ATTACHMENT B

Sharon Hendricks

From: Kenefick, Andrew <AKenefick@wm.com>
Sent: Thursday, June 4, 2020 3:19 PM
To: 'Wiley, Dave'
Subject: Port Townsend Paper/Federal Preemption
Attachments: LL to B Young re COFC Preemption.pdf

Dave, attached is my January 19, 2011 letter to the WUTC. With respect to the "solid waste" issue, you will see that the letter deals extensively (and convincingly, of course) with the "solid waste" question. You will see that "solid waste" is considered "cargo".

ANDREW M. KENEFICK | **Senior Legal Counsel**
(admitted in Washington State)
akenefick@wm.com

Waste Management
720 4th Avenue, Suite 400
Kirkland, WA 98033
T: (425) 825-2003
C: (206) 849-7845

801 Second Avenue, Suite 614
Seattle, WA 98104
(206) 264-8207
(206) 264-8212 Fax

Andrew M. Kenefick
Senior Legal Counsel, Western Group
Admitted in Washington
Direct (206) 264-3062 Fax (866) 863-7961
akenefick@wm.com

January 3, 2011

VIA U.S. MAIL & E-MAIL byoung@utc.wa.gov

Betty Young, Compliance Specialist
Transportation Safety
Washington Utilities & Transportation Commission
P.O. Box 47250
Olympia, WA 98504-7250

RE: Atlas Trucking, Inc./Nippon Paper Industries USA
Federal Preemption of Intermodal Container Transport of Solid Waste Via TOFC/COFC

Dear Ms. Young:

On behalf of Waste Management of Washington, Inc. ("WMW"), I have reviewed the correspondence between the Washington Utilities & Transportation Commission ("WUTC") and Atlas Trucking, Inc. ("Atlas") concerning Atlas's transportation of solid waste in intermodal containers from the Nippon Paper Industries USA's ("Nippon") facility in Port Angeles to WMW's rail transfer facility near Bremerton. In particular, I have reviewed Mr. David Pratt's letter date December 9, 2010 in which the WUTC asserts that the transportation of solid waste via intermodal container to WMW's rail transfer facility requires a solid waste certificate from the WUTC.

WMW agrees with Atlas's position that federal law preempts WUTC regulation over the highway transportation of intermodal containers to WMW's rail transfer facility. This combination of motor carrier transport of intermodal containers for delivery to a rail transfer location is considered "trailer-on-flatcar/container-on-flatcar (TOFC/COFC) service" under the Surface Transportation Board's ("STB") regulations, which specifically exempts TOFC/COFC service from state economic regulation, such as the WUTC regulation. In its response to the WUTC's letter of inquiry, Atlas raised this jurisdictional issue, but the December 9th reply from Mr. Pratt does not address it. I write therefore to embellish the legal reasoning behind our view, shared by WMW and Atlas, that the WUTC's economic regulation of this particular transportation activity is preempted by federal law.

The starting point of this analysis is 49 U.S.C. § 10501(b) of the Interstate Commerce Commission Termination Act of 1995 ("ICCTA") which granted exclusive jurisdiction over railroad operations to the STB, including jurisdiction over rates and rules:

> The jurisdiction of the Board over--
> (1) . . . rates, classifications, rules (including car service, interchange, and other operating rules), practices, routes, services, and facilities of such carriers …

> 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). *See also City of Seattle v. Burlington N. R.R.*, 145 Wash. 2d 661, 665 (2002) (local regulatory authority over railroad operations is preempted by federal law); *City of Auburn v. United States*, 154 F.3d 1025, 1029 (9th Cir. 1998) (upholding an STB decision finding preemption of local environmental permitting standards for the reopening of an existing railroad line through the city of Auburn); *In the Matter of Proposed Rule Relating to Point Protection for Railroad Operations*, Order Directing Withdrawal of Rulemaking Proposal, Docket No. TR-040151 (2005) (recognizing broad preemption under ICCTA and ordering withdrawal of rule regulating certain railroad operations).

