

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

MURREY'S DISPOSAL COMPANY, INC.

Complainant,

v.

WASTE MANAGEMENT OF WASHINGTON,
INC., WASTE MANAGEMENT DISPOSAL
SERVICES OF OREGON, INC., AND MJ
TRUCKING AND CONTRACTING, INC.,

Respondents.

DOCKETS TG-200650 and TG-200651
(Consolidated)

COMPLAINANT MURREY'S
DISPOSAL COMPANY'S MOTION FOR
SUMMARY DETERMINATION

MURREY'S DISPOSAL COMPANY, INC.

Complainant,

v.

WASTE MANAGEMENT OF WASHINGTON,
INC., WASTE MANAGEMENT DISPOSAL
SERVICES OF OREGON, INC., AND DANIEL
ANDERSON TRUCKING AND EXCAVATION,
LLC,

Respondents.

1 Pursuant to WAC 480-07-380(2), and the procedural schedule set forth in Order 04, as revised by the Commission's Notice Modifying Procedural Schedule dated January 29, 2021, Complainant Murrey's Disposal Company Inc. d/b/a Olympic Disposal ("Murrey's") files this Motion for Summary Determination because the undisputed material facts demonstrate that Respondents are engaged in solid waste collection service subject to the Commission's

COMPLAINANT'S MOTION FOR SUMMARY
DETERMINATION - 1

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jurisdiction without a Commission-issued license to do so in violation of RCW 81.77.040.

I. INTRODUCTION AND SUMMARY

2 These consolidated proceedings involve formal complaints brought by Murrey's under RCW 81.04.110 against respondents Waste Management of Washington, Inc. ("WMW") and Waste Management Disposal Services of Oregon, Inc. ("WMDSO")(collectively "Waste Management"), as well as MJ Trucking and Contracting, Inc. ("MJ Trucking") and Daniel Anderson Trucking and Excavation, Inc. ("DAT")(all are collectively referred to as "Respondents"), each of which is engaged in the collection of solid waste for compensation in violation of RCW 81.77.040. The material facts regarding respondent's solid waste collection activities are undisputed. Those undisputed facts demonstrate that each of the respondents is engaged in the act of hauling solid waste for compensation over the public highways of the state as defined by statute. The only question for the Commission in this proceeding is whether RCW 81.77.040 is preempted by federal law, which Respondents assert results simply because Waste Management subcontracts a portion of its solid waste hauling to a railroad. Because in Order 03 the Commission correctly determined that RCW 81.77.040 is not preempted under the facts presented here, Murrey's Motion should be granted.

II. EVIDENCE IN SUPPORT

3 This Motion is supported by the pleadings on file in these proceedings and the following evidence, which is incorporated by reference as if full set forth herein:

Exhibit 1: Certificate G-009.

Exhibit 2: Certificate G-237.

Exhibit 3: Declaration of Blair I. Fassburg and the following attachments thereto:

- 3.1:** Exhibit 3.1 is a true and correct copy of Waste Management of Washington, Inc. and Waste Management Disposal Services of Oregon, Inc.'s Responses and Objections to Data Requests 56-57, 60-64, 66-67, 70-76, 79-80, 86, 92-93, 97.
- 3.2:** Exhibit 3.2 is a true and correct copy of Quote Number 2675 from Waste Management to McKinley Paper Company dated May 30, 2017.
- 3.3:** Exhibit 3.3 is true and correct copies of the Industrial Waste & Disposal Services Agreements signed by a representative of McKinley Paper Company, dated May 30, 2017 and February 6, 2021.
- 3.4:** Exhibit 3.4 is a true and correct copy of an invoice from MJ Trucking to Waste Management dated December 28, 2020 for transportation from McKinley Paper.
- 3.5:** Exhibit 3.5 is a freight bill issued by the Union Pacific Railroad Company to Waste Management for transportation of solid waste from Belfair, Washington to Gilliam, Oregon.
- 3.6:** Exhibit 3.6 is a true and correct copy of Quote Number 4837 from Waste Management to Port Townsend Paper Company dated May 21, 2020.
- 3.7:** Exhibit 3.7 is a true and correct copy of the Industrial Waste & Disposal Services Agreement signed by a representative of Port Townsend Paper Company dated June 1, 2020.
- 3.8:** Exhibit 3.8 is a true and correct copy of the Non-Hazardous Transportation Services Subcontractor Agreement between Waste Management National Services, Inc. and Daniel Anderson Trucking & Excavating, LLC dated June 30, 2020.
- 3.9:** Exhibit 3.9 is a true and correct copy of emails between Eric Evans, a representative of Waste Management, and Michael Penson, a representative of Port Townsend Paper dated August 3-4, 2020.
- 3.10:** Exhibit 3.10 is a true and correct copy of an invoice from Daniel Anderson Trucking to Waste Management dated February 4, 2021 for the transportation of OCC Rejects.
- 3.11:** Exhibit 3.11 are true and correct copies of invoices from Waste Management to Port Townsend Paper Company.
- 3.12:** Exhibit 3.12 is a true and correct copy of an email from Daniel Anderson Trucking to Justin Wheeler providing pricing for transportation from Port Townsend Paper Company to North Mason Fiber and the Olympic View Transfer Station dated July 9, 2020.
- 3.13:** Exhibit 3.13 is a true and correct copy of emails between Eric Evans and Terry Nishimoto dated April 14, 2020.

