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May 25, 2021

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

ENTERED
Office of Proceedings
May 25, 2021
Part of
Public Record

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

Dear Ms. Brown:

Enclosed for filing in the referenced docket is the Reply of the Washington Utilities and Transportation Commission in Opposition to the Petition for Declaratory Order. Please contact me if you have any questions.

Sincerely,

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Enclosures

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

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

Docket No: FD 36511

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

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

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SURFACE TRANSPORTATION BOARD**

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

I. INTRODUCTION

The Surface Transportation Board (Board) exercises exclusive jurisdiction over “transportation by rail carrier.” 49 U.S.C. § 10501(a), (b). The question posed by petitioners Waste Management of Washington, Inc. and Waste Management Disposal Services of Oregon, Inc. (collectively the “petitioners”), neither of which is a rail carrier, is whether this exclusive jurisdiction encompasses the service they offer. That service consists of arranging the collection and highway transport of solid waste by motor carriers who operate independently of any rail carrier.

The Board should answer the question posed by the petitioners in the negative. All indicia of Congress’s intent, including and especially the text of 49 U.S.C. § 10501 (“§ 10501”), demonstrate that the petitioners’ service does not fall within the Board’s exclusive jurisdiction. And the Board has read § 10501 in exactly that fashion in a previous declaratory order issued under strikingly similar facts.

The petitioners nevertheless argue that their service falls within the Board’s exclusive jurisdiction because the motor carriers involved collect and transport solid waste in intermodal

containers. They appear to claim that either (1) the intermodal exemption rules promulgated by the Interstate Commerce Commission (ICC) preempt the application of Washington's solid waste collection laws, chapter 81.77 Revised Code of Washington (RCW), to their service or (2) the intermodal exemption rules show that they provide transportation by rail carrier. The petitioners are incorrect on both counts. The intermodal rules do not apply to solid waste collection services and therefore cannot preempt state law. And the ICC order adopting those rules explicitly provides that motor carrier services like the one the petitioners provide are not "transportation by rail carrier," but rather motor carrier services "related to" transportation by rail carrier. 49 U.S.C. § 10502(a).

The petitioners also invoke the Federal Railroad Safety Administration Act, Pub. L. 110-432, §§ 601-05, 122 Stat. 4900, §§ 601-05 (2008) (the "Clean Rail Act" or "CRA"), and contend that it demonstrates the Board's jurisdiction over their service. The petitioners are again incorrect. The CRA addressed § 10501's preemption of state laws regarding transloading facilities operated by rail carriers or their agents. It did nothing to expand the Board's jurisdiction under § 10501 to encompass the motor vehicle collection and transport of solid waste arranged by the petitioners.

Accordingly, the Washington Utilities and Transportation Commission (Commission) respectfully requests that the Board either: (1) dismiss the petition and decline to institute a declaratory proceeding, or (2) enter an order declaring that federal law does not preempt the application of Washington's solid waste collection laws to the petitioners' service.

II. ARGUMENT

The Board has the authority to enter a declaratory order to terminate a controversy or remove uncertainty. 5 U.S.C. § 554(e); 49 U.S.C. § 1321. But a declaratory order is not

necessary to do either in this case. *See, e.g., Delegation of Authority—Declaratory Order Proceedings*, 5 I.C.C.2d 675, 676 (1989) (propriety of a declaratory order turns on the necessity of terminating a controversy). The Board need not terminate a controversy here because the petitioners have sought judicial review of the Commission order that prompted them to file the petition. Petition for Declaratory Order (Petition) at 8 n.1. Courts, including state courts, may decide “issues involving federal preemption under § 10501(b),” *Adrian & Blissfield R.R. Co. — Petition for Declaratory Order*, FD 36148, slip op. at 4 (STB served Jan 31, 2018), and the superior court can resolve the controversy at issue in the first instance. While the Board has in the past issued declaratory orders to provide guidance to courts in evaluating preemption claims, *e.g., id.*, no such guidance is necessary here as the Board has already issued at least one order that effectively addresses the question raised by the petitioners. *See Hi Tech Trans, LLC — Petition for Declaratory Order—Hudson County, NJ*, STB Finance Docket No. 34192, slip op. at 1-6 (STB served Nov. 20, 2002) (*Hi Tech I*). And the Board need not issue a declaratory order to remove uncertainty because, as also discussed below, there is none: the petitioners’ service does not fall within the scope of the Board’s exclusive jurisdiction over “transportation by rail carrier that is . . . only by railroad.” § 10501(a)(1)(A).

A. The motor vehicle solid waste collection service arranged by the petitioners does not fall within the Board’s exclusive jurisdiction over transportation by rail carrier

The petitioners ask the Board to declare that they provide “transportation by rail carrier” such that the Board’s exclusive jurisdiction preempts otherwise applicable state law. But the petitioners admit that they are not rail carriers. Petition at 9. They also admit that they arrange a service provided by motor carriers operating independently of any rail carrier. *Id.* The Board should conclude that its jurisdiction under § 10501 does not encompass the petitioners’ service based on those undisputed facts and any or all of the following: (1) the plain text of § 10501, (2)

Board precedent issued under closely analogous facts, (3) the structure and purpose of the regulatory scheme codified in Title 49 U.S.C., and (4) relevant legislative history demonstrating that the Board has no jurisdiction over the motor vehicle collection and transport of solid waste. In the event that the Board determines that its jurisdiction extends to the petitioners' service, it should conclude that jurisdiction is not exclusive under Board precedent holding that § 10501 does not preempt state health and safety laws that do not burden railroad operations, like the laws at issue here.

