

**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 &
CONTRACTING,

Respondents.

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.

DOCKET TG-200650 and
TG-200651 (*Consolidated*)

**RESPONDENTS' MOTION FOR
SUMMARY JUDGMENT**

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I. INTRODUCTION

1. Federal regulation of railroads is “among the most pervasive and comprehensive of federal regulatory schemes.” *City of Auburn v. U.S.*, 154 F.3d 1024, 1027 (9th Cir. 1998) (quoting *Chicago & N.W. Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 318 (1981)). Included in the federal government’s vast and exclusive jurisdiction of railroads is the regulation of the highway transportation segment of a continuous intermodal movement of containerized solid waste involving rail transportation.

2. Congress’s express and unambiguous preemption of this field of continuous transportation precludes Complainant Murrey’s Disposal Company from prevailing on its claims as a matter of law. For the reasons addressed herein, Respondents Waste Management of Washington, Inc., Waste Management Disposal Services of Oregon, Inc., MJ Trucking & Contracting, Inc., and Daniel Anderson Trucking & Excavating, LLC respectfully request an order granting summary judgment in their favor and dismissing the consolidated Complaints.

II. STATEMENT OF UNDISPUTED FACTS

3. McKinley Paper Company (“McKinley Paper”) is a paper mill in Port Angeles, Washington. Declaration of Eric Evans (“Evans Decl.”) at ¶ 9. As part of its operations, McKinley Paper generates solid waste in the form of old corrugated cardboard rejects (“OCC Rejects”). *Id.* McKinley Paper’s OCC Rejects are disposed of in a landfill. *Id.*

4. Port Townsend Paper Company (“PTP”) is a paper mill in Port Townsend, Washington. *Id.* at ¶ 8. As part of its operations, PTP generates OCC Rejects. PTP’s OCC Rejects are disposed of in a landfill. *Id.*

5. 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 (“UTC”), 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. 200650 Compl. ¶¶ 3-4. Prior to June 2020, Murrey’s provided solid waste

collection service to PTP. 200651 Compl. ¶ 4. Prior to 2011, Murrey's provided solid waste collection service to the prior owner and operator of McKinley Paper.

6. Waste Management of Washington, Inc. ("WMW") is a solid waste collection company operating in Washington under Certificate G-237 issued by the UTC. Declaration of Michael Weinstein ("Weinstein Decl.") at ¶ 3. The solid waste certificate issued to WMW does not authorize service in either Jefferson or Clallam Counties. Weinstein Decl. at ¶ 3.

7. Under contract with Kitsap County, WMW operates the Olympic View Transfer Station ("OVTS") outside of Bremerton, Washington. Evans Decl. at ¶ 4.

8. 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. Evans Decl. at ¶ 4.

9. 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. *Id.* at ¶ 5.

10. North Mason Fiber Co. ("NMF") owns and operates a facility in Mason County, near Belfair, Washington. Evans Decl. at ¶ 5. 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. *Id.*

11. 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. *Id.* at ¶ 6.

12. 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. *Id.*

13. Waste Management Disposal Services of Oregon, Inc. ("WMDSO") owns and operates the Columbia Ridge Landfill in Arlington, Oregon. *Id.* at ¶ 7. The Columbia Ridge

Landfill receives solid waste that is delivered by rail to the UPRR from numerous facilities, including OVTS and NMF. *Id.* at ¶ 7.

14. WMDSO provides solid waste disposal services and contracts with third parties to collect and transport solid waste. Declaration of Justin Wheeler (“Wheeler Decl.”) at ¶ 3.

15. In 2010, Atlas Trucking, Inc. began hauling containerized solid waste from the McKinley Paper facility (then owned and operated by Nippon Paper Industries USA) via motor carrier to OVTS, where WMW transloaded the containers to UPRR trains for delivery to the Columbia Ridge Landfill. Wheeler Decl. at ¶ 4.

