, 2020, Murrey's petitioned the WUTC for an order directing Petitioners to cease and desist from engaging in the continuous intermodal transportation of solid waste from McKinley Paper and PTP to the Columbia Ridge Landfill. Murrey's argued that the WUTC has authority to preclude the trucking segment of a COFC movement performed immediately before or after the COFC movement provided by a rail carrier as part of the continuous intermodal transportation of solid waste. Murrey's also sought a finding that Petitioners' COFC service was not subject to the STB's exclusive jurisdiction. On May 5, 2021, the WUTC issued a final ruling granting the declaratory relief requested by Murrey's and ruling that the STB does not have exclusive jurisdiction over the COFC service described herein.¹ Because the WUTC does not have the authority to determine the STB's jurisdictional reach, Petitioners seek a declaratory order from the STB to eliminate uncertainty and confirm the STB's exclusive jurisdiction over Petitioners' COFC transportation as described herein.

ARGUMENT

A. A Declaratory Order Is Proper.

Pursuant to 5 U.S.C. § 554(e) and 49 U.S.C. § 1321, the STB has authority to issue a declaratory order to terminate a controversy or remove uncertainty. In exercising its discretion, the Board considers, among other things, the issue's significance to the industry and the ripeness of the controversy. *Delegation of Authority—Declaratory Order Proceedings*, 5 I.C.C.2d 675, 767 (1989).

¹ The WUTC's ruling is attached hereto in the Appendix. Petitioners are appealing the WUTC ruling to the Washington State Superior Court and are requesting that the Superior Court stay its review to allow the STB to consider and rule on this petition.

A declaratory order is proper under these circumstances because there is an active and ripe controversy surrounding an issue that is of significance to the industry—the COFC transportation of solid waste. Although not rail carriers themselves, Petitioners have contracted with rail carriers to provide COFC transportation of solid waste. As the state authority charged with regulating the collection of solid waste in Washington, the WUTC has encroached on the STB’s jurisdiction by regulating Petitioners’ COFC service. It is necessary for the Board to confirm that Petitioners’ COFC service is subject to the STB’s exclusive jurisdiction. The Board’s decision in this matter will not only determine the outcome of the ongoing dispute between Murrey’s and Petitioners, but it will also serve as a guide for future disputes related to the continuous intermodal transportation of solid waste that is arranged independently with rail carriers.

B. The STB has Exclusive Jurisdiction Over Rail Transportation, Including TOFC/COFC Service.

The STB and its predecessor, the Interstate Commerce Commission (“ICC”), have regulated “[r]ail trailer-on-flatcar/container-on-flatcar (TOFC/COFC) service” for many decades. *Improvement of TOFC/COFC Regulation*, EP No. 230 (Sub-No. 5), 364 I.C.C. 731 (ICC 1981) (“Sub-No. 5”), *aff’d sub nom. Am. Trucking Assn’s v. Interstate Commerce Comm’n*, 656 F.2d 1115 (5th Cir. 1981). The STB defines “[h]ighway TOFC/COFC service” to “mean[] the highway transportation, in interstate or foreign commerce,” of a “freight-laden intermodal container” “as part of a continuous intermodal movement that includes rail TOFC/COFC service, and during which the trailer or container is not unloaded.” 49 C.F.R. § 1090.1(b) (emphasis added).

TOFC/COFC service, alternatively known as “piggyback” service, is “a form of mixed train **and** truck transportation” that “enables a carrier to transport a trailer [or a container] and its contents over rail on a flatcar and then to haul the trailer [or container] on the highway. The goods need not be unloaded and reloaded when they move from the rail mode to the truck

mode,” or vice versa; “the shipment remains within the trailer or container during the entire journey.” *Interstate Comm. Comm’n v. Texas*, 479 U.S. 450, 451-52 (1987) (emphasis added). TOFC/COFC service “by definition involves a prior or subsequent movement by rail carrier” *Improvement of TOFC/COFC Regulations (Pickup and Delivery)*, EP No. 230 (Sub-No. 7), 6 I.C.C.2d 208 (1989) (“Sub-No. 7”) (emphasis added). In contrast, the transportation of an intermodal container on the highway, without the continuous rail leg, is **not** TOFC/COFC service and is not what is at issue here.

In 1980, Congress addressed the economic and competitive condition of the rail industry by enacting the Staggers Rail Act and explicitly stating: “In regulating the railroad industry, it is the policy of the United States government [] to allow, to the maximum extent possible, competition and the demand for services to establish reasonable rates for transportation by rail” 49 U.S.C. § 10101(1). In the Staggers Rail Act, Congress directed the ICC to exempt from regulation any service “whenever the Board finds that the application in whole or in part of a provision of this part [] is not necessary to carry out the transportation policy” of the federal government. *Id.* § 10502(a)(1). Congress also provided that the ICC “may revoke an exemption” when necessary to carry out federal transportation policy. *Id.* § 10502(d). “Exercise of the ICC’s section [10502] exemption authority neither lodges nor dislodges agency jurisdiction; instead, it *presupposes* ICC jurisdiction over the persons or services exempted.” *Central States Motor Freight Bureau, Inc. v. ICC*, 924 F.2d 1099, 1102 (D.C. Cir. 1991); *see also Fayus Enters. v. BNSF Ry. Co.*, 602 F.3d 444, 451-52 (D.C. Cir. 2010) (In the Staggers Act, Congress “‘reaffirm[ed] that where the [ICC] has withdrawn its jurisdiction to regulate, the State could not assume such jurisdiction.’”) (quoting the Congressional Record).

In 1981, the ICC exercised its authority to exempt from regulation – *i.e.*, to deregulate – the highway portion of the “continuous intermodal movement” if the rail carrier itself was performing the highway transportation in rail-owned trucks. Sub-No. 5, 364 I.C.C. 731. The

exemption was limited to “service provided by railroads,” including both the rail and the truck legs. *Id.* at 733.

The ICC’s exemption was challenged, and the United States Supreme Court held that the exemption prohibited Texas from regulating the motor portion of TOFC/COFC service:

The ICC's statutory authority includes jurisdiction to grant exemptions from regulation as well as to regulate. In 1980, Congress enacted the Staggers Rail Act, 94 Stat. 1895, 49 U. S. C. § 10101 et seq., which authorizes the ICC to exempt from state regulation “transportation that is provided by a rail carrier as a part of a continuous intermodal movement.”

ICC v. Tex., 479 U.S. at 452.

Several years later in 1987, the ICC expanded the TOFC/COFC exemption to include highway transportation by a motor carrier either as the agent or the joint rate partner of a rail carrier. *Improvement of TOFC/COFC Regulations (Railroad-Affiliated Motor Carriers and Other Motor Carriers)*, EP No. 230 (Sub-No. 6), 3 I.C.C.2d 869 (1987) (“Sub-No. 6”). The ICC noted that “[i]t has long been recognized that the rail and highway ... portions of TOFC/COFC service are integrally related, because no single mode of transportation standing alone normally satisfies the needs of a TOFC/COFC shipper.” *Id.* at 872. “[A]ll piggyback service is, by its essential nature, bimodal’ because ‘its basic characteristic is the combination of the inherent advantages of rail and motor transportation.’” *Id.* (quoting *Am. Trucking v. A.T.& S.F.R. Co.*, 387 U.S. 397, 420 (1967)) (brackets omitted). Moreover,

[M]otor TOFC/COFC service that is part of a continuous rail/motor movement is obviously “relat[ed] to a rail carrier providing transportation subject to” the Commission’s jurisdiction. A railroad cannot provide such intermodal service without first receiving a trailer or container, which is generally moved over-the-road by truck. The highway movement of containers and trailers is an integral and necessary element of TOFC/COFC service.