1. The plain text of § 10501 does not extend the Board's jurisdiction over transportation by rail carrier to motor carrier service like the one arranged by the petitioners

The interpretation of any statute begins with its text. *I.R. ex rel. E.N. v. Los Angeles Unified Sch. Dist.*, 805 F.3d 1164, 1167 (9th Cir. 2015). Because the petition concerns the Board's exclusive jurisdiction over rail carriers, the Board should begin its analysis with the textual source of that jurisdiction: § 10501. The petitioners' service does not fall within the Board's exclusive jurisdiction based on the plain text of that provision.

The Board's rail jurisdiction extends to "transportation by rail carrier that is . . . only by railroad" or, under some circumstances, "by railroad and water." § 10501(a). The term "rail carrier," as relevant here, means "a person providing common carrier railroad transportation for compensation." 49 U.S.C. § 10102(6). "Whether a particular activity constitutes transportation by a rail carrier under section 10501 is a case-by-case, fact-specific determination." *Town of Babylon & Pinelawn Cemetery—Petition for Declaratory Order*, FD 35057, slip op. at 4 (STB served Feb. 1, 2008) (*Town of Babylon*).

Congress enacted the Interstate Commerce Commission Termination Act of 1995, Pub. L. 104-88, 109 Stat. 803 (ICCTA), to further deregulate the rail industry. *DHX v. Surface*

Transportation Safety Bd., 501 F.3d 1080, 1082 (9th Cir. 2007). To do so, Congress amended Title 49’s rail provisions to expand federal preemption of state law. *Fayus Enter. v. BNSF Ry. Co.*, 602 F.3d 444, 448-50 (D.C. Cir. 2010). Title 49’s rail preemption provision, now codified at § 10501(b), provides that the “jurisdiction of the Board over . . . transportation by rail carriers . . . is exclusive” and that the remedies provided with respect to Title 49’s rail carrier provisions are similarly “exclusive,” preempting otherwise applicable state law. § 10501(b).

To fall within the Board’s jurisdiction under § 10501, an activity must (1) constitute “transportation” as defined by Title 49 and (2) be “performed by, or under the auspices of, a ‘rail carrier.’” *Town of Babylon* at 4; accord *Hi Tech Trans, LLC—Petition for Declaratory Order—Newark, NJ*, STB Finance Docket 34192 (Sub-No. 1), slip op. at 5-7 (STB served Aug. 14, 2003) (*Hi Tech II*); *N.Y. & Atl. Ry. Co. v. S.T.B.*, 635 F.3d 66, 72 (2d Cir. 2011) (“[b]oth the courts and the STB thus consistently find that to fall within the STB’s exclusive jurisdiction, the facility or activity must satisfy both the ‘transportation’ and ‘rail carrier’ statutory requirements.”).

The service described by the petitioners does not fall within with the Board’s jurisdiction under the plain language of § 10501. The petitioners concede that they are not rail carriers. They also acknowledge that they arrange for motor carrier solid waste collection services provided independently of a rail carrier. Their service is therefore not performed “by, or under the auspices of, a ‘rail carrier,’” *Town of Babylon* at 4, and does not fall within the Board’s exclusive rail jurisdiction under 49 U.S.C. § 10501. *Town of Babylon* at 4; *Hi Tech II* at 5-7.

2. Board precedent issued under similar facts provides that the Board does not have exclusive jurisdiction over the petitioners’ service under § 10501

The Board’s own precedent also works against determining that § 10501 grants the Board jurisdiction over the petitioners’ service. The petitioners are not the first to seek a declaratory order stating that the motor vehicle collection of solid waste and the subsequent transport of that

waste to rail transloading facilities falls within the Board's exclusive jurisdiction. In that prior case, the Board rejected the attempt. It should do the same here.

In 2002, Hi Tech Trans, LLC (Hi Tech) and the state of New Jersey were involved in protracted litigation concerning the application of New Jersey law to Hi Tech's operations. *Hi Tech I* at 2. The Board summarized Hi Tech's operations as follows:

Hi Tech contracts with shippers for the transportation of [Construction and Demolition (C&D)] debris. Hi Tech contracts for trucks to transport the C&D debris from the shippers' construction sites to the truck-to-rail transloading facility located in [Canadian Pacific (CP)'s] Oak Island Yard, where Hi Tech unloads the C&D debris from the trucks and later reloads it onto rail cars. Hi Tech then directs CP to transport the rail cars containing the C&D debris to disposal sites on or near CP's network or to points of interchange with other carriers.

Hi Tech II at 2. Hi Tech characterized these operations, much as the petitioners do here, *see* Petition at 21, as part of "a continuous intermodal rail move." *Hi Tech I* at 2 (internal quotation omitted).