- 3.14:** Exhibit 3.14 is a true and correct copy of emails between Eric Evans and Amy Dougherty dated April 14, 2020.
- 3.15:** Exhibit 3.15 is a true and correct copy of emails between Michael Penson of Port Townsend Paper and Eric Evans of Waste Management dated December 1 - 3, 2020.
- 3.16:** Exhibit 3.16 is a true and correct copy of emails between Eric Evans and Amy Dougherty dated April 21, 2020.
- 3.17:** Exhibit 3.17 is a true and correct copy of emails between Eric Evans and Amy Dougherty dated July 27, 2020.
- 3.18:** Exhibit 3.18 is a true and correct copy of emails between Eric Evans and Amy Dougherty dated October 12, 2020.
- 3.19:** Exhibit 3.19 is a true and correct copy of Daniel Anderson Trucking's Responses to Data Requests No. 7, 9, 11, 12 and 14.
- 3.20:** Exhibit 3.20 is a true and correct copy of MJ Trucking's Responses to Data Requests No. 7, 9, 12, and 14.

III. FACTUAL BACKGROUND

A. General background

- 4 These proceedings involve the generation and disposal of Old Corrugated Cardboard Rejects ("OCC Rejects") by two paper mills: Port Townsend Paper Company ("PTP"), in Jefferson County, and McKinley Paper Company ("McKinley Paper"), in Clallam County. OCC Rejects are ordinary solid waste for which there is no beneficial use or market value.¹ At all times relevant to this proceeding, OCC Rejects have been and will continue to be disposed of in a landfill.²
- 5 Although McKinley Paper has been using Waste Management (which subcontracts portion of its haul to MJ Trucking and the Union Pacific Railroad Company) to manage and dispose of its OCC Rejects on and off for some time, the events that precipitated the filing of these proceedings occurred in 2020 when PTP notified Murrey's that it would be switching to Waste

¹ See Exhibit 3.1, Data Requests No. 66 and 67.

² *Id.*

Management for the disposal of its OCC Rejects. Operating under Certificate G-009, Murrey's is the sole solid waste collection company with authority to provide service in the subject areas of Clallam County and Jefferson. Thus Murrey's notified both PTP and Waste Management that its certificate rights would be violated if Waste Management commenced service without authority from the Utilities and Transportation Commission ("UTC" or "Commission"). In response, Waste Management insisted that its service was preempted by federal law, and not subject to the jurisdiction of the Commission because a portion of the transportation was provided by a rail carrier. Under that premise, which it apparently applies to its service at McKinley Paper as well,³ Waste Management indeed commenced solid waste collection service to PTP in June, 2020 ejecting Murrey's from service and subcontracting portions of the transportation to DAT and the Union Pacific Railroad Company ("UPRR").

- 6 As a result of the commencement of service by Waste Management, Murrey's initiated these consolidated proceedings to request that the Commission enforce RCW 81.77.040 and determine that the solid waste collection services provided by respondents are subject to the Commission's jurisdiction and not preempted by federal law.

B. Undisputed facts

- 7 This motion relies upon the following undisputed facts:

Murrey's Disposal Company:

1. Murrey's Disposal holds authority pursuant to Certificate G-009 to provide solid waste collection service in Clallam and Jefferson Counties, among other places.⁴
2. Except for certain specialized waste collection service (e.g., biomedical waste) not relevant to this matter, no other solid waste collection company holds authority from the Commission to operate in the portion of Clallam County where McKinley Paper is located.