Id. at 873-74 (quoting 49 U.S.C. § 10505(a), now codified as 49 U.S.C. § 10502(a)). “[W]hether they are owned by the railroad partners, affiliated with them, or independent companies, the

motor carriers involved in the over-the-road segment of TOFC/COFC services are business partners of the railroads that are plainly participating in matters ‘related to a rail carrier’ and are thus within the literal and philosophical scope of § 10505(a) [now codified as 49 U.S.C. § 10502(a)].” *Id.* at 874. The ICC rejected the argument of the motor carriers that “the exemption may be applied *only* to rail transportation” *Id.* at 875.

Pursuant to Sub-No. 6, the ICC next adopted 49 C.F.R. § 1090.2:

Except as provided in 49 U.S.C. §10505(e) and (g), §10922(1), and §10530, rail TOFC/COFC service and highway TOFC/COFC service provided by a rail carrier either itself or jointly with a motor carrier as part of a continuous intermodal freight movement, is exempt from the requirements of 49 U.S.C. Subtitle IV, regardless of the type, affiliation, or ownership of the carrier performing the highway portion of the service. Tariffs heretofore applicable to any transportation service exempted by this section shall no longer apply to such service.

Id. at 886.

In 1989, the ICC took the final step to exempt TOFC/COFC service where, as in the present case, such service was “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” Sub-No. 7, 6 I.C.C.2d at 227 (emphasis added). The ICC again rejected the motor carriers’ argument that the expansion of the TOFC/COFC service exemption did not involve “‘a matter related to a rail carrier providing transportation subject to the jurisdiction of the ... Commission” *Id.* at 211 (quoting 49 U.S.C. § 10505(a), now codified as 49 U.S.C. § 10502(a)). “Their view seems to be that the ‘related-to-rail’ language really means ‘provided by rail.’ We reject the motor carriers’ arguments, as we did earlier, and find that the motor carrier services at issue here are related to rail carriers providing transportation subject to Commission jurisdiction” *Id.* The ICC found under its authority at 49 U.S.C. § 10505 (now codified as 49 U.S.C. § 10502(a)), that “TOFC/COFC pickup and delivery services

performed by motor carriers as part of continuous intermodal movement are related to rail carrier transportation” and should be exempted from economic regulation. *Id.* at 222, 226.

In Sub-No. 7, the ICC revised 49 C.F.R. § 1090.2 as follows (additions emphasized):

Except as provided in 49 U.S.C. §10505(e) and (g), §10922(1), and §10530, rail TOFC/COFC service and highway TOFC/COFC service provided by a rail carrier either itself or jointly with a motor carrier as part of a continuous intermodal freight movement, is exempt from the requirements of 49 U.S.C. Subtitle IV, regardless of the type, affiliation, or ownership of the carrier performing the highway portion of the service. **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 are similarly exempt.** Tariffs heretofore applicable to any transportation service exempted by this section shall no longer apply to such service. **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), nor does the exemption operate to relieve any carrier of any obligation it would otherwise have, absent the exemption, with respect to providing contractual terms for liability and claims.**

Id. at 227, *aff’d sub nom. Central States Motor Freight Bureau, Inc. v. ICC*, 924 F.2d 1099, 1102 (D.C. Cir. 1991).² Thus, not only did the ICC confirm that it had jurisdiction to regulate the highway portion of the “continuous intermodal transportation,” its jurisdiction included trucking companies performing the highway portion of TOFC/COFC and operating “independently” of the rail carrier.³ *Id.*

C. Congress Expressly Preempted State Regulation of Rail Transportation, Including TOFC/COFC Service and Transportation of Solid Waste.

² The STB’s decision to **exclude** Plan I TOFC/COFC service from the exemption confirms its jurisdiction over such service. The STB can change – and has changed – what services within its authority it exempts from federal regulation (*i.e.*, deregulates).

³ “Federal regulations have no less pre-emptive effect than federal statutes.” *Fidelity Fed. Sav. & Loan Ass’n v. de la Cuesta*, 458 U.S. 141, 153 (1982).

In 1995, Congress enacted the Interstate Commerce Commission Termination Act (“ICCTA”), abolishing the ICC and creating the STB. *See Friends of the Atglen-Susquehanna Trail, Inc. v. Surface Transp. Bd.*, 252 F.3d 246, 250 n.1 (3d Cir. 2001). In the ICCTA, Congress acted to the full extent of its preemption authority in a field traditionally occupied by the federal government – rail transportation. Under the ICCTA, STB jurisdiction over transportation by rail carriers “is exclusive”:

The jurisdiction of the Board over –

- (1) **transportation by rail carriers**, and the remedies provided in this part with respect to rates, classifications, rules (including car service, interchange, and other operating rules), practices, routes, services, and facilities of such carriers; and
- (2) the construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks, or facilities, even if the tracks are located, or intended to be located, entirely in one State,

is exclusive. Except as otherwise provided in this part, the remedies provided under this part with respect to regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law.

49 U.S.C. § 10501(b) (emphasis added).

The ICCTA was passed “with the purpose of expanding federal jurisdiction and preemption of railroad regulation.” *Or. Coast Scenic RR, LLC v. Or. Dep’t of State Lands*, 841 F.3d 1069, 1072 (9th Cir. 2016). The statutory changes were “made to reflect the direct and complete preemption of State economic regulation of railroads.” *Id.* (quoting H.R. Rep. No. 104-311 at 95 (1995)). The ICCTA “preempts all state laws that may reasonably be said to have the effect of managing or governing rail transportation....” *Ass’n of Am. R.R.s v. S. Coast Air Quality Mgmt. Dist.*, 622 F.3d 1094, 1097 (9th Cir. 2010) (quotation marks & citation omitted). Indeed, there may not be any clearer statement of federal preemption anywhere in federal law. The Ninth Circuit has noted on numerous occasions: “It is difficult to imagine a broader statement of Congress’s intent to preempt state regulatory authority over railroad operations.”

City of Auburn, 154 F.3d at 1030; *accord Swinomish Indian Tribal Cmty. v. BNSF Ry. Co.*, 951 F.3d 1142, 1152 (9th Cir. 2020); *BNSF Ry. Co. v. Cal. Dep’t of Tax & Fee Admin.*, 904 F.3d 755, 760 (9th Cir. 2018); *Or. Coast Scenic R.R.*, 841 F.3d at 1976.

As rail transportation, including TOFC/COFC service, has a history of significant federal presence, “there is no beginning assumption that concurrent regulation by the State is a valid exercise of its police powers.” *U.S. v. Locke*, 529 U.S. 89, 108 (2000). Rather, where Congress expressly preempts state law, the plain text of the statute “begins and ends our analysis.” *Puerto Rico v. Franklin Cal. Tax-Free Trust*, ___ U.S. ___, 136 S. Ct. 1938, 1946 (2016). A statute with an express preemption “necessarily contains the best evidence of the Congress’ pre-emptive intent.” *Id.* (quotation marks & citation omitted). In *AGG Enterprises v. Washington County*, the Ninth Circuit emphasized that Congress is the arbiter of preemption: when Congress expressly says it is preempting state regulation, state regulation is preempted. 281 F.3d 1324, 1328 (9th Cir. 2002).