When New Jersey attempted to regulate Hi Tech's trucking operations, the company petitioned for a declaratory order stating that the Board had exclusive jurisdiction over those operations. *Id.* at 1. The Board denied that petition after finding it "unnecessary . . . to institute a declaratory order proceeding." *Id.* at 3. The Board determined that it was "clear" that it did "not have jurisdiction over those activities" described in the petition "that extend beyond the rail-related activities at" Hi Tech's railroad transloading facility, meaning Hi Tech's trucking operations. *Id.* at 3. As this Board put it, the

movement of trucks carrying C&D debris over New Jersey roads to reach the CP transload facility that Hi Tech operates is not part of 'transportation by rail carrier' as defined in section 10501(a). Thus, the Board does not have jurisdiction over those activities, so section 10501(b) preemption does not apply to the state and local regulations at issue here.

Id. at 5.

The Board reached its jurisdictional conclusion after considering the unlimited sweep *Hi Tech*'s arguments would give ICCTA preemption. As the Board noted in *Hi Tech I*, "[u]nder *Hi Tech*'s theory, all state and local regulation of activities that occur before a product is delivered to a rail carrier for transportation would be preempted. Preemption does not go that far, nor does the Board's jurisdiction." *Id.* at 3.

The facts here do not meaningfully differ from those before the Board in *Hi Tech I*. The petitioners arrange the collection of solid waste and the motor vehicle transportation of that waste to rail transloading yards. At those yards, the waste is transloaded onto rail cars for shipment to a disposal site. The petitioners do not operate the railroad performing that shipment. And the petitioners' motor carriers providing the service arranged by the petitioners operate independently of the rail carrier who hauls the waste to the petitioners' disposal site. Thus, just as the New Jersey laws did in *Hi Tech I*, Washington state law, chapter 81.77 RCW, regulates motor carriers collecting and transporting solid waste rather than rail carriers. The type of equipment the petitioners use should not affect the analysis because, as discussed below, the use of intermodal equipment does not transform the petitioners into rail carriers.

Further, accepting the petitioners' argument would read the Board's jurisdiction in the expansive way the Board rejected in *Hi Tech I* and *Hi Tech II*. Though they do not state it so explicitly, the petitioners appear to argue that their service constitutes transportation by rail carrier because the rail carrier could not perform its leg without the petitioners performing theirs. Petition at 9-10. But, again, the petitioners' motor carrier service operates independently of any rail carrier. In such cases, the Board has recognized the relationship between the petitioners and the rail carrier is more akin to "that of [a] shipper with a carrier." *Hi Tech II* at 6; *accord Town of Babylon* at 6 (concluding that the transloading service at issue was not transportation by rail

carrier because the railroad’s “involvement is limited to transporting cars to and from the facility”). Concluding that § 10501 preempts the application of state law to entities who act like shippers would unmoor the federal preemption of state law from its textual limits. *Hi Tech I* at 3. The Board has always refused invitations to read its jurisdiction in such a fashion. *Town of Babylon* at 4-6; *Hi Tech II* at 6 (noting that “By *Hi Tech*’s reasoning, any third party or noncarrier that even remotely supports or uses rail carriers would come within the statutory meaning of transportation by rail carrier” and then rejecting that interpretation of § 10501); *Hi Tech I* at 3-5. It should do so again.

The petitioners cite the Board’s *New England Transrail* (“*NET*”) decision and contend that it shows the Board’s exclusive jurisdiction over their service. Petition at 16-17 (citing and quoting *New England Transrail, LLC d/b/a Wilmington & Woburn Terminal Ry. —Construction, Acquisition and Operation Exemption—In Wilmington & Woburn*, FD 34797, slip op. (STB served July 10, 2007)). *NET* concerned transloading activities that an entity would perform after certification as a rail carrier by the Board, and the potential preemption of state regulation of those transloading activities resulting from *NET* becoming a rail carrier. *Id.* at 1. It does not speak to the question presented here, whether the Board has exclusive jurisdiction over the motor vehicle collection and transport of solid waste before the waste is “delivered to rail.” *City of Alexandria, Va. —Petition for Declaratory Order*, FD 35157, slip op. at 3 (STB 2009) (citing *Hi Tech I*). *NET* is therefore not in tension with *Hi Tech I* and, to the extent that *NET* is relevant, it proves the point made by the Commission here. *NET*’s preemption analysis largely turned on whether *NET* would be a rail carrier. *NET* at 1, 11-12. Here, the petitioners are not rail carriers, admit they are not, and unlike the petitioner in *NET*, have not applied to become one. The

Board's decision in *NET* signals that the Board does not have exclusive jurisdiction over petitioners' service.

