

**Docket Nos. TG-200650 and TG-200651 (Consolidated) -
Vol. I**

**Murrey's Disposal Co. Inc. v. Waste Management of
Washington**

September 16, 2020



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BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

MURREY'S DISPOSAL CO., INC.,) DOCKETS TG-200650 and) TG-200651 (Consolidated)

Complainant,)

vs.)

WASTE MGMT. OF WASH., INC.,) WASTE MGMT. DISPOSAL SERVICES) OF OR., AND MJ TRUCKING &) CONTRACTING,)

Respondents.) *Caption Continued*

TELEPHONIC MOTION TO DISMISS

Pages 1-77

ADMINISTRATIVE LAW JUDGE ANDREW J. O'CONNELL

September 16, 2020

1:50 p.m.

Washington Utilities and Transportation Commission 621 Woodland Square Loop Southeast Lacey, Washington 98503 REPORTED BY: TAYLER GARLINGHOUSE, CCR 3358 Buell Realtime Reporting, LLC 1325 Fourth Avenue, Suite 1840 Seattle, Washington 98101 (206) 287-9066 | Seattle (360) 534-9066 | Olympia (800) 846-6989 | National www.buellrealtime.com

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22 * * * * *

1 MURREY'S DISPOSAL CO., INC.,)

2 Complainant,)

3 vs.) 4)

5 WASTE MGMT. OF WASH., INC.,) 6 WASTE MGMT. DISPOSAL SERVICES) 7 OF OR., AND DANIEL ANDERSON) 8 TRUCKING AND EXCAVATION, LLC,)

9 Respondents.)

1 LACEY, WASHINGTON; SEPTEMBER 16, 2020

2 1:50 P.M.

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4 P R O C E E D I N G S

5 6 JUDGE O'CONNELL: Let's be on the record, 7 then. Good afternoon. The time is approximately 1:50 8 p.m. on Wednesday, September 16, 2020.

9 My name is Andrew O'Connell. I'm an 10 administrative law judge with the Washington Utilities 11 and Transportation Commission, and I'm presiding in 12 these matters.

13 These matters, which have been consolidated 14 by the Commission, concerned complaints filed with the 15 Commission on July 15, 2020, on Murrey's Disposal 16 Company Incorporation against Respondents, Waste 17 Management of Washington Incorporated, Waste Management 18 Disposal Services of Oregon Incorporated, MJ Trucking 19 and Contracting Incorporated, and Daniel Anderson 20 Trucking and Excavation LLC, Dockets TG-200650 and 21 TG-200651.

22 Respondents filed motions with the 23 Commission to dismiss these dockets on August 4, 2020. 24 Murrey's Disposal filed a response to Respondents' 25 motions to dismiss on August 20, 2020. I denied