Congress defined rail “transportation” to make plain the breadth of its preemption. *Del Grosso v. S.T.B.*, 898 F.3d 139, 149 (1st Cir. 2018) (“transportation” in “ICCTA-speak” is “expansive”). Congress directs that, for the ICCTA’s purposes,

‘[T]ransportation’ includes –

- (A) A locomotive, car, vehicle, vessel, warehouse, wharf, pier, dock, yard, property, facility, instrumentality, or equipment of any kind **related to the movement of** passengers or **property**, or both, **by rail, regardless of ownership** or an agreement concerning use; and
- (B) **services related to that movement**, including receipt, delivery, elevation, transfer in transit, refrigeration, icing, ventilation, storage, handling, and interchange of passengers and property.

49 U.S.C. § 10102(9) (emphasis added).

“Congress enacted the ICCTA as a means of reducing the regulation of the railroad industry.” *Canadian Nat. Ry. Co. v. City of Rockwood*, No. COV-04-40323, 2005 WL 1349077, *3 (E.D. Mich. June 1, 2005). To this end, Congress expressly preempted state regulation by

granting exclusive jurisdiction over railroad operations to the STB. The Ninth Circuit has confirmed the breadth of the statute's preemption: "there is no evidence that Congress intended any such state role under the ICCTA to regulate the railroads." *City of Auburn*, 154 F.3d at 1031 (affirming the STB's finding of federal preemption regarding local environmental laws). The Ninth Circuit has further recognized the need to defer to the STB for guidance on the scope of ICCTA preemption. *Ass'n of Am. R.R.*, 622 F.3d at 1097.

D. The Transportation of Solid Waste Via TOFC/COFC Service Is Preempted.

The federal government's authority to preempt state regulation of the transportation of solid waste as an article of commerce is unquestioned. *Philadelphia v. New Jersey*, 437 U.S. 617, 622-23 (1978). The courts and the STB have recognized the broad meaning of the ICCTA's "rail transportation," including rail transportation of solid waste. *See, e.g., Canadian Nat. Ry.*, 2005 WL 1349077 at *4 ("activities which take place at [railroad] transload facilities are considered 'transportation' by the ICCTA"); *Waste Mgmt. of N.J., Inc. v. Union Cnty. Utils. Auth.*, 945 A.2d 73, 86 (Superior Ct. of N.J., App. Div. 2008) ("As to the nature of the conduct regarding the storage and handling of waste – what has been referred to as 'transloading' – it now seems settled that transloading activities fall within [the ICCTA]'s definition of 'transportation.'") (quotation marks, citations, & n. omitted); *In re New England Transrail, LLC*, FD No. 34797, 2007 STB LEXIS 391, *33 (STB June 29, 2007) (ICCTA preemption applies because "we find that bailing and wrapping activities (including such handling as would be required to prepare the [municipal solid waste] for bailing and wrapping) would also be integrally related to transportation").

Interpreting ICCTA preemption, the STB and the courts have repeatedly ruled that rail transportation of solid waste is preempted. The STB held that intermodal containers of municipal solid waste "which would be transferred directly from trucks to rail cars" were subject to its exclusive jurisdiction. *New England Transrail*, 2007 WL 1989841 at *8-*9. The transfer of pre-baled municipal solid waste from trucks to rail cars also was subject to exclusive STB

jurisdiction. *Id.* Likewise, the STB had exclusive jurisdiction over bulk municipal solid waste unloaded from trucks onto the floor where it was stored temporarily for later loading into rail cars. *Id.* All these “activities would be integrally related to transportation and therefore would be covered by the section 10501(b) preemption.” *Id.* at *9. In 2012, the STB reaffirmed that “the Board’s preemptive jurisdiction extended to solid waste rail transfer facilities owned or operated by rail carriers.” *Solid Waste Rail Transfer Facilities*, EP 684, 2012 WL 5873121, *1 (S.T.B. Nov. 14, 2012).

Likewise, the courts agree that solid waste handling associated with rail carriage is “transportation” pursuant to the ICCTA. In regard to a facility that transloaded solid waste from trucks to railroad cars, the Third Circuit considered solid waste to be STB-regulated “cargo”:

[O]perations of the [waste handling] facilities include dropping off cargo, loading it onto Susquehanna trains, and shipping it. Thus the facilities engage in the receipt, storage, handling, and interchange of rail cargo, which the [ICCTA] explicitly defines as “transportation.” *See* 49 U.S.C. § 10102(9)(B). These operations fit within the plain text of the [ICCTA] preemption clause.

N.Y. Susquehanna & W. Ry. Corp. v. Jackson, 500 F.3d 238, 247 (3rd Cir. 2007); *accord Waste Mgmt. of N.J.*, 945 A.2d at 86.

Recognizing the broad scope of ICCTA preemption, Congress slightly limited its scope in the Clean Railroads Act of 2008 (“CRA”), while confirming the STB’s exclusive jurisdiction over rail transportation of solid waste, including the services at issue here. The CRA added a carve-out from the grant of “exclusive” jurisdiction to the STB over “transportation by rail carriers,” 49 U.S.C. § 10501(b): “Except as provided in paragraph (3), the [STB] does not have jurisdiction under this part over ... a solid waste rail transfer facility as defined in section 10908 of this title, except as provided under sections 10908 and 10909 of this title.” *Id.* § 10501(c)(2)(B). So, with some exceptions, Congress withdrew from STB jurisdiction authority over solid waste rail transfer facilities, which “shall comply with all applicable Federal and State requirements.” *Id.* § 10908(a).

The STB recognized that:

[S]olid waste rail transfer facilities, which, **in the absence of the CRA were, or would have been, subject to the Board's jurisdiction and thus shielded from state and local regulation by federal preemption**, must now comply with certain types of federal and state requirements in the same manner as non-rail solid waste management facilities that do not fall within the Board's jurisdiction or qualify for federal preemption under 49 U.S.C. 10501(b).

Town of Babylon & Pinelawn Cemetery – Pet'n for Decl. Order, FD 5057, 2009 WL 3329242, *5 (S.T.B. Oct. 15, 2009) (emphasis added); accord *Solid Waste Rail Transfer Facilities*, EP 684, 2012 WL 5873121 at *1.

In the CRA, Congress defined a “solid waste rail transfer facility” as: “the portion of a facility owned or operated by or on behalf of a rail carrier ... where solid waste, as a commodity to be transported for a charge, is collected, stored, separated, processed, treated, managed, disposed of, or transferred, when the activity takes place outside of original shipping containers” 49 U.S.C. § 10908(e)(1)(H)(i) (emphasis added). The STB regulation that followed confirmed that the CRA's withdrawal of STB jurisdiction did not apply to:

The portion of a facility to the extent that activities taking place at such portion are comprised **solely of the railroad transportation of solid waste** after the solid waste is loaded for shipment on or in a rail car, including railroad transportation for the purpose of interchanging railroad cars containing solid waste shipments; or ... a facility where **solid waste is solely transferred or transloaded** from a tank truck directly to a rail tank car.