The petitioners also cite *Canadian Nat. Ry. Co. v. City of Rockwood*, 2005 WL 1349077 (E.D. Mich. 2005); *Waste Mgmt. of N.J. v. Union County Utils. Auth.*, 945 A.2d 73 (N.J. 2008); and the Board's *Solid Waste Transfer Facilities*, EP 684, 2012 WL 5873121 (STB served Nov. 20, 2012) for support. Petition at 16-17. None of those decisions or orders provides them any relevant assistance. Again, the petition poses the question of whether the Board has exclusive jurisdiction over motor vehicle solid waste collection and transport services. None of the decisions cited addresses that question, and certainly none of them indicates that the Board incorrectly decided *Hi Tech I. Rockwood*, 2005 WL 1349077 at *1-10; *Waste Mgmt.*, 945 A.2d at 76-92; *Solid Waste Transfer Facilities*, 2012 WL 5873121 at *1-29. As with *NET*, to the extent that any of those decisions is relevant, each of them supports the Commission's reading of § 10501, rather than the petitioners. Each recognizes that preemption under § 10501 requires that a rail carrier, or an agent acting on behalf of one, perform the transportation at issue. *Rockwood*, 2005 WL 1349077 at *4-6; *Waste Mgmt.*, 945 A.2d at 84-89; *Solid Waste Transfer Facilities*, 2012 WL 5873121 at 1. Given that the petitioners are not rail carriers, and neither they nor the motor carriers providing the service they arrange act under the auspices of one, each of the opinions indicates that the petitioners' service does not fall within the Board's exclusive jurisdiction.

Finally, the petitioners also cite *N.Y. Susquehanna & W. Ry. Corp. v. Jackson*, 500 F.3d 238, 252 (3d Cir. 2007) in support of their position. *Jackson* is even less helpful to them than the cases just cited. Much like *NET*, *Rockwood*, *Waste Management*, and *Solid Waste Transfer Facilities*, *Jackson* did not address the Board's jurisdiction over motor vehicle solid waste

collection and transport. 500 F.3d at 242-57. Again, it does not even suggest that the Board incorrectly decided *Hi Tech I*. And much like *NET*, *Rockwood*, *Waste Management*, and *Solid Waste Transfer Facilities*, *Jackson* recognizes that a necessary element of the Board's jurisdiction is the provision of the transportation service by a rail carrier or an agent acting on behalf of one. 500 F.3d at 249-51. Again, the petitioners are not rail carriers and do not act as the agent of one. Under *Jackson*, § 10501 would not preempt the application of Washington's chapter 81.77 RCW to the petitioners' service. Further, *Jackson* also recognizes that the Board's jurisdiction over solid waste services provided by or under the auspices of a rail carrier may not be exclusive, and that § 10501 may not preempt state laws regulating those services. *Id.* at 255-57. This Reply addresses that principle in greater detail below.

3. The structure of the ICA indicates that the Board's exclusive jurisdiction over transportation by rail carrier does not extend to the petitioners' motor vehicle operations

The Board should read the exclusive jurisdiction granted to it by § 10501 in light of the "structure and purpose of the" ICA "as a whole." *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 486 (1996). That structure and that purpose strongly indicate that the Board's exclusive jurisdiction over transportation by rail carrier does not encompass the petitioners' service.

Turning first to structure, the ICA as modified by the ICCTA vests in the board jurisdiction over multiple modes of transportation. As relevant here, the ICA granted to the ICC regulatory jurisdiction over rail and motor carriers. Former 49 U.S.C. § 10501 (1994 main ed.); former 49 U.S.C. § 10521 (1994 main ed.). The Board exercises what remains of that jurisdiction after the enactment of the ICCTA. *Hi Tech Trans, LLC v. New Jersey*, 382 F.3d 295, 305 (3d Cir. 2004) ("the STB perform[s] the core rail and trucking responsibilities formerly conducted by the ICC.") (internal quotation omitted; alteration in original). Structurally then, the ICA

distinguishes between rail and motor carriers and provides separate regulatory schemes for each. *Compare* 49 U.S.C. §§ 10101-11908 (rail carrier provisions) *with* 49 U.S.C. §§ 13101-14916 (motor carrier provisions). The divided nature of the Board’s authority should cause the Board to resist the petitioners’ invitation to apply its jurisdiction over transportation by rail carrier to motor carrier services.

Turning next to purpose, Congress gave the Board exclusive jurisdiction over transportation by rail carrier to ensure that the states could not undo efforts at “deregulating railroads.” *BNSF Ry. Co. v. Cal. Dept. of Tax & Fee Admin.*, 904 F.3d 755, 760 (2018). Here, Washington’s chapter 81.77 RCW regulates motor carriers who operate independently of any railroad. It does not “manag[e] or govern[] rail operations” in any sense. *Id.* at 760-61 (internal quotation omitted). The Board should reject petitioners’ argument that § 10501 grants the Board jurisdiction over their service because such a reading does nothing to advance Congress’s purpose in enacting § 10501.

4. Relevant legislative history indicates that Congress did not intend to preempt state regulation of motor vehicle solid waste collection and transport

If the Board determines that the plain language of the § 10501 and the structure and purpose of the ICA as modified by the ICCTA do not settle the question presented, it should look to legislative history to determine whether Congress intended the Board’s exclusive jurisdiction over transportation by rail carrier to encompass the services provided by petitioners. That relevant legislative history shows that Congress acquiesced to the ICC’s determination that it had no jurisdiction over motor vehicle solid waste collection and transport. It amended the ICA based on that acquiescence to avoid preempting state authority over the service. The Board should interpret § 10501 accordingly.