Federal preemption is broad and extends to highway transportation that is part of continuous intermodal movement related to rail carrier transportation. On November 27, 1989, the Interstate Commerce Commission's ("ICC") (later replaced by the STB) issued the *Improvement of TOFC/COFC Regulation (Pickup and Delivery), Ex Parte No. 230 (Sub-No. 7)*, 6 I.C.C. 2d 218 (1989) regulation, in which the ICC exempted "from economic regulation the motor carrier pickup and delivery portion of [TOFC/COFC] services (sometimes called piggyback service)." Although this regulation was subsequently challenged, the Court of Appeals for the District of Columbia upheld the ICC's preemption decision. *Central States Motor Freight Bureau, Inc. v. Interstate Commerce Commission*, 924 F.2d 1099 (D.C. Cir. 1991). In an opinion authored by now-Supreme Court Justice Ginsburg, the D.C. Circuit noted the broad authority of the ICC to determine when to exercise its authority to exempt TOFC/COFC service – in particular the "TOFC/COFC pickup and delivery services performed by motor carriers as part of continuous intermodal movement related to rail carrier transportation." Thus, the highway transportation of solid waste via intermodal container from Nippon to WMW's rail transfer facility is precisely the kind of "TOFC/COFC" service that the ICC has preempted from economic regulation by the states.

A relevant and instructive case is the WUTC's decision in *The Disposal Group, Inc. v. Waste Management Disposal Services of Oregon, Inc.*, Initial Order, Docket No. TG-941154 (Dec. 19, 1994).[1] While at first blush this order would appear to directly support a conclusion that there is no federal preemption, the reasoning of the WUTC in that decision must be read in light of the subsequent court decisions and legislative actions by Congress in enacting the Federal Railroad Safety Improvement Act in 2008.

In *The Disposal Group*, a certificated waste hauler brought a complaint against Waste Management Disposal Services of Oregon, Inc. ("WMDSO") and its trucking subcontractor, alleging a violation of the hauler's solid waste certificate rights because neither WMDSO nor the freight company held authority to perform collection of solid waste, purportedly required to transport industrial sludge in intermodal containers by trailer to a railroad transfer facility in Portland. WMDSO and the trucker argued to the Commission that trailer-rail transportation service is exempt from WUTC regulation under the TOFC/COFC regulation. WUTC staff and the Commission itself agreed with this argument that state regulation of the haul was preempted under the TOFC/COFC regulation. In the *Initial Order*, the Administrative Law Judge wrote,

[1] The Commission adopted the Initial Order in *The Disposal Group, Inc. v. Waste Management Disposal Services of Oregon, Inc.*, Commission Decision, Docket No. TG-941154 (Jan. 27, 1995).

> ICC regulations exempt from state regulation both the motor portion and rail portion of trailer-on-flatcar/container-on-flatcar (TOFC/COFC) service. The exemption extends to intrastate shipments on trucks that are a portion of continuous TOFC/COFC transport, regardless of whether the trucks are owned and operated by the railroad.

Initial Order at 19. In its brief, the WUTC staff agreed with WMDSO's argument, writing,

> The TOFC/COFC (trailer-on-flat car/container-on-flat car) service described in the rule is the service UP and T&G perform in transporting the sludge by motor carrier and rail in a continuous intermodal freight movement from the ALCOA site to Arlington, Oregon. Those movements are exempt from ICC regulation as well as state regulation of even the intrastate leg of a continuous intermodal movement.

Brief of Commission Staff at 7-8 (Nov. 23, 1994) (emphasis added).

Thus, on a strikingly similar factual record, in *The Disposal Group*, the Commission and Staff agreed with everything that WMW and Atlas assert now – **except one point**. In *The Disposal Group* case, the Commission and Staff doubted that subchapter I of the Interstate Commerce Act – namely 49 USC § 10501(b) – granted the ICC jurisdiction to exempt from state regulation the intermodal movement of solid waste. Since the WUTC and Commission agreed that the material being hauled had value for use as alternative daily cover, it was considered property and not solid waste. As a result, while the WUTC agreed that state economic regulation of the haul was preempted, it did so based on the material being property, not solid waste. Initial Order at 23. If the material had been a solid waste, the WUTC and Staff were skeptical that preemption existed. Initial Order at 20 ("The respondents have not demonstrated that the TOFC/COFC exemption is applicable to the transportation of solid waste.").