³ Emails produced in discovery by Waste Management suggest other legal grounds were explored by McKinley and Waste Management to avoid regulation.

⁴ Exhibit 1.

3. Except for certain specialized waste collection service (e.g., biomedical waste) not relevant to this matter, no other solid waste collection company holds authority from the Commission to operate in the portion of Jefferson County where PTP is located.

Waste Management of Washington, Inc. and its relevant operations:

4. Waste Management of Washington, Inc. (“WMW”) is a solid waste collection company operating in Washington under a certificate issued by the UTC, G-237. Apart from authority to collect and haul biomedical waste, which has been recently transferred to another carrier in February, 2021, the solid waste certificate issued to WMW does not authorize service in either Jefferson or Clallam Counties.⁵
5. WMW does not hold authority to operate as a rail carrier from the United States Surface Transportation Board (“STB”).⁶
6. Kitsap County owns the Olympic View Transfer Station (“OVTS”) outside of Bremerton, Washington, which is operated by WMW under contract with Kitsap County.
7. The Puget Sound and Pacific Railroad (“PSAP”) operates under authority granted by the STB. PSAP owns and operates a rail line located near the OVTS property.
8. WMW transloads intermodal containers of solid waste from motor vehicles to rail cars owned by the Union Pacific Railroad (“the UPRR”) that are staged on rail siding owned by Kitsap County and located at the OVTS.
9. PSAP provides rail car switching services at the OVTS whereby PSAP moves rail cars to and from the Kitsap rail siding to the nearby PSAP rail line.
10. UPRR operates under authority granted by the STB or its predecessor, the Interstate Commerce Commission (“ICC”).
11. North Mason Fiber Co. (“NMF”) owns and operates a facility in Mason County, near Belfair, Washington.
12. 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.
13. 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 line.

⁵ Exhibit 2.

⁶ Exhibit 2.1, Data Request No. 56.

14. 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.

Waste Management Disposal Services of Oregon, Inc. and its relevant operations:

15. Waste Management Disposal Services of Oregon, Inc. (“WMDSO”) owns and operates the Columbia Ridge Landfill in Arlington, Oregon.
16. WMDSO does not hold authority to operate as a rail carrier from the STB.⁷
17. WMDSO’s landfill receives solid waste that is delivered by rail by the UPRR from numerous facilities, including the OVTS and the NMF facility.
18. WMDSO does not hold a certificate authorizing solid waste collection and transportation service issued by the Commission.

WMW and WMDSO affiliated entities account managers and waste stream management:

19. WMDSO and WMW are both subsidiaries of Waste Management, Inc.
20. On behalf of either WMDSO or WMW, a Waste Management, Inc. affiliated entity employs certain Account Managers (sales representatives) who arrange to provide solid waste collection service to industrial solid waste generators in the state of Washington.
21. On behalf of either WMDSO or WMW, a Waste Management, Inc. affiliated entity manages solid waste collection and disposal for both McKinley Paper and PTP.⁸
22. Eric Evans is employed by a Waste Management affiliate as an Account Manager for industrial solid waste generators in Washington like PTP and McKinley Paper.⁹

MJ Trucking:

23. MJ Trucking & Contracting, Inc. (“MJ Trucking”) is a motor carrier holding authority to provide interstate motor carrier transportation from the United States Department of Transportation (“USDOT”) and authority to provide intrastate motor freight carrier transportation from the UTC.
24. MJ Trucking does not hold authority to operate as a rail carrier from the STB.

⁷ Exhibit 2.1, Data Request No. 57.

⁸ See Exhibits 3.13 – 3.18.

⁹ See Exhibits 3.1, 3.13 – 3.18.

25. MJ Trucking does not hold a G certificate to collect and transport solid waste in the state of Washington.

DAT:

26. Daniel Anderson Trucking & Excavation, Inc. (“DAT”) is a motor carrier holding authority to provide interstate motor carrier transportation from the USDOT and authority to provide intrastate motor carrier transportation from the UTC.

27. DAT does not hold authority to operate as a rail carrier from the STB.

28. DAT does not hold a G certificate to collect and transport solid waste in the State of Washington.

GENERAL SUMMARY OF FACTS

Port Townsend Paper:

29. In 2020, PTP contacted sales representatives for Waste Management requesting a quote for services consisting of loading of containers holding solid waste transportation, and disposal for its OCC rejects.

