BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

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| MURREY'S DISPOSAL COMPANY, INC.<br><br>Complainant,<br><br>v.<br><br>WASTE MANAGEMENT OF WASHINGTON, INC., WASTE MANAGEMENT DISPOSAL SERVICES OF OREGON, INC., AND MJ TRUCKING AND CONTRACTING, INC.,<br><br>Respondents. | DOCKETS TG-200650 and TG-200651 (Consolidated)<br><br>COMPLAINANT MURREY'S DISPOSAL COMPANY'S RESPONSE IN OPPOSITION TO RESPONDENTS' MOTION FOR SUMMARY JUDGMENT |
| MURREY'S DISPOSAL COMPANY, INC.<br><br>Complainant,<br><br>v.<br><br>WASTE MANAGEMENT OF WASHINGTON, INC., WASTE MANAGEMENT DISPOSAL SERVICES OF OREGON, INC., AND DANIEL ANDERSON TRUCKING AND EXCAVATION, LLC,<br><br>Respondents. | |



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*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 Response to Respondents' Motion for Summary Judgment.

## I. INTRODUCTION AND SUMMARY

*2* As demonstrated by the parties' opposing motions for summary determination, this is a case ripe for final resolution as a matter of law, and Murrey's Motion for Summary Determination should be granted. Respondents' Motion for Summary Determination conclusively demonstrates that there are no material facts in dispute; the facts acknowledged there establish they engage in solid waste collection service under Washington law. The dispositive issue in these proceedings thus remains whether their solid waste collection services are preempted under federal law, which is a pure legal question previously resolved by the Commission in this proceeding in Orders 02 and 03. Because the Commission's conclusions in Orders 02 and Order 03 were correct, they should now be fully affirmed in a final order.

## II. AUTHORITY AND ARGUMENT

*3* The dispositive legal questions in Murrey's and Respondents' dispositive motions are the same as those raised by Respondents' Motions to Dismiss. After extensive oral and written argument by both sides and a petition for interlocutory review by the Commission of Order 02, the Commission entered Order 03 affirming the decision to deny Respondents' Motion to Dismiss in favor of Murrey's and resolving the question posed by the parties, concluding that the Commission's jurisdiction extends to solid waste collection service by a motor carrier even if rail transportation takes some part in the overall scheme of transportation.

*4* While in ruling upon Respondents' Motions to Dismiss the Commission was required to treat all



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facts pled by Murrey's as true, as discussed in both Murrey's and Respondents' Motions, the operative facts are and remain undisputed, and they are consistent with the pleadings on which the Commission entered Order 03, denying Respondents' Motions to Dismiss. Thus, all of the Commission's pertinent conclusions in Order 03 apply here as well.

A. Order 03 correctly concluded that Respondents' solid waste collection service is not preempted

*5* At the outset of Order 03, the Commission "agree[d] with the conclusion in Order 02 that the jurisdiction Congress and the [Surface Transportation Board ("STB")] asserted over intermodal transportation by rail and motor carrier does not preempt state regulation of solid waste collection service."[1] There the Commission also concluded that its jurisdiction to regulate solid waste collection service is broad. In reaching that conclusion, the Commission noted that the legislature requires the Commission to regulate all solid waste collection companies under RCW 81.77.030 and that that solid waste collection service is broadly defined under its rules. Those rules define "solid waste collection company" as "every common carrier, including a contract carrier, who provides solid waste collection service" and "solid waste collection" as "collecting solid waste from residential or commercial customers and transporting the solid waste, using a motor vehicle, for the collection and/or disposal over the highways of the State of Washington for compensation."[2]

*6* The definition of solid waste collection aptly describes the services provided by Respondents, as described in their own words. Waste Management contracts to collect solid waste from commercial customers, McKinley Paper Company ("McKinley Paper") and Port Townsend Paper Company ("PTP") and transport it for disposal.[3] Under contract with Waste Management,

[1] Order 03, ¶ 8.
[2] *Id.* ¶ 11 (citing WAC 480-07-041).
[3] *See* Declaration of Eric Evans, ¶¶ 7-10.



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Daniel Anderson Trucking and Excavation, Inc. ("DAT") and MJ Trucking & Contracting, Inc. ("MJ Trucking") transport that solid waste via a motor vehicle over the highways of the State of Washington for compensation to a transfer station or other transloading facility for disposal.[4] Thus, there should be no question that a certificate of public convenience and necessity is required under RCW 81.77.040 for any of Respondents to provide the services they admitted performing absent federal preemption.