16. In late 2010 and early 2011, Commission staff investigated whether Atlas Trucking was providing solid waste collection services requiring a G certificate. Goldman Decl., Ex. 1. On February 10, 2011, the Commission staff concluded its investigation and determined that federal law preempted the Commission’s regulation of Atlas Trucking’s transportation of containerized solid waste. *Id.* Commission staff advised WMDSO and WMW of its conclusion. *Id.*

17. In 2020, PTP contacted Waste Management requesting a bid for solid waste transportation and disposal services for its OCC Rejects. Evans Decl. at ¶ 8.

18. In light of the Commission staff’s 2011 determination that federal law preempted the regulation of the transportation of containerized solid waste that included a rail leg, Waste Management submitted a proposal for solid waste transportation and disposal services for PTP’s OCC Rejects. Evans Decl. at ¶ 8. PTP accepted Waste Management’s proposal and entered into a contract with WMDSO. *Id.*

19. WMDSO then entered into a similar contract with McKinley Paper to provide solid waste transportation and disposal of its OCC Rejects. *Id.* at ¶ 9.

20. Commencing in June 2020, under agreement with WMDSO, Respondent Daniel Anderson Trucking & Excavating, LLC (“DAT”) began transporting intermodal cargo containers of OCC Rejects from PTP’s Port Townsend facility to OVTS or NMF. *Id.* at ¶ 10.

21. Under a similar arrangement as exists between WMDSO and PTP, WMDSO contracts with McKinley Paper to provide solid waste transportation and disposal services. *Id.* at ¶ 9. Respondent MJ Trucking & Contracting, Inc. (“MJ Trucking”) transports intermodal cargo containers of OCC Rejects from McKinley Paper’s Port Angeles facility to OVTS or NMF. *Id.* at ¶ 10. Recently, WMDSO has revised its arrangements with McKinley whereby MJ Trucking also transports intermodal containers of solid waste from McKinley to UPRR’s transload facility located in Seattle, Washington, known as the “Argo Yard.” *Id.*

22. Once intermodal cargo containers of OCC Rejects arrive at either OVTS or NMF, the intermodal containers are loaded onto rail cars owned and operated by UPRR. Evans Decl. at ¶ 11. These intermodal containers remain sealed for the duration of their transport. *Id.* at ¶ 12.

23. WMDSO and UPRR have a prior-existing agreement by which UPRR transports intermodal containers of solid waste to Columbia Ridge Landfill in Arlington, Oregon. Wheeler Decl. at ¶ 5. 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. *Id.*

24. Once intermodal cargo containers of OCC Rejects arrive at the Argo Yard, UPRR loads the intermodal containers onto rail cars owned and operated by UPRR. These intermodal containers remain sealed for the duration of their transport. Evans Decl. at ¶¶ 11-12.

25. WMDSO and UPRR have a prior-existing agreement by which UPRR loads the intermodal containers of solid waste from the Argo Yard to the Columbia Ridge Landfill. Wheeler Decl. at ¶ 6. All intermodal containers holding OCC Rejects generated by McKinley Paper and delivered to the Argo Yard are transported by UPRR under this agreement. *Id.*

26. Waste Management uses continuous intermodal transportation to transport OCC Rejects from PTP and McKinley Paper that **always** includes **both** a rail and a trucking segment. Evans Decl. at ¶ 12. The closed intermodal containers are not unloaded during the continuous intermodal service. *Id.*

III. ARGUMENT

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

27. The federal Surface Transportation Board (“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).

28. TOFC/COFC, 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). The transportation of an intermodal container on the highway, without the continuous rail leg, is **not** TOFC/COFC service.

29. 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).

30. 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.

31. 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.

32. 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.

33. 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.

34. In 1989, the ICC took the final step to exempt TOFC/COFC service “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.

35. 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 227.¹ 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. *Id.*

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

36. 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 added to its prior enactment in the Staggers Rail Act and 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).

37. 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

¹ The STB’s decision to **exclude** Plan I TOFC/COFC service from the exemption confirms its jurisdiction over such service.

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.

38. 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).

39. 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).