30. Waste Management’s Account Manager, Eric Evans, responded to PTP’s request for a quote by submitting a proposal for pricing for solid waste transportation and disposal services for its OCC rejects.¹⁰

31. WMDSO then entered into a contract with PTP to provide loading, transportation and disposal of solid waste consisting of its OCC rejects.¹¹

32. Commencing in June 2020, under agreement with WMDSO, DAT began loading and transporting solid waste in the form of OCC rejects from PTP via intermodal cargo containers.

33. DAT loads and transports containers of solid waste from PTP’s Port Townsend facility to either the OVTS or NMF.¹²

34. DAT issues invoices for transportation services directly to Waste Management.¹³

¹⁰ Exhibit 3.6.

¹¹ Exhibit 3.7.

¹² Exhibit 3.19, Data Request Nos. 11 and 12.

¹³ Exhibit 3.10.

35. MJ Trucking has also transported solid waste generated by PTP.¹⁴

McKinley Paper:

36. A Waste Management affiliated entity contracted with McKinley Paper to provide solid waste loading, transportation and disposal services in 2017.¹⁵ A new agreement identifying WMDSO as the service provider was executed on February 06, 2021.¹⁶

37. Under agreement with WMDSO, MJ Trucking transports solid waste in the form of OCC rejects from McKinley Paper's Port Angeles facility via intermodal cargo containers.¹⁷

38. MJ Trucking transports intermodal cargo containers of solid waste from McKinley Paper's Port Angeles facility to either the OVTS or to NMF in Mason County.

39. MJ Trucking issues invoices for transportation directly to Waste Management.¹⁸

Union Pacific Railroad/Transloading of Solid Waste:

40. Once intermodal cargo containers of solid waste arrive at either the OVTS or NMF, the intermodal containers are loaded onto rail cars owned and operated by the UPRR.

41. WMDSO and UPRR have a previously-negotiated agreement by which UPRR transports intermodal containers of solid waste to Columbia Ridge Landfill in Arlington, Oregon. All intermodal solid waste containers holding OCC rejects generated by PTP or McKinley Paper and delivered to OVTS or NMF are transported by the UPRR under this agreement.¹⁹

42. Once intermodal cargo containers of solid waste arrive at the Argo Yard, UPRR loads the intermodal containers onto rail cars owned and operated by the UPRR.

43. WMDSO and UPRR have a previously-negotiated agreement by which UPRR transports intermodal containers of solid waste from the Argo Yard to Columbia Ridge Landfill in Arlington, Oregon. All intermodal solid waste containers holding OCC rejects generated by McKinley Paper and delivered to the Argo Yard are transported by the UPRR under this agreement.²⁰

¹⁴ Exhibit 3.20, Data Request No. 12.

¹⁵ Exhibit 3.3 (the identity of the Waste Management entity that contracted with McKinley Paper is not identified).

¹⁶ *Id.*

¹⁷ Exhibit 3.20, Data Requests 9, 14.

¹⁸ Exhibit 3.4.

¹⁹ Exhibit 3.1, Data Requests No. 74, 75.

²⁰ Exhibit 3.1, Data Request No. 74, 75.

44. The UPRR issues a freight bill for transportation from the OVTS or the NMF facility to Waste Management.²¹
45. Neither MJ Trucking, DAT, nor the UPRR have contractual relationship with either PTP or McKinley Paper.
46. Waste Management issues a single invoice to PTP for the loading, transportation and disposal services provided by WMDSO, DAT, MJ Trucking, WMW, OVTS, NMF, PSAP and the UPRR.²²
47. WMDSO issues a single invoice to McKinley Paper for the loading, transportation and disposal services provided by WMDSO, DAT, MJ Trucking, WMW, OVTS, NMF, PSAP and the UPRR.²³

IV. AUTHORITY AND ARGUMENT

8 The issues in these proceedings have been previously presented to the Commission in comprehensive fashion in the form of Respondents' Motions to Dismiss, oral argument on same, and supplemental briefing, followed by Respondents Petition for Interlocutory Review and a conclusive order denying same and Respondents' Motions to Dismiss. At that time, the proceedings were not procedurally ripe for a final order because Order 03 was interlocutory in nature and the record had not been developed for findings of fact. Now that the parties have engaged in discovery and Murrey's has submitted the instant Motion supporting its allegations with undisputed evidence, the Commission should enter findings of fact and re-affirm the legal conclusions regarding the Commission's jurisdiction to regulate solid waste transportation, including that provided by Respondents, set forth in Order 03.