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<p>1 Respondents' request to follow reply in these 2 proceedings responding to Murrey's Disposal's response. 3 I had several legal questions for each party 4 after reviewing the motion and the response. We are 5 here today because I determined that holding a hearing 6 on Respondents' motion to dismiss was the best course in 7 order to provide the parties the opportunity to complete 8 any presentation of their positions and afford me the 9 chance to plainly ask any unanswered legal questions I 10 may have after the parties' presentations. 11 Each side will have 15 minutes for their 12 presentations with Respondents going first as the 13 movants. The Respondents can save some of their time if 14 they wish to address anything raised by Murrey's 15 Disposal. 16 At the conclusions of the parties' 17 presentations, I will pose any remaining legal questions 18 I have for each party, and I intend to listen to all of 19 the presentations before posing any remaining legal 20 questions I have. 21 Before we get to the purpose of this 22 hearing, let's take appearances from the parties' 23 representatives. Short appearances are sufficient for 24 this hearing as Respondents' representatives have filed 25 a notice of appearance and the representatives from</p>	<p>1 out about it, so I'm very happy that you had actual 2 notice, but I want to make sure that we get everything 3 sent to you. 4 MR. FASSBURG: Very good. 5 JUDGE O'CONNELL: All right. And for 6 Respondents? 7 MS. GOLDMAN: Good afternoon, Your Honor. 8 My name is Jessica Goldman. I'm from the law firm 9 Summit Law Group, and I represent all of the respondents 10 in the combined complaint. Along with me on the line is 11 my partner, Jesse Taylor, and Andrew Kenefick, the 12 inside counsel for Waste Management, and Michael 13 McBride, who is the outside regulatory counsel for Waste 14 Management in Washington DC. 15 JUDGE O'CONNELL: Okay. Thank you. Are 16 there any matters we should address before we get to the 17 presentations by the parties? 18 Okay. Hearing none, I have a timer and I 19 will alert the parties when their time for presenting is 20 over. So I would like to turn to Respondents. 21 Would you like to save any of your 15 22 minutes for responding to Murrey's Disposal? 23 MS. GOLDMAN: Yes, Your Honor. I'd like to 24 reserve three minutes. 25 JUDGE O'CONNELL: Okay. I will put 12</p>
Page 6	Page 8
<p>1 Murrey's Disposal have included their identifying 2 information in the complaint. 3 Let's -- let's begin with Murrey's Disposal. 4 MR. FASSBURG: Good afternoon, Judge 5 O'Connell. Blair Fassburg with Williams Kastner on 6 behalf of Murrey's Disposal. And as indicated, on the 7 line, Dave Wiley, who also represents Murrey's Disposal, 8 will be here and present today. 9 JUDGE O'CONNELL: Okay. Thank you. Now, my 10 understanding is that you recently submitted a letter 11 requesting to make sure that you are included on the 12 master service list for those proceedings. And although 13 your information was included in the complaint, I'd like 14 to ask that you submit a formal notice of appearance to 15 the dockets to make sure that you're not omitted from 16 any service from the Commission, and that will make sure 17 we have all of your identification and contact 18 information. 19 MR. FASSBURG: Absolutely, although that 20 typically hasn't been required in past practice, we'd be 21 more than happy to do that. 22 JUDGE O'CONNELL: Great. And I'm aware. 23 Let's just double cross our Ts in this instance because 24 I don't want -- I'm aware that you missed a certain 25 notification of an order that was issued. You did find</p>	<p>1 minutes on my timer, and I will begin whenever you're 2 ready and whenever you start. 3 MS. GOLDMAN: Thank you, Your Honor, and 4 good afternoon. Murrey's complaint concerns what is 5 called trailer on flat car transportation or TOFC, and 6 there's no dispute that that is what is at issue here. 7 TOFC is the continuous intermodal movement of 8 containerized property including both a highway and a 9 rail segment. The question of law that's presented here 10 today is whether the UTC may regulate the highway 11 segment of the TOFC movement of containerized solid 12 waste. 13 Your Honor, the answer to that is no as a 14 matter of law. Your Honor is not presented here with a 15 novel issue. This is settled law for almost 30 years. 16 And I begin with what Congress has decreed. 17 Congress authorized first the Interstate 18 Commerce Commission, the ICC, and then later it's the 19 Surface Transportation Board, the STB, with jurisdiction 20 over transportation by rail carriers and specifically 21 noted in the statute that the jurisdiction was 22 exclusive. That statute is 49 USC Section 10501, Sub B. 23 I will be referring to the board here to refer both to 24 the ICC and the predecessor and the STB, the successor, 25 as all of the regulations and laws have been the same.</p>

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1 Congress defined what it meant by
2 transportation in this exclusive broad assignment of
3 jurisdiction to the board. In this statute, Congress
4 defined transportation to include a vehicle related to
5 the movement of property by rail regardless of ownership
6 and to services related to that movement. And that
7 definition is found in 49 USC Section 10102, paren 9.
8 So Congress expressly granted to the board
9 but not to states the jurisdiction to regulate
10 transportation by rail carriers. In this regulatory
11 scheme, Congress also authorized the board to exempt
12 from federal regulation services that were subject to
13 the board's exclusive jurisdiction and which related to
14 a rail carrier providing transportation and which the
15 board determined in the exercise of its exclusive
16 jurisdiction and discretion were not requiring any
17 further or additional federal regulation. And that
18 exemption authority is provided in 49 USC Section 10502,
19 Sub A, Sub 1.
20 Finally, as part of this regulatory scheme,
21 Congress authorized the board as part of its exclusive
22 jurisdiction to revoke exemptions previously entered if,
23 in the determination of the board, it was now once again
24 appropriate and necessary for federal regulation of --
25 of its jurisdiction. And that revocation authorization

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1 is found in 49 USC Section 10502, Sub D.
2 So in this regulatory scheme, Congress gave
3 the board broad exclusive jurisdiction over
4 transportation by rail carrier, and that included the
5 authority to regulate, it included the authority to
6 exempt from federal regulation, and it included the
7 authority to revoke exemptions and to reinstate
8 regulation as deemed proper by the board.
9 In the exercise of this exclusive
10 jurisdiction, the board in 1989 considered TOFC
11 services. Now, this was the third rulemaking by the
12 board considering and regulating TOFC services.
13 Previously, eight years previously in 1981, the board
14 exercised its exclusive jurisdiction and exempted from
15 federal regulation the highway portion of TOFC services,
16 but only if the rail carrier itself was performing the
17 highway transportation in rail-owned trucks.
18 That exemption was challenged and the
19 Supreme Court eventually upheld it in ICC versus Texas
20 in 1987. And the Supreme Court in that decision ruled
21 that the Commission's power to grant exemptions is
22 coextensive with its own authority to regulate or not to
23 regulate these intermodal movements by rail carrier
24 confirming that, indeed, the exemptions as part of the
25 jurisdiction of the board.