40. “Congress enacted the ICCTA as a means of reducing the regulation of the railroad industry.” *Canadian Nat. Ry.*, 2005 WL 1349077 at *3. To this end, Congress expressly preempted state regulation by granting exclusive jurisdiction over railroad operations to the STB. In *City of Seattle v. Burlington Northern Railroad Co.*, the Washington Supreme Court affirmed that the ICCTA “unambiguously express[es] a clear congressional intent to regulate railroad operations as a matter of federal law” and in that case preempted the City’s railroad switching and blocking ordinances. 145 Wn.2d 661, 663, 41 P.3d 1169 (2002). The Court recognized that the purpose of the ICCTA “was to significantly reduce regulations of surface transportation industries. The ICCTA placed with the STB complete jurisdiction to the exclusion of the states, over the regulations of railroad operations.” *Id.* at 665-66 (quotation marks & citations omitted). The statute “unambiguously reserves jurisdiction over” the subjects listed “to the STB.” *Id.* at 667. “Congress gave the ICCTA broad preemptive power to enable uniform regulation of interstate rail operations.” *Id.* at 669. The Ninth Circuit also 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.

C. The Transportation of Solid Waste Via TOFC/COFC Service is Preempted.

41. 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. Co. v. City of Rockwood*, No. COV-04-40323, 2005 WL 1349077, *4 (E.D. Mich. June 1, 2005) (“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”).

42. 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).

43. 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.

44. The Washington State Supreme Court also has relied on ICCTA preemption applying to the transportation of solid waste. In *Regional Disposal Co. v. City of Centralia*, 147 Wn.2d 69, 51 P.3d 81 (2002), the Court reviewed a similar transportation arrangement whereby Regional Disposal Company (“RDC”) and its hauler LeMay Enterprises² (“LeMay”) provided COFC services through the City of Centralia. RDC and LeMay challenged a city tax on the rail transportation of solid waste. Represented by the same counsel who represents Murrey’s here, RDC and LeMay successfully relied on the fact that the rail transportation of solid waste falls within the ICCTA’s exclusive grant of STB jurisdiction. RDC and LeMay argued that the tax violated the Railroad Revitalization and Regulatory Reform Act (“4-R A”) because it discriminated against rail transportation of solid waste. *Id.* at 74. That statute prohibits a “tax that discriminates against a rail carrier providing transportation subject to the jurisdiction of the [STB] under this part.” 49 U.S.C. § 11501(b)(4). “This part,” is Part A, governing “rail.” The “jurisdiction of the Board” in Part A is set forth only in 49 U.S.C. § 10501 which makes “exclusive” the STB’s jurisdiction over “transportation by rail carriers.” *Id.* § 10501(b).

² LeMay and Murrey’s are both owned by Waste Connections, Inc. See <http://www.lemayinc.com/AboutUs.html> (last visited Sept. 25, 2020); <https://www.murreysdisposal.com/> (last visited Sept. 25, 2020).

45. RDC and LeMay’s challenge was predicated on the solid waste it transported being “property” under the ICCTA. The trial court agreed and “ruled that 49 U.S.C. § 10501(b)(2) preempts Centralia’s tax because the [STB] is given exclusive jurisdiction” Brief of City of Centralia, *Regional Disposal Co. v. City of Centralia*, 2001 WL 34797765, *9 (Oct. 19, 2001).³ The Supreme Court affirmed. 147 Wn.2d at 77. If solid waste were not property under the ICCTA, ICCTA preemption would not apply, and the Washington Supreme Court could not have reached its holding.

46. 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. 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).

47. 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).

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³ Respondents were unable to obtain the trial court’s decision and therefore rely on the quotation of that decision in the Supreme Court briefs.

*5 (S.T.B. Oct. 15, 2009) (emphasis added); accord *Solid Waste Rail Transfer Facilities*, EP 684, 2012 WL 5873121 at *1.

48. 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).

49. 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.

50. 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 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].”).

51. The STB recognized that the CRA “excludes from the definition 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).

52. 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.

53. 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 rulings govern.