A. Respondents admit that they provide solid waste collection service as defined by statute

9 The undisputed facts in this proceeding demonstrate conclusively that Respondents are each engaged in activities prohibited by RCW 81.77.040. That statute provides that companies shall not haul solid waste for compensation without a certificate from the Commission. And by the

²¹ Exhibit 3.5.

²² Exhibit 3.11.

²³ See Exhibit 3.2.

same statute, solid waste collection includes “advertising, soliciting, offering, or entering into an agreement to provide that service.”²⁴ Thus, the Commission will find that a company has violated RCW 81.77.040 if they transport solid waste, or advertise or offer solid waste transportation service without authority from the Commission, even if the company itself only arranges for service but ultimately does not provide the transportation service using its own vehicles or drivers.²⁵

10 In fact, in one relatively recent classification proceeding, the Commission ruled that RCW 81.77.040 applied as follows:

So long as the Commission is charged by the legislature with regulating companies that solicit, offer, advertise, and enter into agreements to transport goods or haul solid waste, companies who subcontract the services they agree to provide have two choices: obtain a permit from the Commission, or cease and desist operations in Washington.²⁶

Thus, whether any of respondents actually transports solid waste is immaterial to the Commission’s ultimate decision in this proceeding. If each of them advertises, offers, agrees to provide, or actually provides service for the transportation of solid waste, they have violated RCW 81.77.040.

11 Indeed, each of the respondents does unquestionably engage in activities that qualify by law as solid waste collection service:

- a. WMDSO entered into contacts with both PTP and McKinley Paper to provide solid waste collection and transportation service.²⁷
- b. WMW engages in transloading of solid waste-laden containers and is indistinguishable from its affiliated entity WMDSO in its engagement with potential customers by use of account managers like Eric Evans, who represents both entities in soliciting and offering

²⁴ RCW 81.77.040.

²⁵ *In re Dolly, Inc.*, Dkt. TV-171212, Order 04, ¶ 26 (May 18, 2018).

²⁶ *Id.*

²⁷ See Exhibits 3.2 - 3.3, 3.6 – 3.7.

service.

- c. DAT transports solid waste in the form of OCC Rejects generated by PTP in Jefferson County.²⁸
- d. MJ Trucking transports solid waste in the form of OCC Rejects generated by McKinley Paper in Clallam County and has transported solid waste generated by PTP as well.²⁹

Thus, there should be no dispute that RCW 81.77.040 applies to the conduct at issue in this proceeding, and the only question remaining is whether federal law preempts Commission regulation of that conduct.

B. The Commission's Order Affirming Interlocutory Order had it right: Commission regulation of Respondents' service is not preempted

12 Respondents assert that the Commission may not grant the relief sought by Murrey's, contending that the Commission's jurisdiction to regulate solid waste transported by a motor carrier to a rail carrier is preempted by federal law. As alluded to above, the issue of federal preemption has been extensively and thoroughly briefed and argued in these proceedings in connection with Respondents' Motions to Dismiss and Petition for Interlocutory Review.³⁰ In ruling on those motions, the Commission found "the jurisdiction Congress and the STB have asserted over intermodal transport by rail and motor carrier does not preempt state regulation of solid waste collection service."³¹ The Commission went on to provide:

Based on the factual allegations in the complaints, which we accept for purposes of the Motions, Respondents are providing solid waste collection service. They are "collecting solid waste from . . . commercial 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." Respondents are using

²⁸ Exhibit 3.19.

²⁹ Exhibit 3.20.

³⁰ For purposes of brevity, the authority and arguments set forth in Murrey's Response to Respondents' Motions to Dismiss, its Supplemental Brief supporting its Response to the Motions to Dismiss, and its Response to Respondents' Petition for Interlocutory Review are incorporated by reference as if fully set forth herein. Portions of those arguments are included again here for the sake of emphasis and to avoid any potential procedural complaints by Respondents regarding the nature of the issues raised in this Motion.

³¹ Order 03, ¶ 8.

COFC intermodal transportation to transport the solid waste, but that is only a portion of the service they are providing.