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1 Then for the second time, in 1987, the board
2 exercised its exclusive jurisdiction and expanded the
3 TOFC exemption. This time it expanded it to include
4 transportation by a motor carrier either as the agent or
5 the joint rate partner of a rail carrier.
6 Then finally, for the third time, in 1989,
7 the board exercised its exclusive jurisdiction and
8 considered whatever the TOFC exemption should be
9 expanded to cover pickup and delivery operations
10 independently arranged with the motor carrier.
11 The opponent of this contemplated regulation
12 with the motor carriers, and they argued to the board in
13 the rulemaking that the board could not take that step
14 because taking that step was not related to a rail
15 carrier providing transportation because it was not
16 service provided by the rail carriers. That's exactly
17 the same argument that Murrey's makes today to the UTC.
18 The board rejected this argument and ruled
19 the highway movement of containers and trailers is an
20 integral and necessary element of TOFC service. So the
21 board exercised its exemption authority and adopted 49
22 CFR Section 1090.2 and that is the CFR exemption that's
23 been cited in both of the parties' papers to Your Honor.
24 That is a -- is a broad exemption and I want to just
25 focus on two parts of this exemption.

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1 The first part is that it exempts from
2 federal regulation TOFC service provided by a rail
3 carrier either itself or jointly with a motor carrier as
4 part of a continuous intermodal freight movement.
5 Regardless of the type, affiliation, or ownership of the
6 carrier performing the highway portion of this service.
7 That exemption, that regulation, also
8 provides that motor carrier TOFC pickup and delivery
9 services arranged independently with the shipper or
10 receiver and performed immediately before or after a
11 TOFC movement provided by a rail carrier are similarly
12 exempt. So with this third rulemaking, the board
13 effectively deregulated TOFC services.
14 Now, the motor carriers challenged this
15 regulation and this exemption that the final version
16 of -- and it -- and they argued that the board's
17 exemption authority was limited to only transportation,
18 quote, provided by a rail carrier, end quote. Again,
19 the same argument that Murrey's makes here.
20 The DC Circuit in Central States in a
21 decision authored by then Judge Ruth Bader Ginsburg
22 rejected this argument. The DC Circuit concluded with
23 little difficulty, those are its words, that the board
24 had jurisdiction over motor carrier operations that are
25 closely related to TOFC rail transportation even though

<p style="text-align: right;">Page 13</p> <p>1 the rail and motor carrier segments are contracted for 2 and billed separately. So the DC Circuit upheld the 3 exemption. 4 Now, I want to be clear here because there 5 has been confusion generated by the response brief about 6 why this exemption matters, why this CFR provision is 7 relevant here. It's not relevant here because it itself 8 exempts UTC regulation. As I noted and as is clear from 9 the statute and the regulation, it only exempts federal 10 regulation. That regulation is relevant here because it 11 confirms that Congress's broad grant of exclusive 12 jurisdiction over rail transportation to the board 13 includes all TOFC service no matter who provides the 14 motor carrier segment or under what terms. 15 In Central States, Judge Ginsburg for the 16 court wrote exercise of the ICC's exemption authority 17 neither lodges nor dislodges agency jurisdiction. It 18 presupposes ICC jurisdiction over the persons or 19 services exempted. So the exemption itself required 20 that the board had jurisdiction over all parts of any 21 TOFC movement in the first place before the board could 22 take action to promulgate the exemption. And that 23 jurisdiction by statute is exclusive over rail 24 transportation. 25 Congress has never disapproved 49 CFR</p>	<p style="text-align: right;">Page 15</p> <p>1 facts in the law correctly, but I think there are a few 2 discrepancies that need to be pointed out. 3 What I'd like to start even earlier than 4 that, what's at issue in this case are not just whether 5 or not the services provided by the Respondents are or 6 are not subject to UTC regulation. The position being 7 taken by the Respondents is so long as solid waste is 8 loaded onto a train, it doesn't matter where it started 9 and how it got there. All services being provided 10 leading up to rail transportation of solid waste would 11 be preempted according to the Respondents' position. 12 That means all economic regulation beyond 13 just the UTC's requirement that a solid waste collection 14 company comply with RCW 81.77. This would implicate 15 municipal taxes, this would implicate state taxes, this 16 would implicate regulatory fees. And what they're 17 planning essentially is that so long as you load it onto 18 the train, any trucking company who does not therefore 19 have to comply with state environmental regulations or 20 state economic regulation as to price would be required 21 to comply. They can just do whatever they want because 22 there's no state regulation. 23 And by the way, there's no federal 24 regulation of this service either, so they're claiming 25 essentially that they're free from regulation to do as</p>
<p style="text-align: right;">Page 14</p> <p>1 Section 1090.2 or the longstanding Central States' 2 decision confirming the board's jurisdiction over TOFC 3 movements. They remain the law now nearly 30 years 4 later. 5 Murrey's is asking the UTC to make an 6 unprecedented assertion of authority here to regulate a 7 highway transportation of solid waste that is an 8 integral part of a continuous intermodal rail 9 transportation service. Murrey's invitation to assert 10 state authority over conduct that Congress has expressly 11 preempted from state regulation should be rejected. 12 And, Your Honor, I would reserve the 13 remainder of my time. 14 JUDGE O'CONNELL: Okay. You have an 15 additional 30 seconds, so I will mark that as three 16 minutes and 30 seconds that you may reserve for 17 responding to anything that Murrey's Disposal brings up. 18 Okay. Let's turn -- 19 MS. GOLDMAN: Thank you, Your Honor. 20 JUDGE O'CONNELL: You're welcome. 21 Let's turn to Murrey's Disposal, 22 Mr. Fassburg. I'm going to set my timer for 15 minutes 23 and you can begin when you're ready. 24 MR. FASSBURG: Thank you. So, Your Honor, I 25 believe Ms. Goldman did, in fact, describe some of the</p>	<p style="text-align: right;">Page 16</p> <p>1 they choose, and those are not policies that the state 2 should encourage. 3 Now, the state's regulation of solid waste 4 collection is something that U.S. Congress has 5 explicitly recognized as an important police power of 6 the state for the public health and safety. And so in 7 the context of motor carriage of solid waste, the U.S. 8 courts have determined there is no preemption of, for 9 example, intrastate transportation of solid waste 10 generated within the state, and there is -- it is 11 permissible for the state to engage in economic 12 regulation, for example, requiring a company obtain a 13 certificate to provide solid waste transportation via a 14 truck. 15 Now, that's important because what was not 16 explained by the Respondents is that all of these cases 17 and these exemptions were created in the context of a 18 different regulatory regime than exists today. Rail 19 transportation was preempted at a previous time than 20 trucking. In 1989 and 1987 and 1991, state regulation 21 of trucking was still allowed. It wasn't until 1994 22 that the state regulation of trucking was preempted by 23 the FAAAA. 24 So understanding that is important to the 25 outcome here because when each of these steps was taken,</p>