The Board's predecessor, the ICC, determined that its jurisdiction did not extend to the motor vehicle collection and transport of run-of-the-mill solid waste because solid waste carried by truck did not constitute property, a prerequisite for its jurisdiction. *Joray Trucking Corp. Common Carrier Application*, 99 M.C.C. 109 (ICC 1965). The ICC consistently affirmed that determination, even when asserting jurisdiction over more exotic cargo like hazardous waste or nuclear waste. *E.g., Long Island Nuclear Service Corp. Common Carrier Application*, 110 M.C.C. 398 (1969). When doing so, the ICC explained that motor carriage "in interstate operations of essentially a local character[,] such as the disposal of debris and rubble and trash and garbage collection[,] . . . appear in marginal purview of the remedial aims of the" ICA. *Id.* at 403-04. It thus exercised its "discretion in the administration of part II [of the ICA] by finding such items not to be 'property.'" *Id.* at 403-04.

In 1994, Congress enacted the Federal Aviation Administration Authorization Act of 1994 (FAAAA), Pub. L. 103-305, 108 Stat. 1606, to amend the ICA. Those amendments should inform the Board's interpretation of the ICCTA. *See Fla. E. Coast. Ry.*, 266 F.3d at 1333 (interpreting the ICCTA in light of earlier amendments to the ICA). When enacting the FAAAA, Congress preempted state regulatory authority over motor carriers of property. FAAAA § 601, *codified at* 49 U.S.C. 14501(c). But in doing so, Congress left intact the states' ability to regulate motor carriers who collect and transport solid waste by acquiescing to the ICC's interpretation of the term "property." *AGG Enters. v. Washington County*, 281 F.3d 1324, 1329 (9th Cir. 2002) (quoting H.R. Conf. Rep. No. 103-677, at 85 (1994), *reprinted in* 1994 U.S.C.C.A.N. 1715, 1757). Specifically, the Conference Report for the FAAAA explained that:

[t]he conferees further clarify that the motor carrier preemption provision does not preempt State regulation of garbage and refuse collectors. The managers have been informed by the Department of Transportation that under ICC case law,

garbage and refuse are not considered ‘property.’ Thus, garbage collectors are not considered ‘motor carriers of property’ and are thus unaffected by this provision.

H.R. Conf. Rep. No. 103-67 at 85.

Congress recodified the FAAAA’s motor carrier preemption provision when enacting the ICCTA. *Compare* 49 U.S.C. § 14501(c) *with* former 49 U.S.C. § 11501(h) (1994 main ed.).

When doing so, Congress provided no evidence in either the text of the ICCTA or in any legislative history indicating that it had changed its intent regarding the preemption of state regulation of motor vehicle state solid waste collection and transport. Accordingly, the Board should conclude that Congress in enacting the ICCTA intended to leave state regulatory authority over that service un-preempted. As it considers that evidence of congressional intent, the Board should conclude that the petitioners’ service does not fall within its exclusive jurisdiction under § 10501.

5. The Board should conclude that § 10501 does not preempt Washington’s chapter 81.77 RCW because the chapter does not unreasonably burden rail transportation or discriminate against rail carriers

The Board and the courts have repeatedly concluded that § 10501 does not preempt the application of state health and safety laws to rail carriers unless those laws unreasonably burden or discriminate against rail carriers. Under the facts presented by the petitioners, Washington’s chapter 81.77 RCW does not even apply to a rail carrier, let alone burden or discriminate against one. The Board should thus conclude that the petitioners’ service does not fall within the scope of the Board’s exclusive jurisdiction under § 10501.

Whether a statute preempts state law turns on congressional intent, and thus “any understanding of the scope of a pre-emption statute must rest primarily on a fair understanding of congressional purpose.” *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485-86 (1996) (internal quotation omitted; alteration in original). Reflecting that fact, and because “Congress does not lightly

preempt state law,” both the Board and federal courts recognize that preemption “does not deprive the states of the ‘power to regulate where the activity regulated [is] merely [a] peripheral concern’ of Federal law.” *Cities of Auburn and Kent, WA – Petition for Declaratory Order – Burlington N. R.R. Co. – Stampede Pass Line*, Finance Docket 33200, slip op. at 8 (STB served July 2, 1997) (quoting *Medtronic*, 518 U.S. at 486; *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 243 (1959) (first alteration in original)) (*City of Auburn*).

The Board has determined that states and localities may enact measures to protect public health and safety so long as they do not unreasonably burden or discriminate against railroad operations. *City of Auburn* at 8-10; *Maumee & W. R.R. Corp. & RMW Ventures, LLC – Petition for Declaratory Order*, Finance Docket 34354, slip op. at 2 (STB served Mar. 3, 2004). The federal courts agree. *E.g.*, *Am. Assoc. of R.Rs. v. Coast Air Quality Mgmt. Dist.*, 622 F.3d 1094 (9th Cir. 2010); *Jackson*, 500 F.3d at 252; *Green Mountain R.R. Corp. v. Vt.*, 404 F.3d 638, 643 (2d Cir. 2005). This is because the ICCTA’s “core”, meaning non-peripheral, concerns consist of providing for the Board’s oversight of the “economics and finances of the rail carriage industry.” *Jackson*, 500 F.3d at 252. Non-burdensome, non-discriminatory health and safety measures do not implicate these core concerns and thus survive preemption. *City of Auburn* at 8-10.