49 C.F.R. § 1155.2(a)(10) (emphasis added).

Congress and the STB thus affirmed that “solid waste, as a commodity to be transported for a charge,” 49 U.S.C. § 10908(e)(1), is subject to the STB's exclusive jurisdiction except when it concerns a solid waste rail transfer facility. Moreover, Congress did not withdraw from the STB's exclusive jurisdiction the handling of solid waste by a rail carrier that does **not** “take[] place outside of original shipping containers,” as is the case with TOFC/COFC transportation. *Id.* The rail transportation of solid waste in intermodal containers that remain sealed from pickup

at the customer until delivery to a landfill was not of concern in the CRA because the containerized solid waste is not “collected, stored, separated, processed, treated, managed, disposed of, or transferred” at a solid waste transfer facility.

Congressional intent is clear. The House sponsor of the CRA emphasized that TOFC/COFC services are regulated exclusively by the STB and nothing in the new statute changed this. “[T]he amendment does not apply to containerized facilities. **They still are subject to the Federal preemption.**” Federal Railroad Safety Improvement Act of 2007, 153 Cong. Rec. H11671-02, H11691, 2007 WL 3024635 (Oct. 17, 2007) (emphasis added). The legislative history makes it clear that the statute’s purpose was to curtail the use of federal preemption in siting solid waste transfer facilities at rail yards and not federal preemption of rail transportation of solid waste itself. *Id.* (“[T]here is a growing concern in the Northeast that some railroads are using Federal preemptions standards to shield themselves from important State and local environmental laws which are leading to a lack of environmental and health-related oversight of [municipal waste transfer facilities].”).

The STB recognized that the CRA “excludes from the definition [of ‘solid waste transfer facility’] the portion of a facility where the only activity is railroad transportation of solid waste after the waste has been loaded for shipment in or on a rail car, including interchanging rail cars of solid waste,” as is the case with TOFC/COFC. “In such cases, assuming the facility, or portion thereof, meets the other necessary qualifications, **it would be subject to the Board’s general jurisdiction over rail transportation and entitled to preemption from most state and local laws**” *Solid Waste Rail Transfer Facilities*, EP 684, 2009 WL 94517, *4 (S.T.B. 2009) (emphasis added). If rail transportation of solid waste were not already within the STB’s jurisdiction – which is exclusive – this provision of the statute would be meaningless. Congress would not need to exempt state permitting regulations from federal preemption if it did not otherwise fall within the scope of the ICCTA preemption. Statutory interpretation requires

giving effect to each word and not interpreting the provision so as to render it meaningless. *U.S. v. 144, 774 pounds of Blue King Crab*, 410 F.3d 1131, 1134 (9th Cir. 2005).

The CRA carve-out had immediate effect. In *New Jersey Department of Environmental Protection v. J.P. Rail, Inc.*, the court reconsidered federal preemption based on the CRA's passage while the case was pending. No. C-41-06, 2009 WL 127666 (N.J. Super. Ct., App. Div. Jan. 21, 2009). The trial court initially had ruled the solid waste transfer facility and the transloading process preempted by the ICCTA: "federal preemption barred [New Jersey] from requiring defendants to obtain permits and approvals" *Id.* at *2-*3. The appellate court concluded that the intervening action by Congress now allowed for state regulation over the facility. *Id.* at *8.

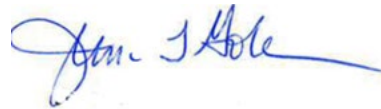
The CRA confirmed that rail transportation of solid waste was part of the STB's exclusive jurisdiction of "transportation by rail carrier" under 49 U.S.C. § 10501(b) as the STB and the courts had previously held. *See Solid Waste Rail Transfer Facilities*, EP 684, 2009 WL 94517 at *4 (prior to the CRA, solid waste rail transfer facilities "came within the Board's jurisdiction **as part of transportation by rail carrier**") (emphasis added). Other than withdrawing solid waste transfer facilities from the STB's jurisdiction, Congress left untouched the longstanding rulings that the STB regulated the transportation by rail carrier of solid waste. *Wash. Natural Gas Co. v. Pub. Util. Dist. No. 1*, 77 Wn.2d 94, 98, 459 P.2d 633 (1969) (*expressio unius est exclusio alterius*).

Those STB rulings govern here. With the exception only of solid waste transfer facilities, which are not at issue here, the STB alone regulates the rail transportation of solid waste. That rail transportation includes COFC service from beginning to end, including both the motor carrier leg and the rail leg, irrespective of how the two carriers and the customer structure their business relationship.

CONCLUSION

Petitioners' continuous intermodal transportation of OCC Rejects via COFC service fits squarely within the STB's exclusive jurisdiction over "[m]otor 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." Sub-No. 7, 6 I.C.C.2d at 227. Accordingly, Petitioners respectfully request that the Board issue a declaratory order finding that (1) Petitioners' COFC pickup and delivery of OCC Rejects from McKinley Paper and PTP to the Columbia Ridge Landfill is subject to the STB's exclusive jurisdiction, and (2) state regulation of Petitioners' COFC pickup and delivery of OCC Rejects is preempted by federal law.

RESPECTFULLY SUBMITTED,



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CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon all parties of record in this proceeding, by the method as indicated below, pursuant to 49 C.F.R. § 1104.12.

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APPENDIX

**BEFORE THE WASHINGTON
UTILITIES AND TRANSPORTATION COMMISSION**

MURREY’S DISPOSAL CO., INC., Complainant, v. WASTE MGMT. OF WASH., INC., WASTE MGMT. DISPOSAL SERVICES OF OR., AND MJ TRUCKING & CONTRACTING, Respondents.	DOCKETS TG-200650 and TG-200651 (<i>Consolidated</i>) ORDER 06 GRANTING COMPLAINANT’S MOTION FOR SUMMARY DETERMINATION, DENYING RESPONDENTS’ MOTION FOR SUMMARY DETERMINATION
MURREY’S DISPOSAL CO., INC., Complainant, v. WASTE MGMT. OF WASH., INC., WASTE MGMT. DISPOSAL SERVICES OF OR., AND DANIEL ANDERSON TRUCKING AND EXCAVATION, LLC, Respondents.	

BACKGROUND

- 1 On July 15, 2020, Murrey’s Disposal Company, Inc. (Murrey’s Disposal), filed with the Washington Utilities and Transportation Commission (Commission) a complaint against Waste Management of Washington, Inc. (WMW), Waste Management Disposal Services of Oregon, Inc. (WMDSO), and MJ Trucking & Contracting, Inc. (MJ Trucking). Murrey’s Disposal filed a second complaint against WMW, WMDSO, and Daniel

Anderson Trucking and Excavation, Inc. (DAT) (respondents in both complaints; collectively, Respondents). The complaints allege that Respondents are providing solid waste collection services in Murrey's Disposal's service territory in Jefferson County and Clallam County without a certificate of public convenience and necessity and request that the Commission order Respondents to cease and desist.

2 On August 4, 2020, the Respondents filed answers to the complaints and motions to dismiss. Respondents contend that the Commission lacks jurisdiction over the complaints because federal law preempts Commission regulation of the intermodal rail and motor carrier transportation of solid waste that Respondents provide.