*7* In Order 03, the Commission then turned to Respondents' specific arguments that its solid waste collection service is preempted because Respondents transport to a rail carrier, and concluded that federal rail transportation preemption does not extend to motor carriers providing solid waste collection service even when transporting to a rail carrier:

> 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.[5]

As discussed throughout this proceeding, the Commission's overriding conclusion was and is correct. Respondents merely transport *to* rail carriers, they are not rail carriers themselves. And solid waste transportation has never been subject to the STB's separate and independent jurisdiction over motor carriers. Thus, the Commission should affirm its ruling here, entering a final order concluding that Respondents have indeed violated RCW 81.77.040.

B. Respondents continue to advance incorrect legal theories that are readily disproven

*8* Respondents' Motion for Summary Judgment is an obvious attempt to take a second bite at the

[4] *Id.*, ¶ 9.
[5] *Id.* ¶ 14.



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apple here and convince the Commission that Order 03 was in error. Yet, just as they did in their Motions to Dismiss, Respondents continue to ignore and obfuscate crucial elements of the law that demonstrate that federal law does not broadly preempt all trailer-on-flat-car/container-on-flat-car ("TOFC/COFC") service as they persistently claim.

C. The existence of STB's jurisdiction over motor carriers does not support preemption

*9* Respondents' argument begins with a careful recitation of the history of the rulemakings, and appeals thereof, that led to the adoption of the TOFC/COFC exemption rules set forth in 49 C.F.R. Section 1090.2. But Respondents' reliance upon those exemptions in the context of interpreting the STB's exclusive jurisdiction over rail carriers has been and remains woefully misplaced.

*10* Recall in their Motions to Dismiss, Respondents argued "[f]ederal preemption of railroad operations extends to highway transportation that is part of a continuous intermodal movement related to rail transportation," citing *Central States Motor Freight Bureau, Inc. v. Interstate Comm. Comm'n*, 924 F.2d 1099, 1102 (D.C. Cir. 1991). As noted by Murrey's in response to their earlier Motion, however, that opinion did not actually address the scope of the Interstate Commerce Commission's ("ICC") jurisdiction under 49 U.S.C. Section 10501(b). Instead, like many of the opinions cited by Respondents, *Central States* actually interpreted the scope of the ICC's then-existing authority to exempt carriers providing service related to rail carrier transportation, including motor carriers offering service related to rail transportation. [6]

*11* Because the ICC historically regulated motor carriers on the basis of price, route and service, (albeit under jurisdiction set forth Subtitle IV, Part B of Title 49, United States Code) it was

[6] Contrary to Respondents' assertion in ¶ 34 of their Motion that 49 U.S.C. 10505 is now codified in Section 10502, Section 10502 is substantively different from former Section 10505. Whether the scope of exemption authority affects the validity of 49 C.F.R. 1090.2 is not at issue in this proceeding, but it should be noted that 49 U.S.C. 10502(f) no longer authorizes exemptions for continuous intermodal service by a motor carrier and is now limited to that service only when provided by a rail carrier.



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logical that the ICC at the time was authorized to exempt related motor carrier service from federal regulation when it would impact a rail carrier's ability to provide through transportation.[7] As noted by Respondents, the purpose of the exemptions was to permit rail carriers to compete with motor carriers (not to permit motor carriers to bootstrap rail carrier preemption to gain their own competitive advantage). But, nonetheless, because the ICC's jurisdiction over motor carriers did not derive from Section 10501(b), as it does for rail carrier transportation, there was simply no basis for Respondents' contention then or now that their highway solid waste collection and transportation service is preempted under Section 10502. Instead, it is apparent that Congress merely intended for the STB to have authority to exempt certain motor carriers that were subject to its motor carrier jurisdiction.

*12* Respondents' arguments continue to ignore this crucial distinction in the source of the STB's jurisdiction in their Motion for Summary Judgment. For example, in paragraph 35, Respondents emphatically argue "[t]hus, 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." But, once again, this premise is no revelation because the STB's jurisdiction over motor carriers is expressed in Subtitle IV, Part B. And as addressed in Murrey's Supplemental Brief in Opposition to Respondents' Motions to Dismiss (which is incorporated by reference here for purposes of brevity), the STB has concluded repeatedly that its motor carrier jurisdiction does not apply to the collection and transportation of solid waste for disposal.[8] Consequently, Respondents' arguments regarding the scope of preemption rests upon nothing more than unsupported logical leaps between unconnected sources of jurisdiction.