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1 Congress allowed the regulation of trucking at the
2 federal level and at the state level. At the federal
3 level, the ICC was in fact the regulatory agency with
4 jurisdiction over interstate trucking, and it was the
5 UTC here in Washington that had jurisdiction over the
6 regulation of intrastate trucking.

7 Now, what's at issue in this case is a leg
8 that occurs entirely within the state transportation
9 from either Port Angeles or Port Townsend to another
10 point within the state. That would be intrastate
11 trucking. Absent any sort of preemption argument, that
12 would absolutely be subject to the jurisdiction of the
13 UTC under the cited case law.

14 Now, what Respondents claim is that because
15 that leg is to a rail train loading facility and the
16 material is then loaded onto a train, the UTC would not
17 have authority to regulate that leg.

18 Well, interestingly, that issue was
19 addressed in ICC versus Texas, one of the very cases the
20 Respondents rely upon to claim there's preemption.
21 Interestingly, if you're -- if you review the cases
22 cited by the Respondents, not a single one of them
23 addresses preemption of TOFC service. Instead, every
24 single one of them deals with whether or not the ICC
25 has the authority to exempt from regulation, this

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1 TOFC/COFC service.

2 In ICC versus Texas, the very -- the issue
3 that was central to that case was whether or not the
4 State of Texas had authority to continue its regulation
5 of intrastate TOFC service. After phase two or plan
6 two, TOFC service had already been exempted by the ICC.
7 And what the U.S. Supreme Court stated is that the ICC
8 had authority to exempt state regulation TOFC service.

9 Now, if it were true that broad rail carrier
10 preemption already existed, it would have been
11 unnecessary for the Supreme Court to reach that
12 decision. Because if broad preemption of -- by motor
13 carrier TOFC service had already existed, there would be
14 no need for any such exemption. So clearly, the
15 authority to regulate by the state was presupposed by
16 that decision.

17 Now, I find it interesting that the
18 Respondents argue that CR -- 49 CFR 1090.2 does not
19 provide exemption of state regulation, because if there
20 is the authority to regulate by the state under the
21 ICCTA, which the U.S. Supreme Court clearly indicated
22 there was in ICC versus Texas, the fact that 49 CFR
23 1090.2 only exempts federal regulation, that means that
24 the state remains free to regulate.

25 Taking this step one step further, what the

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1 Respondents apparently rely upon but also this claim
2 relies upon, are the exemptions in 49 CFR 1090.2. In
3 the history of those exemptions and their words give
4 meaning to what's at issue in this case, what was first
5 exempted in 49 CFR 1090.2 was TOFC/COFC service being
6 provided by a rail carrier in equipment that it owned.

