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 DANIEL ANDERSON TRUCKING AND EXCAVATION, LLC Respondents.	DOCKET TG-200651 RESPONDENTS' MOTION TO DISMISS

I. RELIEF REQUESTED

1. Pursuant to WAC 480-07-380(1), Respondents Waste Management of Washington, Inc. ("WMW"), Waste Management Disposal Services of Oregon, Inc. ("WMDSO") (WMW and WMDSO collectively referred to as "WM"), and Daniel Anderson Trucking and Excavation, LLC. ("DAT") move to dismiss this action for failure to state a claim for which relief may be granted.

II. STATEMENT OF FACTS

2. For purposes of this motion (only), Respondents assume as true each of the material facts alleged in the Murrey's Disposal Company, Inc. ("Murrey's") Complaint.

3. "Under the authority granted to it under Certificate G-009, Murrey's" previously "provided solid waste collection service to" Port Townsend Paper Company ("PTP") "in unincorporated Jefferson County," Washington "for disposal." Compl. ¶¶ 1, 4.

4. "In June 2020, PTP notified Murrey's that its solid waste collection service would no longer be needed because PTP would instead be contracting with WM to haul" solid waste "from PTP for disposal." *Id.* ¶ 9.

5. "[D]uring the week of June 15, 2020," WM began collecting and transporting solid waste "from PTP to the Olympic View Transfer Station, which is operated by WMW under a license from Kitsap County." *Id.* ¶ 12. "WMW is a solid waste collection company that holds

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Certificate G-237." *Id.* ¶ 5. "Certificate G-237 does not authorize WMW to provide solid waste collection service in [] Jefferson County." *Id.* ¶ 6.

6. WMDSO "subcontracts with DAT to transport solid waste from" PTP "to the "Olympic View Transfer Station." *Id.* ¶¶ 13, 16. "DAT collects and transports solid waste from PTP solely for disposal." *Id.* ¶ 14. "DAT provides a through bill of lading for transportation from the paper mill to the Olympic View transfer station." *Id.* ¶ 18. "DAT does not hold a Certificate authorizing solid waste collection." *Id.* ¶ 8.

7. At the Olympic View Transfer Station, the PTP "solid waste is loaded by WMW employees to railcars." *Id.* ¶ 16. "WMW pays a license fee to Kitsap County for each container it transloads and an intercompany credit is then transferred from WMDSO to WMW." *Id.*

8. WMDSO "subcontracts part of hauling of" the PTP "solid waste for disposal" from the Olympic View Transfer Station to Oregon via Union Pacific Railroad ("UP"). *Id.* ¶ 17. "UP provides a second bill of lading upon delivery of the solid waste to the WMDSO landfill in Arlington, Oregon." *Id.* ¶ 18.

9. "WMDSO owns and operates the Columbia Ridge landfill in Arlington, Oregon." "It does not hold a Certificate authorizing solid waste collection from the Commission." *Id.* ¶ 7.

10. When Murrey's complained to WM about PTP's decision to move its business to WM, WM explained "to Murrey's that these activities were not subject to WUTC regulation because WMDSO would be providing solid waste collection and transportation service to PTP via trailer-on-flat-car/container-on-flat-car ('TOFC/COFC') service via a motor carrier that it would subcontract to collect containers from PTP and transport to the Olympic View Transfer Station" "operated by WMW where WMW would load the containers onto rail cars of the Union Pacific Railroad." WM further explained that "federal law would preempt WUTC regulation of the solid waste collection and transportation services offered by WM." *Id.* ¶ 10.

11. TOFC or "piggyback" operation is "a form of mixed train and truck transportation" that "enables a carrier to transport a trailer and its contents over rail on a flatcar

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and then to haul the trailer 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 (1987).

12. As part of the referenced communications with Murrey's counsel, Compl. ¶ 10, WM explained to Murrey's that WM had addressed this issue with the UTC Staff and that Assistant Director David Pratt agreed in a February 10, 2011 letter that this type of disposal service was preempted by the federal government and, hence, not regulated by the UTC.[1] WM forwarded Mr. Pratt's letter to Murrey's counsel. *See* **Attachment A**. Mr. Pratt explained that, "[b]ased on staff's review and the analysis of our attorney general staff, we believe the transportation of solid waste-filled containers by Atlas Trucking from Nippon Port Angeles[2] to the Olympic View Transfer Station in Port Orchard is exempt Trailer On Flat Car/Container On Flat Car (TOFC/COFC) service" and, hence, "is preempted from regulation by the commission." *Id.* A copy of the WM letter to which Mr. Pratt was responding also was forwarded to Murrey's counsel. *See* **Attachment B**.