None of the federal statutes, rules, or agency decisions on which the Respondents rely state or otherwise support the conclusion that federal jurisdiction over COFC intermodal transportation of solid waste extends to the entirety of the solid waste collection service of which that transport is a part. 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 or arrange provision of that transport, but none of the Respondents are rail carriers. Even then, neither Congress nor the STB has extended federal authority over solid waste handling by rail carriers.³²

13 Although the ruling was interlocutory and assumed as true all facts asserted in Murrey's Complaints, now that the parties have engaged in discovery and all material facts are both undisputed and supported by evidence, the Commission has an opportunity to affirm its earlier legal ruling, which is fully supported by the law.

C. Federal law does not in fact preempt collection and transportation of solid waste

14 As addressed by Murrey's in earlier rounds of briefing, analysis of preemption of a state's authority to regulate starts with a presumption that "Congress does not intend to supplant state law."³³ Federal preemption of state law that would prevent states from regulating within their traditional police powers, will only be found where it is the "clear and manifest purpose of Congress."³⁴

15 Congress expressly stated that the collection and transportation of solid waste is primarily a function of the state.³⁵ Because solid waste collection and disposal is also considered a matter of public health and safety in which state and local authorities have a legitimate interest, courts are reluctant to limit states' authority to regulate solid waste disposal.³⁶

³² *Id.* at ¶¶ 13-14.

³³ See *AGG Enterprises v. Washington Cty.*, 281 F.3d 1324, 1328 (9th Cir. 2002)(citing *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*), 514 U.S. 645, 654, 115 S. Ct. 1671, 1676, 131 L. Ed. 2d 695 (1995)).

³⁴ *New York State Conference*, 514 U.S. at 654; *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230, 67 S. Ct. 1146, 1152, 91 L. Ed. 1447 (1947).

³⁵ 42 U.S.C. § 6901(a)(4).

³⁶ See *Kleenwell Biohazard Waste & Gen. Ecology Consultants, Inc. v. Nelson*, 48 F.3d 391, 398 (9th Cir. 1995)(holding state regulation of interstate solid waste transportation does not violate the Commerce Clause).

16 As a result, a number of attempts to avoid the application of state regulation like that by Respondents here have failed. For example, the Ninth Circuit has held that Washington's regulation of interstate transportation of solid waste under RCW 81.77 does not violate the Commerce Clause.³⁷ The Ninth Circuit also held that the FAAAA does not preempt state regulation of the transportation and disposal of mixed solid waste and recyclable commodities.³⁸

D. ICCTA preemption applies only to "transportation by rail carriers" and no party alleges Respondents meet these requirements

17 Despite the strong presumption against preemption of solid waste regulation, Respondents nonetheless insist that their activities are preempted under the ICCTA's exclusive jurisdiction over the regulation of rail carriers.³⁹ Yet, none of the Respondents are actually rail carriers, and as addressed in Murrey's Response to Respondents' Petition for Interlocutory Review, the STB's jurisdiction over motor carriers is not set forth in the ICCTA. Instead, 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*⁴⁰ 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. Thus, there is no basis for finding that motor carrier transportation of solid waste is preempted under federal law.

18 Rather than insisting that their motor carrier transportation is preempted, however, Respondents insist that because Waste Management subcontracts the service it agrees to provide PTP and McKinley Paper to the UPRR, Respondents, too, qualify as rail carriers under 49 U.S.C. Section 10501. Yet the STB has repeatedly set forth a two-part test for determining whether specific

³⁷ *Kleenwell*, 48 F. 3d 391.

³⁸ *See AGG Enterprises v. Washington Cty.*, 281 F.3d 1324, 1328 (9th Cir. 2002); *Woodfeathers, Inc. v. Washington Cty., Or.*, 180 F.3d 1017 (9th Cir. 1999).

³⁹ 49 U.S.C. § 10501

⁴⁰ *Joray Trucking Corp. v. Common Carrier Application*, 99 M.C.C. 109 (ICC Jun. 29, 1965).

operations qualify for preemption as transportation by a rail carrier. And following that test, the undisputed facts demonstrate that Respondents are not rail carriers.

19 First, to qualify for preemption the activity must be “transportation,” and second it must be “by a rail carrier.”⁴¹ Whether the activities constitute “transportation” is not at issue in these proceedings; thus Murrey’s briefing has and will continue to focus on whether the activities involved are those of a “rail carrier.”