7 Now, it's important to understand that when
8 that happened, railroads were competing with motor
9 carriers for basically door-to-door service. And in the
10 history of those exemptions, it discusses and, in fact,
11 the case law cited by the Respondents, it discusses how
12 railroads were preventing TOFC/COFC service. So the
13 first real phase in deregulation of TOFC/COFC service
14 was essentially forcing the railroads to allow that
15 through door-to-door service to occur.

16 The next step said if a rail carrier is
17 actually providing the motor carrier service so that it
18 can compete with motor carriers, that would be
19 considered by a rail carrier. And, again, this is in
20 the context of the exemptions.

21 Then they took it a step further and said
22 that if the motor carrier is providing jointly with the
23 rail carrier or as its agent, they can be exempted too.
24 But they refused to go one step further than that and
25 say if the motor carrier is the one arranging for this

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1 service, if it's the true through carrier and it's only
2 replacing a segment of its own service with rail
3 service, that is not exempted.

4 The final phase of the exemptions that were
5 addressed by Respondents were that pickup and delivery
6 service. Now, that service was given broad-brush
7 treatment. Pickup and delivery service may not be
8 something that's broadly understood today due to the
9 deregulation of trucking in 1994. The pickup and
10 delivery service dealt with a local area. It was either
11 in the terminal area or in a commercial zone. That
12 would typically have been defined as we've addressed in
13 our response brief to be basically within the confines
14 of a single city or its metropolitan area.

15 It is unquestioned and undisputed in this
16 case we're not dealing with services within a single
17 commercial zone or a terminal area. The service is
18 pickup from Port Townsend Paper or McKinley Paper and
19 delivery to a place in a different county. And so that
20 third and final leg of the exemptions does not apply to
21 this service. Instead, this service falls fully -- or
22 falls fully within plan one TOFC/COFC service where the
23 motor carrier is the one that provides the service and
24 it subcontracts to the railroad. And that is the
25 facts -- the facts, I'm sorry, that has been admitted

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1 for the purposes of this motion are that Waste
2 Management subcontracts to the railroad, and so they
3 don't even fall within the exemption scheme that they
4 now claim is related to their claim here.
5 Now, finally, the issue that was
6 mischaracterized with respect to our position about
7 whether or not service is by a rail carrier or related
8 to a rail carrier. There is a difference between
9 exemption authorities and preemption authorities.
10 Now, what's at issue in this motion is the
11 preemption authority. Respondents have claimed broadly
12 that, because the ICC now the STB, have jurisdiction
13 over rail transportation, that should apply to service
14 that is decidedly provided by someone other than a rail
15 carrier. This is a trucking company, this is Waste
16 Management of Washington, and this is a landfill, or
17 that the three parties in each of these two proceedings
18 fit those descriptions. None of them is a rail carrier.
19 Now, why that matters is because rail
20 carrier was clearly defined within the statute that
21 provides the jurisdiction of the board. 49 USC 10102
22 defines rail carrier as a person providing common
23 carrier railroad transportation service for
24 compensation, and it goes on, but it does not include
25 related to a rail carrier. That language related to a

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1 rail carrier is included only within the exemption
2 authority of the ICC.
3 And so when the ICC can exempt from
4 regulation something that isn't by a rail carrier, that
5 is a different question as to whether or not it is
6 automatically preempted by the broad sweep of the ICC's
7 jurisdiction.
8 So the cases that we've cited addressing
9 preemption where it relates to service being provided by
10 a rail carrier have been very narrowly construed to
11 apply only to agents of railroads. It typically relates
12 to service being provided at a train load facility, but
13 it does not limit it -- it's not limited to that, but it
14 doesn't go very far beyond that.
15 A review of the case law will demonstrate
16 that only if they're an agent of the rail carrier and
17 then providing transportation services typically on
18 property owned by the railroad are -- do preemption
19 arguments extend beyond the rail carrier itself. And,
20 again, those arguments don't apply here. This is not
21 transportation on railroad property, using railroad
22 property, or by a rail carrier. This is transportation
23 of solid waste on trucks owned or leased by a trucking
24 company to a transload facility that is not owned by the
25 railroad onto -- then onto rail cars owned by the