§ 10501 does not preempt chapter 81.77 RCW because it does not burden or discriminate against railroads. The words “rail carrier” do not appear in the chapter, and neither does the word “railroad.” The word “rail” does appear, but only once, and only to make plain that the chapter does not apply to vehicles travelling on “stationary rails or tracks.” RCW 81.77.010(10). The petitioners are not rail carriers, and they provide a service involving motor carriage arranged independently of any rail carrier. Chapter 81.77 RCW thus does not regulate rail operations, either facially or as applied to their operations, and it cannot impose an undue burden on

operations to which it does not apply. Further, chapter 81.77 RCW applies evenhandedly to “every person” who collects and transports solid waste. RCW 81.77.010(9). It in no way “target[s] the railroad industry.” *Jackson*, 500 F.3d at 254. § 10501(b) does not preempt state regulation so peripheral to the ICCTA’s concerns, especially in light of the congressional intent not to preempt state regulation of solid waste collection services. *AGG*, 281 F.3d at 1329-30.

B. The petitioners’ use of intermodal equipment does not bring their motor carrier service within the Board’s exclusive jurisdiction over transportation by rail carrier.

Despite acknowledging that they are not rail carriers and that they arrange a service provided independently of any rail carrier, the petitioners claim that their service falls within the Board’s exclusive jurisdiction because they use intermodal equipment. Specifically, they argue that: (1) the ICC’s promulgation of the intermodal exemption rules currently codified at 49 C.F.R. §§ 1090.1-1090.3 preempted chapter 81.77 RCW, or (2) the intermodal exemption rules show that they perform transportation by motor carrier such that § 10501(b) preempts state law. Neither of those claims has merit.

1. The ICC’s intermodal exemption rules do not preempt chapter 81.77 RCW because the ICC lacked the jurisdiction to exempt the service offered by petitioners, and nothing suggests that it even sought to

Petitioners first appear to contend that the ICC’s intermodal exemption rules, which this Board now administers, preempt state law. *See* Petition at 10 (parenthetically citing *Fayus Enters.*, 602 F.3d at 451-52, to reference preemption under the Staggers Act); *id.* at 13 n.3 (noting the preemptive effect of federal regulations). This argument fails for three reasons: (1) the ICC determined that it lacked the jurisdiction necessary to preempt state solid waste collection laws, (2) the ICC showed no intent to preempt those laws, and (3) Congress has explicitly disapproved of any such preemption.

First, the intermodal rules do not apply to motor vehicle solid waste collection and

transport. The ICC could exempt any service falling within the scope of its regulatory jurisdiction (as, presumably, the Board may now). *I.C.C. v. Texas*, 479 U.S. 450, 455 (1987). However, the ICC consistently determined that it had no jurisdiction over the motor vehicle collection and transport of non-radioactive solid waste. Those determinations remain good law. ICCTA § 205 (the savings clause, which gives the ICC's orders continuing validity). Indeed, the ICC in late 1994 assured Congress that it had "never" regulated motor vehicle solid waste collection and transportation based on its jurisdictional determinations. 140 Cong. Rec. E2204-03 (daily ed. Oct. 7, 1994).¹ Lacking the jurisdiction to regulate the motor vehicle collection and transport of solid waste, the ICC could not exempt the service from regulation, *see Texas*, 479 U.S. at 455, and thus could not preempt state law.

Second, much as statutory preemption turns on congressional intent, regulatory preemption turns on an agency's intent. *Fid. Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 154 (1982). And just as statutory preemption requires Congress to show clear and manifest intent to preempt state law, regulatory preemption requires an agency to similarly express its preemptive intent. *Hillsborough County, Fla. v. Automated Medical Lab., Inc.*, 471 U.S. 707, 715-16 (1985). Nothing in the text of the intermodal rules, *see* 49 C.F.R. §§ 1090.1-1090.3, or the orders adopting those rules, indicates that the ICC intended them to change its determination that it lacked jurisdiction over motor vehicle solid waste collection and transport. *See Improvement of TOFC/COFC Regulations (Pickup and Delivery)*, Ex Parte No. 230 (Sub-No. 7), 6 I.C.C.2d 208 (1989) (hereinafter *TOFC III*) (adopting rules without discussing the applicability

¹ In a letter concerning whether the states could regulate recycling collection, the ICC's general counsel wrote that "The ICC has never regulated curbside collection of garbage. In fact, the Commission has issued decisions finding that garbage and refuse are not considered property under the Interstate Commerce Act because they have no value." 140 Cong. Rec. E2204-03.

of those rules to motor vehicle solid waste collection and transport services); *Improvement of TOFC/COFC Regulations (Railroad-Affiliated Motor Carriers and Other Motor Carriers)*, Ex Parte No. 230 (Sub-No. 6), 3 I.C.C.2d 869 (1987) (same); *Improvement of TOFC/COFC Regulation*, Ex Parte No. 230 (Sub-No. 5), 364 I.C.C. 731 (1981) (hereinafter *TOFC I*) (same), And the ICC’s General Counsel could not have represented to Congress that the ICC had never regulated solid waste collection if the intermodal rules somehow did exactly that. In short, the ICC never clearly or manifestly announced any intention of preempting state solid waste collection laws through the intermodal exemption rules, and, indeed, appears not to have believed that it had exempted the service. The rules do not preempt state law. *Hillsborough County*, 471 U.S. at 715-16.