20 “The ICCTA defines a ‘rail carrier’ as a ‘person providing common carrier railroad transportation for compensation.’⁴² There are formal procedures that must be followed to obtain the STB’s authorization to act as a rail carrier.”⁴³ Respondents have not followed those procedures to obtain authority as rail carriers (nor do they qualify).

21 Beyond actually authorized rail carriers, the ICC and STB historically extended the definition of “rail carrier” to other entities in extremely limited circumstances applicable only to agents of railroads, and typically only those physically operating at rail transload facilities. In that context, the STB stated: “[w]hether a particular activity constitutes transportation by rail carrier under section 10501(b) is a case-by-case, fact-specific determination.”⁴⁴

22 In assessing the facts on a case-by-case basis, the STB followed standards first developed by the ICC which determine whether transportation is by a rail carrier depending upon the degree of control a railroad exercises over the activity:

The Interstate Commerce Commission (ICC), the Board's predecessor, developed standards to determine whether terminal-type companies that are commonly owned by, or contract with, railroads to provide services are themselves rail carriers. The Board's jurisdiction extends to the rail-related activities that take place at transloading facilities if the activities are performed by a rail carrier or the

⁴¹ *Texas Cent. Bus. Lines Corp. v. City of Midlothian*, 669 F.3d 525, 530 (5th Cir. 2012).

⁴² 49 U.S.C. § 10102(5).

⁴³ *Hi Tech Trans*, 382 F.3d at 305.

⁴⁴ *Town of Babylon & Pinelawn Cemetery*, FIN 35057, 2008 WL 275697, at 3 (S.T.B. Jan. 31, 2008).

rail carrier holds out its own service through the third party as an agent or exerts control over the third-party's operations.⁴⁵

- 23 Murrey's Complaints are not limited to transportation at transloading facilities nor do they involve a transfer service. Instead, they address transportation by Respondents from the solid waste generator's facility by motor carrier to the transloading facility. Thus, there exists no basis for extension of the STB's case-by-case analysis to these facts.
- 24 Moreover, none of Respondents either claim to be rail carriers nor do they assert they serve as the agent of the railroad. To the contrary, the undisputed facts demonstrate that Waste Management is the party that contracts to provide solid waste collection service.⁴⁶ In fact, the only involvement of a railroad here is through the existence of a preexisting contract between Waste Management and the UPRR to haul intermodal containers from certain transloading facilities.⁴⁷ Neither does the railroad issue an invoice to either PTP or McKinley for its transportation service. That invoice is paid by WMDSO, which in turn charges its customers PTP and McKinley for the service *it* provides.⁴⁸ Thus, both factually and legally, the railroad provides service only because WM subcontracts that transportation service *to the railroad*.
- 25 Consequently, WM apparently avers that its service is exempt because its service involves transportation *to* a rail carrier. That argument however has also been squarely rejected by the courts in the context of solid waste transloading facilities.⁴⁹ In *Hi Tech Trans, LLC v. New Jersey*, the 3rd Circuit considered whether a solid waste transloading facility that loaded solid waste onto railcars was preempted under the ICCTA. The court stated:

⁴⁵*Id.*; see also *Grosso v. Surface Transp. Bd.*, 804 F.3d 110, 114 (1st Cir. 2015) (“Whether an activity is conducted by a “rail carrier” is a case-by-case factual determination based on, inter alia, how much control a rail carrier is exercising over the activity.”); *Texas Cent. Bus. Lines Corp. v. City of Midlothian*, 669 F.3d 525, 531 (5th Cir. 2012) (The STB considers the following factors to determine whether transloading is performed by a rail carrier: “whether the rail carrier holds out transloading as part of its business, (2) the ‘degree of control retained by the [rail] carrier,’ (3) property rights and maintenance obligations, (4) contractual liability, and (5) financing”).

⁴⁶ See Exhibits 3.2, 3.3, 3.6 and 3.7.

⁴⁷ See Exhibit 3.1.

⁴⁸ See Exhibit 3.5.

⁴⁹ See *Hi Tech Trans*, 382 F.3d at 308.