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1 railroad -- rail cars owned by the railroad. And that
2 large disconnect in the relationship establishes that
3 there is no preemption as to these services.
4 I'll see if there's any other notes I have
5 that I wanted to relay before I conclude my points, but
6 I believe that covered it. I think -- I think that does
7 conclude it. Thank you.
8 JUDGE O'CONNELL: Okay. Thank you,
9 Mr. Fassburg.
10 I'm going to set my timer for three minutes
11 and 30 seconds. Ms. Goldman, whenever you begin, I will
12 start the timer. Thank you.
13 MS. GOLDMAN: Okay. Thank you, Your Honor.
14 I will try to be as quickly -- quick as I can to address
15 these issues.
16 The key thing here you did not hear from
17 Mr. Fassburg is that there's no dispute that what you're
18 looking at here is TOFC. There's no dispute. That is
19 what you're looking at here. You're not looking at a
20 transload facility, you're not looking at construction
21 of some -- some facility that's adjunct to a railhead.
22 You are talking here about TOFC service.
23 He broadly misstates what the issue is
24 before the Court to say that solid waste loaded onto a
25 train, it doesn't matter how it got there or who it's

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1 from and then it gets dumped onto a train is inherently
2 what you are deciding today, and, Your Honor, that is
3 very much not what you're deciding today.
4 This is a narrow situation. It's -- it's
5 the type of fact pattern that is going to occur very
6 rarely. We're not talking about a Waste Management
7 truck going to a railhead and then dumping its waste on
8 the ground and then being transloaded to a train. We
9 are talking about what is clearly understood to be TOFC.
10 These are containerized waste that go from one -- one
11 leg of transport that is by truck to the other leg of
12 transport that is by train exactly as they were
13 initially loaded.
14 The cases that are -- have been cited by
15 Murrey's don't concern preemption under this statute.
16 They concern preemption issues raised under the Commerce
17 Clause, and they concern the FAAAA, which concerns
18 aviation. They have no bearing whatsoever on the issue
19 here, which is this statute, which clearly says on its
20 face that state regulation is not permitted. You don't
21 need to go to any -- any creative interpretation here.
22 That's what the statute says.
23 I also -- I want to briefly address the
24 pickup and delivery service issue, which is -- is raised
25 kind of at the very end of their brief, and I'll cite

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<p>1 you to it, Your Honor.</p> <p>2 On paragraph 27 of their brief, they offer</p> <p>3 you some -- some cites for the authority that service</p> <p>4 must be performed within a terminal area or commercial</p> <p>5 zone for it to be pickup and delivery service as</p> <p>6 contemplated by the -- the CFR. You can review every</p> <p>7 single one of their cites as I have and you'll find</p> <p>8 nothing that says anything like that in those citations.</p> <p>9 There is no such rule.</p> <p>10 And to the degree that there's any confusion</p> <p>11 about it, Your Honor, I would suggest you -- and I'll</p> <p>12 provide this cite again to you after the argument, but</p> <p>13 this is -- take a look at ICC's 1989 decision where it</p> <p>14 adopted the CFR that's at issue here. Take a look at</p> <p>15 the way they describe the authority, and they are</p> <p>16 indeed, as Mr. Fassburg says, talking about door-to-door</p> <p>17 service. They're not limiting pickup and delivery in</p> <p>18 any fashion to, you know, the -- the -- the economic</p> <p>19 area, the commercial zone, the city, what have you. You</p> <p>20 have been pointed to not a single rule that -- that</p> <p>21 applies in the fashion that they suggest.</p> <p>22 I want to also just briefly address, Your</p> <p>23 Honor, this -- this business about related to. He says</p> <p>24 to you that the preemption authority doesn't say</p> <p>25 anything about related to. It's only if the exemption</p>	<p>1 Commission lacks jurisdiction in this instance to</p> <p>2 require MJ Trucking and Daniel Anderson Trucking to have</p> <p>3 a solid waste collection permit. And do I understand</p> <p>4 correctly that your argument that the Commission lacks</p> <p>5 jurisdiction is based solely on the preemption provision</p> <p>6 of the ICCTA, the Interstate Commerce Commission</p> <p>7 Termination Act, that's true?</p> <p>8 MS. GOLDMAN: That's -- that's correct, Your</p> <p>9 Honor, as that authority has been confirmed by the DC</p> <p>10 Circuit and by the board itself.</p> <p>11 JUDGE O'CONNELL: Okay. Is your preemption</p> <p>12 argument based at all upon the Surface Transportation</p> <p>13 Board's regulations, the interpretation of its</p> <p>14 jurisdiction, or the exemption language in 49 CFR</p> <p>15 1090.2?</p> <p>16 MS. GOLDMAN: Yes, Your Honor, it is because</p> <p>17 the promulgation of the regulation in that CFR itself</p> <p>18 and the decision in which the Commission explains the</p> <p>19 basis for is adopting that -- that -- that regulation</p> <p>20 and then the DC Circuit's affirmation that the board</p> <p>21 acted within its authority is the law as -- that goes to</p> <p>22 the breadth of the authority to regulate rail</p> <p>23 transportation, which is by statute by itself exclusive</p> <p>24 to the federal government.</p> <p>25 JUDGE O'CONNELL: Okay. Does your motion</p>
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<p>1 that says related to. And, Your Honor, that just is not</p> <p>2 true. The definition of transportation in this --</p> <p>3 JUDGE O'CONNELL: Ms. Goldman, you're going</p> <p>4 to have to stop, but I understand your point, your</p> <p>5 counterpoint to what Mr. Fassburg said about preemption</p> <p>6 versus exemption authority.</p> <p>7 I want to move forward because I -- I still</p> <p>8 do have quite a few even more detailed legal questions,</p> <p>9 if you can believe it, for each side. For -- I want to</p> <p>10 start with Respondents, and I have many questions that I</p> <p>11 want to ask, and then I have just as many for Murrey's</p> <p>12 Disposal.</p> <p>13 Ms. Goldman, your -- your motion is a</p> <p>14 12(b)(6) motion to dismiss for failure to state a claim</p> <p>15 upon which the Commission may grant relief. In</p> <p>16 evaluating your motion, I'm -- I have to construe the</p> <p>17 facts of the complaint in the light most favorable to</p> <p>18 Murrey's Disposal, but as I understand, I should -- as I</p> <p>19 understand your argument, I should rule in your favor if</p> <p>20 no facts or circumstances consistent with the complaint</p> <p>21 would present the Commission with jurisdiction; is that</p> <p>22 correct?</p> <p>23 MS. GOLDMAN: That is correct, Your Honor.</p> <p>24 JUDGE O'CONNELL: Okay. So I want to</p> <p>25 confirm the basis for the motion. You assert that the</p>	<p>1 also include a Commerce Clause argument?</p> <p>2 MS. GOLDMAN: It does not.</p> <p>3 JUDGE O'CONNELL: Okay. And a question</p> <p>4 about TOFC transportation, would you still argue that</p> <p>5 states are preempted from regulating TOFC that is not by</p> <p>6 rail carriers? And I'm thinking, what if the TOFC</p> <p>7 movement is wholly intrastate, is conducted by a motor</p> <p>8 carrier only, and never travels by rail?</p> <p>9 MS. GOLDMAN: Your Honor, I think that by</p> <p>10 definition, that's not TOFC.</p> <p>11 JUDGE O'CONNELL: Even if it --</p> <p>12 MS. GOLDMAN: TOF --</p> <p>13 JUDGE O'CONNELL: Go ahead.</p> <p>14 MS. GOLDMAN: Sorry, Your Honor. TOFC</p> <p>15 requires inherently, and the DC Circuit explained it, as</p> <p>16 has the U.S. Supreme Court, the two different types of</p> <p>17 transport. The -- it can be by both sometimes, but it</p> <p>18 always includes a rail component.</p> <p>19 JUDGE O'CONNELL: Okay. So it's not special</p> <p>20 to the fact that this is the container, it has to be by</p> <p>21 rail or by boat?</p> <p>22 MS. GOLDMAN: Well, the -- yes -- yes and</p> <p>23 yes, Your Honor. The relevance of the container is that</p> <p>24 it is intended for that mode of transportation from door</p> <p>25 to door. Never to -- never to be unpacked at any point</p>