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[7] *See* Murrey's Supplemental Brief in Opposition to Respondents' Motion to Dismiss, ¶ 7 (and all authority cited there).

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



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D. Respondents' arguments also now illogically reverse their prior position on the relevance of the TOFC/COFC exemptions

*13* Respondents have also now reversed their prior stance on the relevance of TOFC/COFC exemptions set forth in 49 C.F.R. Section 1090.2. Respondents previously expressly disavowed the relevance of those exemptions arguing:

> Murrey's appears to be under the mistaken impression that the critical question in this case is whether the TOFC/COFC federal exemption applies. Complt. ¶¶ 1, 22, 24, 26. If the exemption does not apply, it appears that Murrey's believes that the State is free to regulate. That is not the law and it misapprehends ICCTA's very structure. TOFC/COFC transportation falls within the exclusive jurisdiction of the STB. Whether the STB elects to exempt that transportation from federal regulation is another and different issue. **It does not affect the federal preemption of state regulation.**[9]

*14* Now, rather than insisting that section has no bearing on preemption, Respondents, in an about face, expressly rely on it to argue their services are preempted, insisting that the exemptions issued under former 49 U.S.C. Section 10505 guide the scope of preemption under 49 U.S.C. Section 10501(2).[10] But this argument is wrong for two reasons. First, it continues to confuse exemption from regulation with preemption, and second it misconstrues and misapplies the exemption rules.

*15* The first issue is addressed above. The authority to exempt motor carriers from regulations adopted under the ICC or STB's jurisdiction in Subtitle IV, Part B, does not establish the breadth of the preemptive effect of Section 10501(2).

*16* The second has been previously addressed by Murrey's in these proceedings as well. 49 C.F.R. 1090.2 includes an unambiguous statement that Plan I TOFC/COFC service, in which the rail carrier participates only as the agent of the motor carrier, is simply not exempted. Thus, when Respondents broadly assert the ICC's "jurisdiction included trucking companies performing the highway portion of TOFC/COFC and operating 'independently' of the rail carrier" they simply

[9] Respondent's Motion to Dismiss, Dkt. TG-200650, n. 4 (emphasis different in original).
[10] Respondents' Motion for Summary Judgment, ¶¶ 27 – 35.



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disregard, deflect and ignore the key and most relevant portion of the exemptions.

*17* For Respondents, the exception for Plan I TOFC/COFC service belies a fatal flaw in their contentions. The undisputed facts in these proceedings demonstrate that the rail carriers involved in transporting solid waste generated by McKinley Paper and PTP participate only under existing contracts to transport waste for Waste Management, not for McKinley Paper or PTP. In other words, the rail carriers participate only as Waste Management's agents, not their joint rate partner, and not as the principal party providing TOFC/COFC service. Thus, the service provided by Respondents may be conclusively classified as Plan I TOFC/COFC service and therefore does not fall within the scope of exempt services.

*18* Moreover, Respondents' attempt to insist that the mere fact that pickup and delivery service arranged independently by the shipper or receiver is exempt means that <u>all</u> highway TOFC/COFC service is preempted is an impermissible reading of the exemption rules. In order to read the exemption rule so broadly as to conclude that literally all highway TOFC/COFC service is exempt would require that exception for Plan I TOFC/COFC service be rendered inoperative. Respondents' interpretation is completely incorrect and violates basic principles of statutory construction, which require that all parts be given meaning and no parts be read to become meaningless.[11] Nor is Respondents' interpretation supported by any authority whatsoever. Thus, once again, their premise is simply wrong.

E. <u>The only extension of ICCTA preemption to companies not authorized to act as rail carriers is limited</u>

*19* Despite Respondents' unsupported contentions otherwise, the federal courts of appeals, the ICC and now the STB have extended Interstate Commerce Commission Termination Act ("ICCTA") preemption beyond companies actually authorized to operate as rail carriers in only extremely limited circumstances. Again, to qualify for preemption, the activities engaged in must be both

[11] *Rake v. Wade*, 508 U.S. 464, 471, 113 S. Ct. 2187, 2192, 124 L. Ed. 2d 424 (1993)(cited here only for the general principle of statutory construction).