D. The Commission Misapprehends the Extent of the STB’s Exclusive Jurisdiction.

54. In its order Granting Review of Interlocutory Order and Affirming Denial of Motions to Dismiss (“Order”), the Commission incorrectly focused its inquiry on its **own** authority to regulate solid waste collection services, while misapprehending the extent of the STB’s exclusive jurisdiction over continuous intermodal transportation of any cargo, including solid waste, that includes a highway TOFC/COFC leg. There is no dispute that the UTC has the authority to regulate traditional solid waste collection services undertaken exclusively by motor carrier. However, the UTC’s jurisdiction does not extend to TOFC/COFC pickup and delivery services of solid waste where, as here, the services are performed by motor carriers as part of a continuous intermodal movement including a rail leg.

55. Contrary to the Commission’s Order, ¶ 14, federal law does **not** constrain the STB’s jurisdiction over highway TOFC/COFC service to those instances in which a rail carrier is providing or arranging for transportation. Rather, “whether 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)].” Sub-No. 6, 3 I.C.C.2d at 874. This was made clear in 1989 when the ICC exempted TOFC/COFC service “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 long ago rejected the argument relied on by the Commission—that its jurisdiction over matters “related-to-rail” really meant “provided by rail.” *Id.* at 211.

56. That the property being transported via TOFC/COFC service is solid waste does not deprive the STB of its expansive jurisdiction. As discussed *supra*, Section C, the STB’s jurisdiction over “rail transportation” unquestionably **includes** the transportation of solid waste. *See, e.g., Canadian Nat. Ry. Co.* 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.* 945 A.2d at 86 (“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); *New England Transrail, LLC*, 2007 STB LEXIS 391 at *33 (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”). That Congress carved out a specific and narrow exception to the STB’s jurisdiction, 49 U.S.C. § 10501(c)(2)(B), does not indicate that the STB lacks jurisdiction over the transportation of solid waste. It establishes the **opposite**—the STB’s expansive jurisdiction necessarily included solid waste rail transfer facilities **until exempted**. *Town of Babylon & Pinelawn Cemetery*, FD 5057, 2009 WL 3329242 at*5 (“[S]olid waste rail transfer facilities, . . . were, or would have been, subject to the Board’s jurisdiction and thus

shielded from state and local regulation by federal preemption”); accord *Solid Waste Rail Transfer Facilities*, EP 684, 2012 WL 5873121 at *1. As Congress has not exempted the transportation of solid waste via TOFC/COFC service, such service continues to be “shielded from state and local regulation.” *Id.*

57. Respondents’ continuous transportation of intermodal containerized solid waste from motor carrier to railroad, unloaded only at the final destination, is, by definition, TOFC/COFC service. The TOFC/COFC service at issue here, like all such continuous intermodal movement of cargo including a rail leg, is part of rail transportation exclusively regulated by the STB. The hypothetical “repercussions” of an order recognizing the STB’s exclusive jurisdiction over the continuous intermodal transportation of solid waste via TOFC/COFC service, Order at ¶ 16, is not a basis to disregard such exclusive jurisdiction.

IV. CONCLUSION

58. The law is settled: that the State cannot regulate a train’s transportation of solid waste, nor the TOFC/COFC transportation of **any** cargo. Rail transportation, including the highway portion of TOFC/COFC service, has long been regulated exclusively by the federal government.

59. Respondents’ 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. Complainant has not disputed this characterization of the transportation of OCC Rejects. That Respondents are using COFC service to transport solid waste, and not any other cargo, does not curtail the STB’s exclusive jurisdiction. To the contrary, both the STB and the courts have concluded that all legs of the transportation of solid waste via COFC service continue to be exempt from state regulation. In fact, this was the exact conclusion reached by Commission staff in 2011. Goldman Decl. Ex. 1.

60. As Respondents' use of COFC service is preempted by the ICCTA, summary judgment should issue.

RESPECTFULLY SUBMITTED this 16th day of March 2021.

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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 WAC 480-07-150.

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DATED this 16th day of March 2021.

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