3 On August 20, 2020, Murrey's Disposal filed responses opposing the motions to dismiss.

4 On August 27, 2020, the Commission entered Order 01, consolidating these dockets.

5 On October 19, 2020, following a hearing and supplemental briefing from the parties, the presiding Administrative Law Judge Andrew J. O'Connell entered Order 02, denying Respondents' motions to dismiss.

6 On October 29, 2020, Respondents filed a petition for interlocutory review of Order 02.

7 On December 7, 2020, after receiving a response from Murrey's Disposal opposing Respondents' petition for interlocutory review, the Commission entered Order 03, granting interlocutory review of Order 02 and affirming Order 02's denial of the motions to dismiss.

8 On December 18, 2020, the Commission convened a virtual prehearing conference before Judge O'Connell. At the conference, the Parties agreed to collaborate and file jointly with the Commission a stipulation of material facts by January 15, 2021, and agreed that the Commission should hold a subsequent status conference to determine a further procedural schedule.

9 On January 13, 2021, the Commission entered Order 04, Prehearing Conference Order, memorializing the agreed procedural schedule and setting a status conference for January 26, 2021.

10 On January 15, 2021, the Commission issued a notice continuing the deadline for the Parties' joint stipulation of material facts (or a letter explaining the Parties' inability to agree) until January 21, 2021, pursuant to the Parties' request.

- 11 On January 21, 2021, Murrey's Disposal filed with the Commission a letter indicating that the Parties were unable to reach an agreed stipulation of facts.
- 12 On January 26, 2021, the Commission convened a virtual status conference before Judge O'Connell to discuss further process due to the Parties' failure to stipulate to a list of agreed facts. The Parties presented an agreed procedural schedule, but did not indicate an agreed hearing date. The Parties also indicated the need for a protective order in these consolidated dockets.
- 13 On January 27, 2021, the Commission entered Order 05, Protective Order, in these consolidated dockets.
- 14 On January 29, 2021, the Commission issued a notice modifying the procedural schedule and notice of evidentiary hearing (set for August 5-6, 2021) in these consolidated dockets. The modified procedural schedule provided for, among other things, simultaneous motions for summary determination to be filed on March 16, 2021, and required responses to the motions by April 7, 2021.
- 15 On March 16, 2021, the Parties filed with the Commission motions for summary determination, supported by declarations and exhibits.
- 16 On April 7, 2021, the Parties filed responses to the motions for summary determination. Respondents also filed additional declarations.

DISCUSSION AND DECISION

- 17 The Commission may grant a motion for summary determination when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.¹ Here, based upon the declarations and exhibits submitted by the Parties and viewed in the light most favorable to Respondents, there is no genuine issue of material fact. Respondents are providing solid waste collection service in Jefferson County and Clallam County (within Murrey's Disposal's certificated service territory) without the statutorily required certificate of authority from the Commission. We therefore determine that Murrey's Disposal is entitled to judgment as a matter of law as explained below.

¹ WAC 480-07-380(2)(a).

- 18 Murrey's Disposal has authority from the Commission to collect solid waste in unincorporated Jefferson County and Clallam County.² WMW also has authority from the Commission to collect solid waste, but not in Jefferson County or Clallam County.³ DAT and MJ Trucking each have common carrier permits from the Commission, but lack authority to operate as solid waste collection companies.⁴ WMDSO holds no authority from the Commission, but "provides solid waste disposal services and contracts with third parties to collect and transport solid waste to provide these services."⁵
- 19 Port Townsend Paper is located in unincorporated Jefferson County and McKinley Paper is located in Port Angeles, Clallam County.⁶ Both are former customers of Murrey's Disposal for the collection and disposal of solid waste in the form of Old Corrugated Cardboard Rejects (OCC Rejects).⁷ It is undisputed that OCC Rejects are solid waste and have no positive market value.⁸
- 20 Port Townsend Paper currently contracts with WMDSO for the collection and disposal of solid waste (OCC Rejects).⁹ WMDSO subcontracts with DAT to collect solid waste in trailer on flatcar or container on flatcar (TOFC/COFC) containers from Port Townsend Paper and deliver the solid waste via motor vehicle over public highways to the Olympic View Transfer Station operated by WMW under contract with Kitsap County and also to a facility owned and operated by North Mason Fiber Company (NMF) in Mason County near Belfair, Washington.¹⁰

² Murrey's Disposal: Certificate G-009.

³ WMW: Certificate G-237. Declaration of Michael Weinstein at 1, ¶ 3.

⁴ DAT: Common Carrier Permit CC029397, USDOT Number 2489589. MJ Trucking: Common Carrier Permit CC030132, USDOT Number 935162.

⁵ Declaration of Justin Wheeler at 1, ¶ 3.

⁶ Declaration of Eric Evans at 2-3, ¶¶ 8-9.

⁷ Respondents' Motion at 1-2, ¶ 5. Murrey's Disposal provided solid waste collection services to the prior owner and operator of McKinley Paper. *Id.*

⁸ See Respondents' Motion at 1, ¶¶ 3-4; Murrey's Disposal's Exhibit 3.1 at 11, Response to Data Request No. 67.

⁹ Declaration of Eric Evans at 2, ¶ 7; Murrey's Disposal's Exhibit 3.1 at 25, Response to Data Request No. 97; Murrey's Disposal's Exhibit 3.19 at 5, Response to Data Request No. 11.

¹⁰ Declaration of Eric Evans at 1-3, ¶¶ 3-4, 9; Murrey's Disposal's Exhibit 3.1 at 23, Response to Data Request No. 92. MJ Trucking has collected solid waste in TOFC/COFC containers from

- 21 After arriving at the Olympic View Transfer Station or NMF's facility, the containers of solid waste from Port Townsend Paper are subsequently loaded onto rail cars and transported via railroad by Union Pacific Railroad (Union Pacific RR) under a preexisting contract with WMDSO to the Columbia Ridge Landfill in Arlington, Oregon, which is owned by WMDSO, where the solid waste is disposed.¹¹
- 22 McKinley Paper currently contracts with WMDSO for the collection and disposal of solid waste (OCC Rejects).¹² WMDSO subcontracts with MJ Trucking to collect solid waste in TOFC/COFC containers from McKinley Paper and deliver the solid waste via motor vehicle over public highways to the Olympic View Transfer Station, NMF's facility, and Union Pacific RR's facility in Seattle, Washington (the Argo Yard).¹³
- 23 After arriving at the Olympic View Transfer Station, NMF's facility, or the Argo Yard, the containers of solid waste from McKinley Paper are subsequently loaded onto rail cars and transported via railroad by Union Pacific RR under a preexisting contract with WMDSO to the Columbia Ridge Landfill in Arlington, Oregon, where the solid waste is disposed.¹⁴

Port Townsend Paper on behalf of DAT. Murrey's Disposal's Exhibit 3.20 at 5, Response to Data Request No. 12.

¹¹ Declaration of Eric Evans at 2-3, ¶¶ 4-6, 10; Declaration of Justin Wheeler at 2, ¶ 5; Murrey's Disposal's Exhibit 3.1 at 24, Response to Data Request No. 93. Puget Sound and Pacific Railroad (Puget Sound and Pacific RR) has authority from the STB and provides rail switching services at the Olympic View Transfer Station and NMF's facility. Declaration of Eric Evans at 1-2, ¶¶ 3, 5.