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by "transportation" and "by a rail carrier."[12]

*20* In interpreting its jurisdiction under Section 10501(2) of the United States Code, the STB interprets "transportation" broadly. That the activities engaged in by Respondents constitute "transportation" is not in dispute here.

*21* The far more pertinent question though remains whether Respondents, each of whom are either motor carriers, or in the case of WMDSO, a landfill operator, are rail carriers for purposes of ICCTA preemption at all. The answer to this question has been and will always, be "no." Section 10501(2) has only been applied to entities that have not been authorized as rail carriers by the STB in very narrow circumstances.[13] In determining when to extend rail carrier preemption to non-rail carriers, the STB applies a test first articulated by the federal courts of appeals,[14] and addressed repeatedly in this proceeding.

*22* To be considered transportation *by a rail carrier*¸ the rail carrier must control transportation that is an integral part of its service.[15] Respondents themselves cite to an order in an STB proceeding that held as much. In *Town of Babylon and Pinelawn Cemetery – Petition for Declaratory Order*, the STB's final order made clear that where the railroad does not control the transportation at issue, it does not meet the requisite standard of "transportation by a rail carrier" that must be met before preemption applies.[16] And no order of the STB or appellate opinion cited by Respondents or identified by Murrey's ever interprets the STB's jurisdiction over rail carrier transportation under Section 10502(b) to extend to operations of a motor carrier's TOFC/COFC service. Thus, Respondents are simply wrong that TOFC/COFC service is

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[12] *Hi Tech Trans, LLC v. New Jersey*, 382 F.3d 295 (3d Cir. 2004).
[13] *See Id.*; *New York & Atl. Ry. Co. v. Surface Transp. Bd.*, 635 F.3d 66, 72 (2d Cir. 2011); *Town of Babylon & Pinelawn Cemetery--Petition for Declaratory Order*, FIN 35057, 2008 WL 275697, at *2 (S.T.B. Jan. 31, 2008).
[14] *See Lone Star Steel Co. v. McGee*, 380 F.2d 640 (5th Cir. 1967).
[15] *New York & Atl. Ry. Co.*, 635 F.3d. at 72-73;
[16] *Town of Babylon & Pinelawn Cemetery--Petition for Declaratory Order*, FIN 35057, 2008 WL 275697, at *4 (S.T.B. Jan. 31, 2008)



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preempted under Section 10501(2).[17]

F. Respondents also failed to overcome the strong presumption against preemption of state regulation of solid waste

*23* While Respondents are correct that federal preemption of rail carrier transportation is broad, it is not without limits. The federal circuit courts of appeals have all recognized repeatedly that preemption does not "encompass everything touching on railroads."[18] Instead, "the ICCTA preempts 'all state laws that may reasonably be said to have the effect of managing or governing rail transportation.'"[19] Federal courts of appeals have also recognized that ICCTA preemption does not prevent states from exercising certain traditional police powers over local health and safety concerns,[20] notwithstanding those opinions have not addressed solid waste collection. Given the strong presumption against federal preemption of state regulation of solid waste collection service,[21] and the fact that Respondents failed to cite to a single authority directly concluding that TOFC/COFC service provided by a non-rail carrier that subcontracts a portion of its service to a railroad is preempted, there is simply no basis to conclude that federal law preempts the states' strong interest in regulating their solid waste collection service.

G. The statutory carve out of solid waste transfer facilities from Section 10501(2) does not affect the STB's jurisdiction over motor carrier TOFC/COFC service because it was never subject to jurisdiction under Section 10501(2) in the first place

*24* Respondents' Motion for Summary Judgment also addresses whether the federal government has authority to preempt state regulation of solid waste service. There, Respondents argue that the

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[17] Nor is it of any relevance that Respondents transport solid waste in closed containers. That fact would be relevant only if the question before the Commission were whether a rail transfer facility was subject to its jurisdiction. *See* 49 U.S.C. § 10908(e). That question is not before the Commission; the only question here is whether the Commission may continue to regulate the collection and transportation of solid waste over the highway for compensation if it is taken to a rail transfer facility or transloading facility.