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1 or -- or handled in any fashion. It's put in the type
2 of container that is intended for this intermodal two
3 modes of transportation including rail. So it goes on a
4 truck bed and it goes on the rail car exactly in the
5 same fashion, but it does require that one of those legs
6 be by train.
7 JUDGE O'CONNELL: Okay. So in reviewing
8 your -- your motion, what is the significance of --
9 well, there -- they're the same footnote, but there are
10 different footnote numbers. Footnote four in your
11 motion for 200650 and footnote six in Docket 200651, it
12 seems to suggest that the exemption language from the
13 Surface Transportation Board in 49 CFR 1090.2 is
14 irrelevant for the preemption question.
15 MS. GOLDMAN: Your Honor, let me just read
16 the footnote so I can be sure to answer your question.
17 So I hope this answers your question, and, please, Your
18 Honor, if it doesn't, let me know.
19 But what we're trying to explain here is
20 that we're not saying that the regulation is what
21 preempts your authority. The statute preempts your
22 authority. The relevance of the regulation is that it
23 confirms the breadth of the regulatory preemption,
24 because absent the authority to act on TOFC matters, in
25 the first instance, as part of its exclusive authority

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1 to regulate rail transportation, the board could not
2 have engaged in the rulemaking and then adopted that
3 provision.
4 So there's discussion about the exemption
5 and then exemption to the exemption, none of that
6 matters for your purposes.
7 What matters for your purposes is that all
8 of it is TOFC, and then it goes to the far breadth of
9 TOFC, which uncoupled any contractual or control
10 relationship between the rail and the motor carrier and
11 that that is therefore within the bailiwick within the
12 exclusive statutory jurisdiction of the board. Did that
13 answer your question?
14 JUDGE O'CONNELL: Yes, yes. But I want to
15 follow up and make sure I -- I understand. So you're
16 also saying, for instance, that Murrey's Disposal's
17 argument that transportation offered where the rail
18 carrier's the agent of the motor carrier, it's the
19 fourth sentence of the 1090.2, that argument misses the
20 point because even if that is the structure, the Surface
21 Transportation Board has authority over that arrangement
22 and authority to exempt or not exempt it from federal
23 regulation?
24 MS. GOLDMAN: Exactly, Your Honor. All of
25 this is part of the jurisdiction and this exception that