¹² Declaration of Eric Evans at 2, ¶ 8; Murrey's Disposal's Exhibit 3.1 at 22, Response to Data Request No. 86.

¹³ Declaration of Eric Evans at 1-3, ¶¶ 3-4, 9; Murrey's Disposal's Exhibit 3.1 at 20, Response to Data Request No. 79. DAT has collected solid waste in TOFC/COFC containers from McKinley Paper on behalf of MJ Trucking. Murrey's Disposal's Exhibit 3.19 at 7, Response to Data Request No. 14.

¹⁴ Declaration of Eric Evans at 2-3, ¶¶ 4-6, 9-10; Declaration of Justin Wheeler at 2, ¶¶ 5-6; Murrey's Disposal's Exhibit 3.1 at 21, Response to Data Request No. 80. Puget Sound and Pacific RR has authority from the STB and provides rail switching services at the Olympic View Transfer Station and NMF's facility. Declaration of Eric Evans at 1-2, ¶¶ 3, 5.

- 24 Respondents do not hold authority from the Surface Transportation Board (STB) to operate as rail carriers.¹⁵ Respondents do not offer to provide solid waste collection services to Port Townsend Paper or McKinley Paper jointly with Union Pacific RR.¹⁶
- 25 These facts establish that Respondents are providing solid waste collection services under Washington law without the required certificate of authority from the Commission. Respondents collect solid waste in the form of OCC Rejects from Port Townsend Paper and McKinley Paper for compensation and transport it via motor vehicle over Washington's public highways for collection and disposal.
- 26 Chapters 70A.205 and 81.77 Revised Code of Washington (RCW) establish the legislative authority for regulating the handling of solid waste, which includes the Commission, the state Department of Ecology, and county and city governments. The Legislature defines "solid waste handling" very broadly as "the management, storage, collection, transportation, treatment, utilization, processing, and final disposal of solid wastes, including the recovery and recycling of materials from solid wastes, the recovery of energy resources from solid wastes or the conversion of the energy in solid wastes to more useful forms or combinations thereof."¹⁷
- 27 Specifically with respect to the Commission's responsibilities, the Legislature requires:
- The commission shall supervise and regulate every solid waste collection company in this state,
- (1) By fixing and altering its rates, charges, classifications, rules and regulations;
- (2) By regulating the accounts, service, and safety of operations;
- (3) By requiring the filing of annual and other reports and data;
- (4) By supervising and regulating such persons or companies in all other matters affecting the relationship between them and the public which they serve;
- (5) By requiring compliance with local solid waste management plans and related implementation ordinances;

¹⁵ Respondents' Response to Motion at 9, n. 9, stating "Respondents **do not** claim they are rail carriers or should be treated as rail carriers." (bold and underline included in original).

¹⁶ Murrey's Disposal's Exhibit 3.1 at 12-15, Responses to Data Request Nos. 70, 71, 72, 73.

¹⁷ RCW 70A.205.015(23).

(6) By requiring certificate holders under chapter 81.77 RCW to use rate structures and billing systems consistent with the solid waste management priorities set forth under RCW 70A.205.005 and the minimum levels of solid waste collection and recycling services pursuant to local comprehensive solid waste management plans.¹⁸

28 A “solid waste collection company” is “every person or his or her lessees, receivers, or trustees, owning, controlling, operating, or managing vehicles used in the business of transporting solid waste for collection or disposal, or both, for compensation . . . over any public highway in this state as a ‘common carrier’ or as a ‘contract carrier.’”¹⁹ No one may operate as a solid waste collection company without a certificate from the Commission granting authority to begin service in a specified territory.²⁰

29 The Commission has promulgated rules in Chapter 480-70 WAC to implement this authority, the purpose of which is:

[T]o administer and enforce Chapter 81.77 RCW by establishing standards for: Public safety; Fair practices; Just and reasonable charges; Nondiscriminatory application of rates; Adequate and dependable service; Consumer protection; and Compliance with statutes, rules, and commission orders.²¹

30 The Commission’s rules define a “solid waste collection company” as “every common carrier, including a contract carrier, who provides solid waste collection service,” and “solid waste collection” as “collecting solid waste from residential or commercial

¹⁸ RCW 81.77.030.

¹⁹ RCW 81.77.010(9). A “common carrier” for these purposes is “any person who collects and transports solid waste for disposal by motor vehicle for compensation, whether over regular or irregular routes, or by regular or irregular schedules.” RCW 81.77.030(1).

²⁰ RCW 81.77.040; WAC 480-07-101. A company may be granted authority by the Commission to operate even in a territory already served by a certificate holder, but only if the existing solid waste collection company serving the territory does not object to the issuance or will not provide service to the satisfaction of the Commission. RCW 81.77.040.

²¹ WAC 480-70-001.

customers and transporting the solid waste, using a motor vehicle, for collection and/or disposal over the highways of the state of Washington for compensation.”²²

- 31 The Commission has also included in its rules the determination that neither the Interstate Commerce Act nor the Federal Aviation Administration Authorization Act (FAAAA) exempt solid waste collection companies operating in Washington from Commission regulation.²³
- 32 Respondents have consistently characterized the service they are providing as TOFC/COFC intermodal transportation that is preempted from Commission regulation by the Interstate Commerce Commission Termination Act (ICCTA), which authorizes the STB to regulate transportation by rail carriers.²⁴ Respondents’ argument centers on the TOFC/COFC containers in which the solid waste is collected and transported in this instance. Respondents argue that their “continuous transportation of intermodal containerized solid waste from motor carrier to railroad, unloaded only at the final destination, is . . . like all such continuous intermodal movement of cargo including a rail leg . . . part of rail transportation exclusively regulated by the STB.”²⁵
- 33 We disagree. Respondents’ service consists of more than the TOFC/COFC intermodal transportation because it involves the inherently local concerns of entering upon a customer’s property to collect and remove solid waste and then transporting that waste over Washington’s public highways by motor vehicle. Regardless of the container in which the solid waste is initially placed, or the fact that it may at some point be moved via rail, its collection remains intrinsically local in nature and falls outside of the STB’s jurisdiction.²⁶ None of the federal statutes, rules, or agency decisions on which the

²² WAC 480-70-041.

²³ WAC 480-70-006(5).

²⁴ 49 U.S.C. § 10501. To show that the Commission is preempted, Respondents must demonstrate that their operations constitute transportation by a rail carrier under the ICCTA. Respondents fail to meet this burden as none are rail carriers and their operations are not at the direction of a rail carrier, offered jointly with a rail carrier, and are not related to transportation by a rail carrier. Additionally, the case law has long established that the STB does not regulate the transportation by motor vehicle of solid waste, as explained *infra* at Paragraphs 33-35 and associated notes.

²⁵ Respondents’ Motion at 19, ¶ 57.

²⁶ 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

Respondents rely state or otherwise support the conclusion that federal jurisdiction over TOFC/COFC intermodal transportation extends to the entirety of the solid waste collection service of which intermodal transport may be only a part. In other words, the jurisdiction of Congress and the STB over TOFC/COFC intermodal transportation does not extend so far as to preempt state regulation of solid waste collection.