[18] *Delaware v. Surface Transp. Bd.*, 859 F.3d 16, 18 (D.C. Cir. 2017).

[19] *Id.*

[20] *Green Mountain R.R. Corp. v. Vermont*, 404 F.3d 638, 643 (2d Cir. 2005); *New York Susquehanna & W. Ry. Corp. v. Jackson*, 500 F.3d 238, 254 (3d Cir. 2007).

[21] *AGG Enterprises v. Washington Cty.*, 281 F.3d 1324, 1328 (9th Cir. 2002).



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federal government has such authority, and exercised it to preempt state regulation of rail carrier transportation.[22] Based on this alone, Respondents insist that highway TOFC/COFC service must also be preempted. But their analysis leaves holes large enough for a commercial motor vehicle laden with solid waste to drive straight through it. Specifically, Respondents rely upon the STB decisions regarding rail transloading facilities rather than highway transportation. In *In re New England Transrail, LLC*,[23] the STB indeed addressed whether its jurisdiction extended to solid waste, but not in the context of its jurisdiction over motor carriers under Section 13501. Instead, it dealt only with whether activities involving solid waste at a transloading facility were considered both transportation and by a rail carrier. The same is true of the STB's rulemaking cited to by Respondents.[24] Thus, once again, there is no basis to extend preemption principles that apply only to rail carriers to non-rail carriers such as Respondents.

H. The Washington Supreme Court did not find that solid waste is property under Section 10501(2).

*25* Murrey's must also once again respond to Respondents' misguided and misleading arguments regarding the opinion of the Washington Supreme Court in R*egional Disposal Co. v. City of Centralia*.[25] Respondents boldly, but inaccurately, assert that "[t]he Washington Supreme Court also has relied on ICCTA preemption applying to the transportation of solid waste."[26] But nowhere in that opinion does the Supreme Court even consider the ICCTA or reference Section 10501 at all. What specific arguments may or may not have been made by counsel to the trial court, and whatever the bases the trial court concluded supported its order, are simply not addressed by the Supreme Court in its opinion and cannot be considered precedent of any kind. Respondents gloss over this fact, relying solely upon the affirmation of the trial court's order,

[22] Respondents' MSJ, ¶¶ 41 – 43.
[23] Fed. Carr. Cas. (CCH) ¶ 37241 (S.T.B. June 29, 2007).
[24] Solid Waste Rail Transfer Facilities, EP 684, 2012 WL 5873121 (S.T.B. Nov. 14, 2012).
[25] 147 Wn.2d 69, 51 P.3d 81 (2002).
[26] Respondents' MSJ, ¶ 44.



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failing ever to acknowledge that the only authority considered by the Washington Supreme Court in affirming the trial court's order there was the prohibition of local tax discrimination under the "4R Act" set forth in 49 U.S.C. Section 11501(b)(4). Thus, this argument too must wholly fail.

I. The Commission is not bound to informal staff opinions

*26* Finally, it bears repeating that Respondents' reliance upon a decade-old informal staff opinion letter with express and appropriate disclaimers as to its efficacy advising that highway TOFC/COFC service is exempt is wholly misplaced in defending their position here. While Respondents may feel it provides context and justification to their decisions to repeatedly violate RCW 81.77.040, it cannot serve to avoid enforcement. The Commission has been clear on this point before, concluding that "Staff's legal opinions are advisory" and that "[t]he Commission cannot, and does not, abdicate its authority to impose penalties for violations of statutes or Commission rules because Staff may have interpreted the law differently."[27]

## III. CONCLUSION AND REQUEST FOR RELIEF

As addressed throughout these proceedings, including Murrey's Responses in Opposition to Respondents' Motions to Dismiss, Murrey's Supplemental Brief in Opposition to Respondents' Motions to Dismiss, and Murrey's Motion for Summary Determination, the law is unambiguous even if rather complex. Highway TOFC/COFC simply does constitute transportation by a rail carrier. No authority supports Respondents' positions that their service falls within the broad preemptive effect of the ICCTA, nor do they qualify for any other exemption under federal law. Put simply, Respondents must finally comply with RCW 81.77.040. Because they admittedly have not, Murrey's is entitled to summary determination and Respondents' dueling motion should be denied.

[27] *In re Ghostruck, Inc.*, Dkt. TV-161308, Order 05, ¶ 15 ( May 31, 2017).



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