13. Murrey's disagreed with Congress, the UTC Staff, the Attorney General's staff, and WM and filed this action.

14. In summary, WM and DAT agree to the following summary of the material facts alleged by Murrey's:

a. WMDSO has contracted with PTP to transport and dispose of PTP's solid waste at WMDSO's Columbia Ridge Landfill located near Arlington, Oregon;

[1] Where a complainant, like Murrey's, "asserts allegations in a complaint on specific documents but does not physically attach those documents, the documents may be considered in ruling on a CR 12(b)(6) motion for judgment on the pleadings" and doing so does not convert the motion to one for summary judgment. *Jackson v. Quality Loan Serv. Corp.*, 186 Wn. App. 838, 844, 347 P.3d 487 (2015); *accord Sebek v. City of Seattle*, 172 Wn. App. 273, 275, n.2, 290 P.3d 159 (2012). WM recognizes that Mr. Pratt's letter is an informal opinion and is not binding on the Commission. WM cites these letters and provides copies because those very documents were the subject of the conversation referenced in the Complaint. Compl. ¶ 10.

[2] This is the same facility now operated for PTP. *See* https://www.peninsuladailynews.com/news/mckinley-paper-mill-nearing-startup-in-port-angeles/ (last visited Jul. 26, 2020).

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b. Solid waste is loaded into intermodal containers at the PTP facility;

c. DAT transports those containerized solid wastes to an intermodal rail transfer facility, *i.e.*, the Olympic View Transfer Station; and

d. WMW transfers those containerized solid wastes onto rail cars for transportation to and disposal at the Columbia Ridge Landfill.

III. ARGUMENT

A. The STB Has Exclusive Jurisdiction Over Railroad Operations.

15. Federal law preempts state law

> [W]hen Congress conveys an intent to preempt local law by: (1) "express preemption", where congress explicitly defines the extent to which its enactments preempt laws; (2) "field preemption", where local law regulates conduct in an area the federal government intended to exclusively occupy; and (3) "conflict preemption", where it is impossible to comply with both local and federal law.

City of Seattle v. Burlington N. RR. Co., 145 Wn.2d 661, 667, 41 P.3d 1169 (2002). "Construction of a statute is a question of law." *Id.* at 665. 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). Where the statute contains an express preemption, that "necessarily contains the best evidence of the Congress' pre-emptive intent." *Id.* (quotation marks & citation omitted).

16. "National rather [than] local control of interstate railroad transportation has long been the policy of Congress." *City of Chicago v. Atchison, Topeka & Santa Fe R.R. Co.*, 357 U.S. 77, 87 (1958). "Congress enacted the ICCTA [Interstate Commerce Commission Termination Act of 1995] as a means of reducing the regulation of the railroad industry." *Canadian Nat. Ry. Co. v. City of Rockwood*, No. COV-04-40323, 2005 WL 1349077, *3 (E.D. Mich. June 1, 2005). To this end, Congress expressly preempted state regulation by granting exclusive jurisdiction over railroad operations to the Surface Transportation Board ("STB"). Pursuant to the ICCTA, STB's exclusive jurisdiction over

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> [R]ates, 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 regulations of **rail transportation** are **exclusive and preempt the remedies provided under Federal or State law**.

49 U.S.C. § 10501(b)(1) (emphasis added).

17. In *City of Seattle*, the Washington Supreme Court affirmed that 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 at 663. The Court recognized that the purpose of ICCTA "was to significantly reduce regulation 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.

18. The Ninth Circuit 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 v. U.S. Govt.*, 154 F.3d 1025, 1031 (9th Cir. 1998) (affirming the STB's finding of federal preemption regarding local environmental laws).

B. The STB Has Exclusive Jurisdiction Over Piggyback Service of Solid Waste.

19. Federal preemption of railroad operations extends to highway transportation that is part of continuous intermodal movement related to rail carrier transportation. Exclusive federal jurisdiction of intermodal movement has long been recognized. *See, e.g., Central States*, 924 F.2d 1099 (affirming the ruling of the Interstate Commerce Commission ("ICC") – the predecessor to the STB – exempting from economic regulation motor carrier pickup and delivery services performed immediately before or after a TOFC/COFC movement); *ICC v. Texas*, 479

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U.S. at 451 (ICC's jurisdiction includes TOFC or "piggyback" service that mixes train and truck transportation and enables a carrier to transport a trailer and its contents over rail on a flatcar and then to haul the trailer on the highway).

20. ICCTA defines preempted "rail transportation" to include a "vehicle, … yard, property, facility, instrumentality, or equipment of any kind related to the movement of … property … by rail, regardless of ownership or an agreement concerning use" and "services related to that movement, including receipt, delivery, elevation, transfer in transit, refrigeration, icing, ventilation, storage, handling, and interchange of … property." 49 U.S.C. § 10102(9). The broad definition of "rail transportation" is plain. *Canadian Nat. Ry. Co.*, 2005 WL 1349077, *4 ("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 [ICCTA]'s definition of 'transportation.'") (quotation marks, citations, & n. omitted); *In re New England Transrail, LLC*, Finance Docket No. 34797, 2007 STB LEXIS 391, *33 (STB June 29, 2007) (ICCTA preemption applies because "we find that the baling and wrapping activities (including such handling as would be required to prepare the [municipal solid waste] for baling and wrapping) would also be integrally related to transportation").