34 The federal law on which the Respondents rely at most reflects the STB's assertion of jurisdiction over the combination of rail and motor carrier transportation when *rail carriers* provide, arrange, or jointly partner with a motor carrier to provide that transport.²⁷ Here, none of the Respondents are rail carriers and none of the services provided are offered at the direction of a rail carrier or jointly with a rail carrier.²⁸ Even then, neither Congress nor the STB has extended federal authority over solid waste handling by rail carriers to the extent Respondents assert.²⁹ To the contrary, Congress exempted solid waste rail transfer facilities from STB jurisdiction, thus preserving states' ability to regulate such facilities in the same manner as non-rail solid waste management facilities.³⁰ This illustrates Congress's respect for state authority over solid waste handling, including the rail transfer facilities that are used as part of rail transportation, as well as the collection, disposal, and other handling of solid waste before and after it is transported.

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.

AGG Enter. v. Wash. Cty., 281 F.3d 1324, 1328 (9th Cir. 2002) (citing *Cal. Reduction Co. v. Sanitary Reduction Works of S.F.*, 199 U.S. 306, 318 (1905); *Kleenwell Biohazard Waste and Gen. Ecology Consultants, Inc. v. Nelson*, 48 F.3d 391, 398 (9th Cir. 1995)). Internal citations omitted.

²⁷ Respondents' Motion at 5-9, ¶¶ 27-35 citing *e.g. Improvement of TOFC/COFC Regulation*, 364 I.C.C. 731 (1981), *aff'd sub nom. Am. Trucking Ass'n v. ICC*, 656 F.2d 1115 (5th Cir. 1981); *ICC v. Texas*, 479 U.S. 450 (1987); *Cent. States Motor Freight Bureau Inc. v. ICC*, 924 F.2d 1099 (1991); *Improvement of TOFC/COFC Regulations (Railroad-Affiliated Motor Carriers and Other Motor Carriers)*, 3 I.C.C.2d 869 (1987); *Am. Trucking Ass'n v. Atchison, T. & S. F. R. Co.*, 387 U.S. 397 (1967); *Improvement of TOFC/COFC Regulations (Pickup and Delivery)*, 6 I.C.C.2d 208 (1989). *See also infra* n. 31 and accompanying text.

²⁸ *Supra* n. 15 and accompanying text; n. 16 and accompanying text.

²⁹ *See infra* n. 27; n. 31 and accompanying text.

³⁰ 49 U.S.C. § 10501(c)(2)(B).

- 35 Respondents do not point to any language in the ICCTA or any other law, legislative history, or regulation demonstrating or even suggesting, that Congress or the STB intended to preempt traditional state regulation of solid waste collection. To the contrary, Congress, federal courts, and the STB have historically preserved traditional state regulation of solid waste collection.³¹ The most reasonable interpretation of federal law is, therefore, that Congress never granted the STB jurisdiction over solid waste transfer facilities, the solid waste collection service as a whole, and neither has the STB ever asserted such jurisdiction.
- 36 Additionally, Respondents argue that they relied upon advice provided by Commission Staff in 2011, which indicated that the operations raised as issues in this case were not regulated by the Commission.³² We have consistently rejected such arguments. Commission Staff's opinions on the applicability of statutes and rules are their opinions alone, which Commission Staff stated explicitly in its 2011 advice.³³ "The Commission through its rules and final orders interprets the statutes the legislature has enacted for the Commission to implement and enforce."³⁴ Here, the Commission has jurisdiction over the solid waste collection services conducted by Respondents. Respondents' misunderstanding of the law and Commission jurisdiction does not absolve the Respondents of their culpability for operating contrary to Commission regulation.³⁵

³¹ See *AGG Enter. v. Wash. Cty.*, 281 F.3d at 1328-29 (explaining the intrinsically local nature of solid waste collection, states' historic regulation, and that the legislative history of the FAAAA showed that Congress believed that solid waste was not property under ICC case law and that garbage collectors would be unaffected, and citing H.R. Conf. Rep. No. 103-677, at 85 (1994), reprinted in 1994 U.S.C.C.A.N. 1715, 1757); *Kleenwell Biohazard Waste and Gen. Ecology Consultants, Inc. v. Nelson*, 48 F.3d 391; *Joray Trucking Corp. Common Carrier Application*, 99 M.C.C. 109 (Jun. 29, 1965); *Long Island Nuclear Serv. Corp., Common Carrier Application*, 110 M.C.C. 395 (Sep. 9, 1969); *Transp. of "Waste" Prod. for Reuse and Recycling*, 114 M.C.C. 92, 103-08 (1971); *ICC v. Browning-Ferris Indus., Inc.*, 529 F. Supp. 287 (N.D. Ala. 1981); *Wilson v. IESI N.Y. Corp.*, 444 F. Supp. 2d 298 (M.D. Pa. 2006); *Hi Tech Trans, LLC v. New Jersey*, 382 F.3d 295 (3d Cir. 2004).

³² Respondents' Motion at 3, ¶ 16; Declaration of Eric Evans at 2, ¶ 7.

³³ See *In re Proper Carrier Classification of, and Complaint for Penalties Against Ghostruck Inc.*, Docket TV-161308, Order 05, Denying Petition for Administrative Review, 5, 11, ¶¶ 14, 30 (Jun. 1, 2017); Declaration of Jessica L. Goldman, Exhibit No. 1 at 2.

³⁴ *Id.* at 11, ¶ 30; see also *id.* at 5, ¶¶ 14-15.

³⁵ In *Ghostruck*, the Commission reasoned that Staff's contribution to a company's misunderstanding of the law through interactions and discussions *may* be a mitigating factor in reducing (but not eliminating) the penalty amount assessed to the company. See *id.* at 5-6, ¶¶ 16-

37 Murrey's Disposal argues that Respondents are motor carriers, not rail carriers, and that

the STB's jurisdiction varies based upon the mode of transportation involved, and its authority over motor carriers is actually set forth in 49 U.S.C. Section 13501. Starting with the ICC's decision in *Joray Trucking Corp. v. Common Carrier Application* construing its jurisdiction over motor carriers, the ICC and its successor, the STB, consistently ruled that federal law does not confer jurisdiction over the collection and transportation of solid waste hauled for disposal."³⁶

Murrey's Disposal argues that Respondents' operations do not qualify for preemption by virtue of the STB's exclusive jurisdiction over rail carriers granted in 49 U.S.C. Sections 10501 and 10502 because Respondents are not rail carriers or under the control of a rail carrier.³⁷ Instead, Respondents' "service involves transportation to a rail carrier," preemption of which has been rejected.³⁸ Thus, Murrey's Disposal argues, the Commission cannot be preempted from regulating Respondents' service by virtue of the STB's exclusive jurisdiction to regulate rail carriers.³⁹ For the reasons explained above, we agree.

38 Accepting Respondents' arguments would have repercussions far beyond the Commission and these consolidated dockets. WMW is a certificated solid waste collection company (albeit without authority to operate in Murrey's Disposal service territory), but the Respondents' preemption argument, if accepted, would preclude the Commission (or any municipality that has contracted for, or engages in, solid waste collection) from regulating *any* company that provides solid waste collection service using TOFC/COFC containers that are eventually moved via rail. The Commission would also be precluded from regulating any aspect of solid waste collection service utilizing TOFC/COFC containers, including the contents or type of the solid waste collected,

18. Here, no penalty is in dispute, only whether Respondents must hold authority from the Commission to conduct solid waste collection from Port Townsend Paper and McKinley Paper.