Third, an agency cannot preempt state law by rule in contravention of congressional intent. *Hillsborough County*, 471 U.S. at 714-15. Congress has expressed its intent not to preempt the state regulation of motor vehicle solid waste collection. *AGG*, 281 F.3d 1329. The rules cannot override that intent, even if the Board somehow believed that the ICC had sought to exempt the service.

2. The intermodal rules do not transform the petitioners’ motor carrier service into transportation by rail carrier

The petitioners also argue that this Board has exclusive jurisdiction over their service as “[r]ail [t]ransportation.” Petition at 9. This argument is fatally flawed because the relevant intermodal rulemaking plainly treats motor carrier services like the one arranged by petitioners as motor carriage.

To the extent that the petitioners argue that all intermodal service, whether provided by motor vehicle or rail car, is rail transportation, they are manifestly incorrect. The intermodal exemption rules separately define “rail trailer-on-flatcar/container-on-flatcar (TOFC/COFC)

service”² and “highway TOFC/COFC service.”³ 49 C.F.R. § 1090.1(a), (b). The ICC had no reason to do so if all intermodal service were rail transportation. Instead, the separate definitions track its separate regulatory authority and allowed the ICC to exempt services under both its rail and motor carrier jurisdiction. *See* former 49 U.S.C. § 10501 (1994 main ed.); former 49 U.S.C. § 10521 (1994 main ed.); *Texas*, 479 U.S. at 455 (the ICC’s authority to exempt is coextensive with its regulatory jurisdiction).

To the extent that the petitioners argue that the specific intermodal service they offer is “rail transportation,” Petition at 9, that argument amounts to legal sleight of hand. The Board’s exclusive jurisdiction encompasses “transportation by rail carrier,” not generalized “rail transportation.” *Grafton & Upton R.R. Co. v. Town of Milford*, 417 F. Supp. 2d 171, (D. Mass. 2006) (“Congress intended the transportation and related activities undertaken by rail carriers to benefit from federal preemption, *but did not mean such preemption to extend to activity related to rail transportation undertaken by non-rail carriers.*” (Emphasis added.)). Setting aside for the moment the intermodal rules’ inapplicability to solid waste collection, the rules only aid the petitioners if the rules show the ICC or the Board regulating the petitioners’ service as “transportation by rail carrier.” They do not.

The statute granting the authority to exempt services, currently codified at 49 U.S.C. § 10502(a), provides that, “[i]n a matter related to a rail carrier providing transportation subject to the jurisdiction of the Board under this part, the Board, to the maximum extent consistent with this part, shall exempt a person, class of persons, or a transaction or service” upon making

² That service consists of the “transportation by rail, in interstate commerce, of” specified intermodal equipment. 49 C.F.R. § 1090.1(a).

³ That service consists of the “highway transportation, in interstate or foreign commerce” of the same intermodal equipment specified in the definition of rail TOFC/COFC service. 49 C.F.R. § 1090.1(b).

certain findings. In 49 U.S.C. § 10502(f), Congress authorized the Board to exempt under § 10502(a) “transportation provided by a rail carrier as part of a continuous intermodal movement.” *TOFCIII*, 6 I.C.C.2d at 212-13.

The ICC exercised its authority to promulgate rules exempting intermodal transport services from economic regulation in three successive rulemakings spanning the 1980s. *Central States*, 924 F.2d at 1101. As the petitioners recognize, the relevant rulemaking here is the third. Petition at 21.

In that third rulemaking, the ICC “exempt[ed] from economic regulation the motor carrier pickup and delivery portion of [TOFC and COFC] services.” *TOFC III*, 6 I.C.C.2d at 208. This had the effect of exempting trucking services provided by motor carriers operating independently of a rail carrier. *Central States Motor Freight Bureau v. ICC*, 924 F.2d 1099, 1104, 1104-05, 1105, 1106, 1108 (D.C. Cir. 1991) (noting that the question presented concerned motor carrier services not provided by a rail carrier); *TOFC III*, 6 I.C.C.2d at 224 (Commissioner Lamboley dissenting).