21. 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). ICCTA's preemption of state regulations applies to rail transportation of property including solid waste. In *New York Susquehanna & Western Railway Corp. v. Jackson*, the Third Circuit held that ICCTA preempted state environmental regulation over a solid waste rail transloading facility.

> It is undisputed that operations of the facilities include dropping off cargo, loading in onto Susquehanna trains, and shipping it. Thus the facilities engage in the receipt, storage, handling, and

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> interchange of rail cargo, which the [ICC] Termination Act explicitly defines as "transportation." *See* 49 U.S.C. § 10102(9)(B). These operations fit within the plain text of the Termination Act preemption clause.

500 F.3d 238, 247 (3rd Cir. 2007); *see also City of Chicago,* 357 U.S. at 87–89 (pre-ICCTA case holding that bus service between train terminals operated by a third party on a rail carrier's behalf was an "integral part" of interstate rail transportation).

22. Congress' response to the *Susquehanna* decision confirmed ICCTA's preemption over TOFC/COFC services. Concerned that **solid waste rail transfer facilities** could not be regulated by state and local environmental laws,[3] Congress enacted the Rail Safety Improvement Act of 2008 ("RSIA").[4] The RSIA specifically amended 49 U.S.C. § 10501 to **remove** from STB's exclusive jurisdiction "solid waste rail transfer facilities" except as specifically provided in two other sections of the statute. 49 U.S.C. § 10501(c)(2)(B).[5] Congress did not withdraw or otherwise affect the STB's exclusive jurisdiction over the transportation of solid waste (and other movements by rail).

23. This carve-out from ICCTA's federal preemption is only applicable to "solid waste transfer facilities," not to the ongoing preemption of TOFC/COFC movements. The fact that Congress needed to enact the limited carve-out further confirmed that without the carve-out the STB exclusively would have had jurisdiction over solid waste transfer facilities, as with all other "regulations of rail transportation" under 49 U.S.C. § 10501(b)(1). Congress gave to local and state environmental regulators certain limited regulatory authority over solid waste transfer facilities but, in doing so, did not withdraw Congress' more general federal preemption over rail transportation of solid waste, including TOFC/COFC service.

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[3] The STB has explained that "prior to enactment of the" 2008 legislation, "the Board's preemptive jurisdiction extended to solid waste rail transfer facilities owned or operated by rail carriers." 77 Fed. Reg. 69769, 69770 (Nov. 21, 2012).

[4] *See, e.g.,* 151 Cong. Rec. § 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.").

[5] WMW's rail transfer facility in Bremerton is fully permitted under state and local law.

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C. The STB Exempted TOFC/COFC From Certain Federal Regulations, Confirming its Sole Authority to Regulate Related Solid Waste.

24. So, Congress granted the STB exclusive jurisdiction over "rail transportation," excepting more recently, as noted, only regulation of "solid waste transfer facilities." Exercising its exclusive jurisdiction, the STB has exempted from some **federal** regulations "[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." 40 C.F.R. § 1090.2.

25. Importantly, STB's exemption of certain TOFC/COFC regulation pursuant to the exercise of its exclusive jurisdiction does not, somehow, open up TOFC/COFC to state regulation.[6] Nothing at all has changed the Congressional grant of exclusive jurisdiction to the STB. 49 U.S.C. § 10501(b)(1); *see also ICC v. Texas*, 479 U.S. at 452 ("The ICC's authority includes jurisdiction to grant exemptions from regulation as well as to regulate."); *Central States Motor Freight Bureau, Inc. v. Interstate Comm. Comm'n*, 924 F.2d 1099, 1102 (D.C. Cir. 1991) (Judge Ruth Bader Ginsburg) ("Exercise of the ICC's section 10505 exemption authority neither lodges nor dislodges agency jurisdiction; instead, it *presupposes* ICC jurisdiction over the persons or services exempted."). Notably, where the STB exempts rail transportation from federal regulation because the STB concluded that it was unnecessary to regulate, the STB always retains the authority to revoke an exemption, consistent with its exclusive jurisdiction. *See, e.g.,* 49 U.S.C. § 10502(d) ("[t]he Board may revoke an exemption"); *id.* § 10502(f) ("[t]he Board may exercise its authority under this section to exempt" intermodal transportation). Either way, the rail transportation of solid waste – including by truck and rail interchange – remains within the exclusive jurisdiction of the STB by congressional mandate.

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[6] Murrey's appears to be under the mistaken impression that the critical question in this case is whether the TOFC/COFC **federal exemption** applies. Compl. ¶¶ 1, 25. 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.

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IV. CONCLUSION

26. Pursuant to 49 U.S.C. § 10501(b)(1), the WUTC lacks authority to regulate "rail transportation," including the TOFC/COFC intermodal services provided by WM to DAT including transport over the Union Pacific Railroad. No certificate of public convenience and necessity may be required for such federally preempted service.

27. For each of these reasons, Murrey's action is without merit and should be dismissed as a matter of law.

RESPECTFULLY SUBMITTED this 4th day of August, 2020.

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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 at Seattle, Washington, DATED this 4th day of August, 2020.

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