Thankfully, the intervening sixteen years since the WUTC decision has provided a clear answer that 49 USC § 10501(b) does preempt state regulation of TOFC/COFC transportation even if the material being transported is solid waste. This conclusion derives from the Third Circuit Court of Appeals' decision in *New York Susquehanna & Western Railway Corp. v. Jackson*, 500 F.3d 238 (3d Cir. 2007) and Congress's subsequent passage of the Federal Railroad Safety Improvement Act in reaction to it. In the *Susquehanna* case, the railroad argued that state environmental regulations over a solid waste rail transloading facility were preempted under 49 USC § 10501(b). The Third Circuit easily concluded the solid waste operations clearly fell within the scope of federal preemption under 49 USC § 10501(b), stating,

> It is undisputed that operations of the [solid waste transloading] 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 [ICC] Termination Act explicitly defines as "transportation." *See* 49 USC § 10102(9)(B). These operations fit within the plain text of the Termination Act preemption clause.

500 F.3d at 247 (emphasis added). Even though the cargo being managed was solid waste, the Third Circuit held that the federal preemption existed under 49 USC § 10501(b).[2] Thus, after the

[2] The Third Circuit did, however, find that certain regulations relating to public health and safety would not be preempted so long as they do not interfere with or unreasonably burden railroad transportation. Examples included uniform building and plumbing codes.

Susquehanna decision, federal preemption of WUTC regulation over TOFC/COFC services should be undisputed.

An even more compelling development confirming federal preemption over TOFC/COFC hauling is the Congressional reaction to the *Susquehanna* decision. Concerned that solid waste rail transfer facilities could circumvent state and local environmental laws, Congress enacted the Rail Safety Improvement Act of 2008 ("RSIA").[3] The RSIA specifically amended 49 USC § 10501 to state that the STB does not have jurisdiction over "solid waste rail transfer facilities" except as specifically provided in two other sections of the statute. *See* 49 USC § 10501(c). This carve-out is only applicable to "solid waste transfer facilities" and would not be applicable to the TOFC/COFC exemption. The significance of the RSIA amendments to 49 USC § 10501 is that such an amendment would have been completely unnecessary if – as the WUTC opined in 1994 – 49 USC § 10501 did not establish federal preemption over rail transportation of "solid waste." In other words, Congress deemed it necessary to give back to local and state environmental regulators certain limited regulatory authority over solid waste rail transfer facilities.[4] But, in giving this limited authority back, Congress did not withdraw the more general federal preemption over rail transportation of solid waste, including the TOFC/COFC service.

Accordingly, WMW must disagree with the WUTC's position that a solid waste certificate is required. I recognize that the above analysis is somewhat complex, and because it raises arcane legal issues I am also providing a copy of this letter to the Commission's Attorney General. I do hope however that it has provided you with a sufficient understanding of this issue such that you can agree that neither Atlas Trucking nor WMW is required to obtain a WUTC certificate in hauling Nippon's waste "as part of the continuous intermodal movement related to rail carrier transportation." If you would like to discuss this matter further or require additional information, please let me know.

Sincerely,

Andrew M. Kenefick

cc: *via e-mail only*
Bruce Swenson – Atlas Trucking, Inc.
Sally Brown – Office of Attorney General

[3] *See, e.g.,* 151 Cong Rec. S 9472, 9531 (July 29, 2005) (Sen. Lautenberg: "A conflict in Federal laws and policy has resulted in certain solid waste-handling facilities located on railroad property being unregulated. Environmental laws such as the Solid Waste Disposal Act should apply to the operation of these facilities. However, a broad-reaching Federal railroad law forbids environmental regulatory agencies from overseeing the safe handling of trash or solid waste at these sites.").

[4] WMW's rail transfer facility in Bremerton is fully permitted under state and local law. WMW did not seek to circumvent local regulation as was done in the *Susquehanna* case.