The ICC based the third rulemaking’s exemption on a finding that the motor carrier services at issue related to rail transportation under § 10502(a), rather than a finding that the services were “transportation provided by a rail carrier as part of a continuous intermodal movement” under 49 U.S.C. § 10502(f). *TOFC III*, 6 I.C.C.2d at 212 (“the language of § 10505(a)⁴ applies to matters ‘related to a rail carrier providing transportation subject to [ICC] jurisdiction.’ It does not limit our exemption authority to services ‘provided by rail carriers.’”); *id.* at 213 (“the fact that pickup and delivery operations not provided by railroad do not qualify

⁴ Congress recodified 49 U.S.C. § 10505(a) as 49 U.S.C. § 10502(a) and 49 U.S.C. § 10505(f) as 49 U.S.C. § 10502(f) when enacting the ICCTA. The relevant language is identical in both, and this brief refers to the current and former sections interchangeably.

for exemption under § 10505(f) is immaterial to whether they qualify under the ‘related to rail’ language of § 10505(a)’); *id.* at 214 (“we find that the motor portion of a TOFC/COFC shipment that is covered by an interchange agreement between a motor carrier and a railroad is a matter related to a rail carrier for purposes of § 10505(a)’). It made this finding despite acknowledging that the motor carrier services involved were part of a continuous intermodal movement. *See id.* at 208 (“we find that the motor carrier portion of such coordinated TOFC/COFC service, which by definition involves a prior or subsequent movement by rail carrier, is a matter related to rail carrier transportation’); *id.* at 213 (“an equipment interchange agreement establishes an operational relationship between the truck and the railroad, and it ensures continuity in the movement of the goods.’”).

On review, the Court of Appeals for the District of Columbia Circuit affirmed. *Central States Motor Freight Bureau v. ICC*, 924 F.2d 1099, 1102-10 (D.C. Cir. 1991). In doing so, the court repeatedly and specifically noted that the question before it involved motor carrier services “not provided by a rail carrier.” *E.g., id.* at 1102, 1104, 1104-05, 1106. The D.C. Circuit implicitly rejected the argument the petitioners make here: it reasoned that the ICC was not treating the motor carriers providing the exempted service as rail carriers, but was simply “coordinating its regulatory approach” to the “rail . . . [and] motor . . . legs” of intermodal service. *Central States*, 924 F.2d at 1108.

The natural reading of the third intermodal rulemaking treats the ICC as having there exempted certain motor carriers from the application of statutes and regulations governing *motor carriers*. *See TOFC III*, 6 I.C.C.2d at 208. It did so upon a finding that their service “related to”

service provided by a rail carrier. *Id.* The D.C. Circuit, after all, applied this exact reading in affirming the ICC. *Central States*, 924 F.2d at 1108.

The upshot of all of this is that under the intermodal exemption rules, the petitioners' service is motor carrier service related to rail carriage. TOFC III, 6 I.C.C.2d at 208. It is not transportation provided by a rail carrier as part of a continuous intermodal movement. *See id.* at 212-14. It is, in fact, not rail carriage at all. *Id.* It is, in other words, not transportation by rail carrier subject to the Board's exclusive jurisdiction.

C. The Clean Rail Act does not show that the petitioners' service constitutes transportation by rail carrier

The petitioners also contend that the Clean Rail Act provides further evidence that Congress preempted state regulation of the motor vehicle transport of solid waste in intermodal containers. They are incorrect that the law has any application to the petition before the Board.

The CRA "clarifi[es]" the Board's "general jurisdiction over solid waste transfer facilities." *Id.* at § 602. To do so, the CRA defines "solid waste rail transfer facilities," and includes within the definition facilities "owned or operated on behalf of a rail carrier." 49 U.S.C. § 10908(e)(1)(H). The CRA limits this Board's exclusive jurisdiction over those facilities, except as otherwise provided. 49 U.S.C. § 10501(c)(2)(B). Accordingly, those facilities must observe "all applicable Federal and State law requirements . . . respecting the prevention and abatement of pollution, the protection and restoration of the environment, and the protection of public health and safety, including laws governing solid waste, to the same extent as required for any similar law waste management facility." 49 U.S.C. § 10908(a).

The CRA simply does not apply here. It addresses the preemption of state solid waste laws otherwise applicable to railroad facilities. Federal Railroad Safety Improvement Act of 2007, 153 Cong. Rec. H11671-02, H11690-92, 2007 WL 3024635 (Oct. 17, 2007). In the CRA,

Congress acquiesced to the Board's determination that rail transloading operations "closely related to providing direct rail service" provided by agents of a rail carrier were effectively part of the rail carrier, and therefore subject to the Board's exclusive jurisdiction. *Hi Tech I* at 4. But in the CRA Congress also eliminated § 10501(b)'s preemptive effect with regard to those very facilities. In enacting the CRA, Congress did not expand this Board's rail carrier jurisdiction to include entities like the petitioners who are not rail carriers and do not operate as agents of one. Indeed, if anything, by leaving *Hi Tech I* undisturbed, Congress appears to have acquiesced to the Board's determination that it had no jurisdiction over the trucking of solid waste to railroad transloading facilities provided independently of a rail carrier. *Hi Tech I* at 3, 4, 5.

III. CONCLUSION

The petitioners concede that they do not provide transportation by rail carrier. They are not rail carriers, and they arrange the collection and transport of solid waste by motor carriers who operate independently of a rail carrier. The fact that their service uses intermodal containers does nothing to transform the motor carriage involved into rail carriage. The Board should either dismiss the petition and decline to institute a declaratory proceeding or enter a declaratory order stating that its jurisdiction does not extend to the petitioners' service.

DATED this 25th day of May 2021.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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

/s/ Elizabeth M. DeMarco
(signature)

May 25, 2021
(date)

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

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