³⁶ Murrey's Disposal's Motion at 14, ¶ 17, citing *Joray Trucking Corp. v. Common Carrier Application*, 99 M.C.C. 109.

³⁷ Murrey's Disposal's Motion at 15-17, ¶¶ 18-28.

³⁸ Murrey's Disposal's Motion at 16, ¶ 25 (emphasis in original), citing *Hi Tech Trans, LLC v. New Jersey*, 382 F.3d 295.

³⁹ Murrey's Disposal's Motion at 17, ¶ 28.

transported, and disposed, the enforcement of county and city comprehensive solid waste management plans, public safety, and consumer protection. Indeed, none of the provisions of Chapters 70A.205 and 81.77 RCW and Chapter 480-70 WAC would apply to solid waste collection service using TOFC/COFC containers or the companies that provide it. Absent a showing of express Congressional intent to so preempt state authority over solid waste handling, Respondents' argument that the ICCTA preempts all local regulation of solid waste collection services using TOFC/COFC containers must fail.

39 As stated in Order 03, we need not ascribe to Respondents any intent to undermine Washington's authority over solid waste handling. This case presents only the issue of Respondents providing uncertificated solid waste collection services to two large commercial customers located in another solid waste collection company's exclusive service territory. The Legislature has established a process by which the Commission can authorize more than one solid waste collection company to operate in the same service territory.⁴⁰ If Respondents seek to serve solid waste collection customers outside of WMW's service territory, they cannot rely on claims of federal preemption of solid waste collection service to circumvent that process.

40 Thus, we determine that there is no genuine issue of material fact and that Murrey's Disposal is entitled to judgment as a matter of law. Respondents are providing solid waste collection services without the required certificate of authority from the Commission and federal law does not preempt the Commission's jurisdiction over the services provided. Accordingly, we order Respondents to immediately cease and desist their provision of solid waste collection services to Port Townsend Paper and McKinley Paper. The remaining events in the procedural schedule in these consolidated dockets are cancelled.

FINDINGS AND CONCLUSIONS

41 Having discussed above all evidence and matters material to this decision, the Commission now makes the following summary findings of fact and conclusions of law, incorporating by reference pertinent portions of the preceding detailed findings and conclusions:

⁴⁰ RCW 81.77.040.

- 42 (1) The Commission is an agency of the State of Washington vested by statute with the authority to regulate the rates, rules, regulations, practices, accounts, securities, transfers of property, and affiliated interests of public service companies, including solid waste collection companies.
- 43 (2) Murrey's Disposal is a solid waste collection company subject to Commission jurisdiction with a service territory including Clallam County and unincorporated Jefferson County.
- 44 (3) WMW is a solid waste collection company subject to Commission jurisdiction, but whose service territory does not include Clallam County or unincorporated Jefferson County.
- 45 (4) MJ Trucking and DAT are common carriers subject to Commission jurisdiction, but do not have authority from the Commission to operate as solid waste collection companies.
- 46 (5) WMDSO owns and operates the Columbia Ridge Landfill in Arlington, Oregon, and does not have authority from the Commission to operate as a solid waste collection company in Washington state.
- 47 (5) Port Townsend Paper is a paper mill located in Port Townsend, Jefferson County, and is former customer of Murrey's Disposal.
- 48 (6) McKinley Paper is a paper mill located in Port Angeles, Clallam County whose prior owner and operator was a customer of Murrey's Disposal.
- 49 (7) On July 15, 2020, Murrey's Disposal filed complaints in these dockets against the Respondents, alleging that Respondents were operating as solid waste collection companies in Murrey's Disposal's service territory without a certificate of public convenience and necessity by providing solid waste collection services to Port Townsend Paper and McKinley Paper.
- 50 (8) On March 16, 2021, the Parties filed with the Commission motions for summary determination, supported by declarations and exhibits.
- 51 (9) On April 7, 2021, the Parties filed responses to the motions for summary determination. Respondents also filed additional declarations.

- 52 (10) WMDSO contracts with Port Townsend Paper and McKinley Paper to collect solid waste in the form of OCC Rejects.
- 53 (11) WMDSO contracts with DAT to collect the solid waste from Port Townsend Paper in TOFC/COFC containers and deliver the solid waste over Washington's public highways via motor vehicle to Olympic View Transfer Station or a facility owned and operated by NMF in Mason County near Belfair, Washington.
- 54 (12) WMDSO contracts with MJ Trucking to collect the solid waste from McKinley Paper in TOFC/COFC containers and deliver the solid waste over Washington's public highways via motor vehicle to Olympic View Transfer Station, a facility owned and operated by NMF in Mason County near Belfair, Washington, or the Argo Yard, Union Pacific RR's facility, in Seattle, Washington.
- 55 (13) The Olympic View Transfer Station is operated by WMW under contract with Kitsap County.
- 56 (14) WMDSO has a preexisting contract with Union Pacific RR to transport via railroad solid waste in TOFC/COFC containers to the Columbia Ridge Landfill in Arlington, Oregon.
- 57 (15) After the solid waste in TOFC/COFC containers from Port Townsend Paper and McKinley Paper arrives at the Olympic View Transfer Station, NMF's facility, or the Argo Yard, it is subsequently loaded onto rail cars and transported by Union Pacific RR according to Union Pacific RR's preexisting contract with WMDSO.
- 58 (16) Respondents do not hold authority from the STB to operate as rail carriers.
- 59 (17) Respondents do not offer the provided solid waste collection services to Port Townsend Paper or McKinley Paper at the direction of or jointly with Union Pacific RR.
- 60 (18) Respondents are providing solid waste collection service to Port Townsend Paper and McKinley Paper in Murrey's Disposal's service territory without a statutorily required certificate of public convenience and necessity from the Commission.

- 61 (19) The Legislature has established a process in statute by which the Commission can authorize more than one solid waste collection company to operate in the same service territory.⁴¹
- 62 (20) The Commission is not preempted by federal law from regulating the operations of the Respondents at issue in these consolidated proceedings.
- 63 (21) There is no genuine issue of material fact and Murrey's Disposal is entitled to judgment as a matter of law.
- 64 (22) The Commission should deny Respondents' motion for summary determination and grant Murrey's Disposal's motion for summary determination and order Respondents to cease and desist.
- 65 (23) The Commission should cancel the remaining procedural schedule in these consolidated dockets.

ORDER

THE COMMISSION ORDERS THAT

- 66 (1) Respondents' Motion for Summary Determination is DENIED and Murrey's Disposal's, Co., Inc., Motion for Summary Determination is GRANTED.
- 67 (2) Respondents are ordered to immediately cease and desist solid waste collection services provided to Port Townsend Paper Company and McKinley Paper Company.
- 68 (3) The remaining events in the procedural schedule are cancelled.

⁴¹ RCW 81.77.040.

- 69 (4) The Commission retains jurisdiction over the terms of this Order.

DATED at Lacey, Washington, and effective May 3, 2021.

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

DAVID W. DANNER, Chair

ANN E. RENDAHL, Commissioner

JAY M. BALASBAS, Commissioner