Even if we assume arguendo that Hi Tech's facility falls within the statutory definition of "transportation" and/or "railroad," the facility still satisfies only a part of the equation. The STB has exclusive jurisdiction over "transportation by rail carrier." 49 U.S.C. § 10501(a), (b) (emphasis added). However, the most cursory analysis of Hi Tech's operations reveals that its facility does not involve "transportation by rail carrier." The most it involves is transportation "to rail carrier." Trucks bring C & D debris from construction sites to Hi Tech's facility where the debris is dumped into Hi Tech's hoppers. Hi Tech then "transloads," the C & D debris from its hoppers into rail cars owned and operated by CPR, the railroad. It is CPR that then transports the C & D debris "by rail" to out of state disposal facilities. As we noted above, Hi Tech operates its facility under a License Agreement with CPR. Pursuant to the terms of that license agreement, Hi Tech is permitted to use a portion of CPR's OIRY for transloading. Hi Tech is responsible for constructing and maintaining the facility and CPR disclaims any liability for Hi Tech's operations. License Agreement, ¶¶ 4(d), 7. Thus, the License Agreement essentially eliminates CPR's involvement in, and responsibility for, the operation of Hi Tech's facility. Hi Tech does not claim that there is any agency or employment relationship between it and CPR or that CPR sets or charges a fee to those who bring C & D debris to Hi Tech's transloading facility.⁵⁰

- 26 Similarly, WM alleges that WMDSO subcontracts the transportation of loaded containers from PTP to the transfer station where WMW employees load the containers onto rail cars. Nothing about these activities constitutes "transportation by a railroad." Instead, as the Court held in *Hi Tech Trans*, these activities constitute "transportation to a railroad."
- 27 Finally, following the Third Circuit's interpretation of the ICCTA finding that solid waste transloading facilities could be preempted, Congress took action designed to preclude this result, enacting 49 U.S. Code § 10908, which makes clear that Congress did not intend to preempt state regulation of solid waste being transported to the rail carrier.
- 28 Thus, if none of Respondents are rail carriers or under the control of a rail carrier (as the evidence demonstrates they are not), Respondents' service cannot be preempted by virtue of the STB's exclusive jurisdiction to regulate transportation by rail carriers.

⁵⁰ *Hi Tech Trans, LLC v. New Jersey*, 382 F.3d 295, 308 (3d Cir. 2004) (italics in original, emphasis added). The same logic has been applied to hold that ICCTA preemption did not apply to transloading facilities that were owned or operated by entities other than rail carriers. See, e.g., *New York & Atl. Ry. Co. v. Surface Transp. Bd.*, 635 F.3d 66, 73 (2d Cir. 2011).

E. The STB has not preempted regulation of the trucking leg of intermodal service when the trucking company subcontracts to a railroad

29 In their Motions to Dismiss, Respondents adamantly insisted that the exemptions set forth in 49 C.F.R. 1090.2 were not the source of the broad preemption of state regulation they assert applies to their solid waste collection services.⁵¹ Respondents should thus be held to this position should they attempt to reverse their it here. Nonetheless, assuming *arguendo* that they do assert exemption under 49 CFR 1090.2, the undisputed facts now conclusively demonstrate that their operations do not qualify for exemption under that rule. As addressed by Murrey's in its previous briefing, federal exemptions of TOFC/COFC service apply only when the rail carrier is the joint rate partner or principal to the motor carrier. Where the railroad is instead acting only as the agent of a motor carrier, the exemptions are expressly inapplicable.

30 Here, the undisputed facts demonstrate that the railroad's only involvement is as a subcontractor to WMDSO under a previously existing contract. Thus, rather than acting as a joint rate partner or principal to Respondents, the railroad serves only as the agent to a solid waste collection company. Consequently, there is no factual basis upon which Respondents could conceivably now reverse or alter their position and insist their operations are somehow exempt.

V. CONCLUSION AND REQUEST FOR RELIEF

As has now been exhaustively addressed in multiple briefs and pleadings, and now supported by an undisputed record, the solid waste collection service provided by Respondents to PTP and McKinley Paper falls squarely within the prohibitions set forth in RCW 81.77.040. Because the Commission's jurisdiction to regulate those services is not preempted by federal law, Respondents are each required to obtain certificate authority from the Commission to provide those services. Since they have no such authority, the Commission should enter a final order finding that Respondents' services are subject to the requirements of RCW 81.77.040 and

⁵¹ See, e.g., Respondents' Motion to Dismiss in Docket TB-200650, p. 7.

commanding Respondents to cease and desist from providing further solid waste collection service to PTP or McKinley paper without having obtained the requisite operating authority from this Commission.

RESPECTFULLY SUBMITTED this 16th day of March, 2021.

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