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1 they point to, which frankly, does not apply based on
2 what they allege. Even if it did, the effect of the
3 exception is to put us back within the federal
4 regulation authority.
5 In other words, it removes it from the
6 exemption. If the exemption says all this stuff that
7 has to do with TOFC, we're not going to regulate it. We
8 the Federal Government, we're not going to regulate it
9 except for the following. And if the following applies,
10 it just means that there's no federal exemption.
11 None of this has to do with preemption,
12 which is the statute. The statute says that the
13 authority is preempted and -- and it is for the board
14 and the exercise of its exclusive jurisdiction to make
15 these kind of finer points about what types of TOFC they
16 want to regulate still, which is the exception, or which
17 types of TOFC, which is pretty much everything else,
18 they are deeming to be exempt because the marketplace is
19 fully functional and does not require regulation to
20 protect the buying public.
21 JUDGE O'CONNELL: Okay. I'm still thinking
22 about the fourth sentence in 1090.2. That -- that part
23 of exemption language, it refers back to the exemption
24 stated in the first sentence. And that exemption in the
25 first sentence very clearly says it applies to when the

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1 rail carrier is providing the motor transportation or is
2 jointly providing it with the motor carrier.
3 So how should I resolve whether that
4 language in the fourth sentence is simply clarifying the
5 exemption in the first sentence and does not imply that
6 the Surface Transportation Board has authority over the
7 circumstances where the rail carrier is only the agent
8 of the motor carrier?
9 MS. GOLDMAN: So let me start with the last
10 sentence, your last sentence, Your Honor.
11 JUDGE O'CONNELL: Sure.
12 MS. GOLDMAN: None of this -- none of this
13 has to do with -- none of -- all of this, no matter
14 which sentence you pick, has to do with confirming the
15 authority, okay? All of this is within their authority
16 to exempt to regulate. That is the determination, the
17 exclusive decision that is to be made by this federal
18 agency, so all of it is within their authority. And, of
19 course, we know that they can revoke to the degree that
20 any of these exemptions they later determine are not
21 effectuating federal rail transportation policy, they
22 can revoke them and reinstate regulation. So all of
23 this, no matter which sentence you pick, confirms the
24 breadth of the authority of the -- of the board.
25 I would say too, Your Honor, that this last

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1 sentence is -- in general is talking about the entire
 2 exemption. It's saying the exemption. It's not just
 3 referring to the circumstances in the first sentence.
 4 But if we look at what the second sentence
 5 of this -- of this regulation says, it's even more
 6 important to show how incredibly broad the -- the ICC
 7 intended it to be. And I will also, Your Honor, if
 8 in -- quote to you what the ICC said in adopting this
 9 regulation, which it is ordered and I am -- am reading,
 10 Counsel, from the 1989 decision of the board improvement
 11 of TOFC/COFC regulation pickup and delivery. And I will
 12 provide to Your Honor again the cite after the argument.
 13 The -- the ICC states it is ordered the
 14 over-the-road portion of TOFC/COFC pickup and delivery
 15 services provided by motor carriers as part of a
 16 continuous intermodal movement is exempted from
 17 regulation to the extent -- extent noted above.
 18 So they are saying here that any TOFC
 19 service that is provided by a motor carrier as part of
 20 this TOFC continuous intermodal service is exempted.
 21 That is the intent of their enlarging the exemption in
 22 1989.
 23 JUDGE O'CONNELL: Okay. I -- I have for
 24 both sides some questions to follow up on the history of
 25 the adoption by the ICC and the STB. In my review of 49

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1 CFR 1090.2, I -- I notice that the regulation is almost
 2 wholly the same as the regulation previously written by
 3 the ICC. Is it -- Ms. Goldman, is it your position that
 4 the ICC, similarly to the STB, has sole jurisdiction
 5 over TOFC transportation?
 6 MS. GOLDMAN: Yes, Your Honor. That's an
 7 excellent question. The ICCTA, when it was adopted, was
 8 a big reorg. They changed the name of the board, but it
 9 specifically gave the board the exact same scope of
 10 jurisdiction. And each of these statutes that -- that
 11 we are -- that I've mentioned in my argument existed at
 12 the time. And there -- so for example, they're --
 13 they're referenced in Central States where Judge
 14 Ginsburg goes through this regulatory and statutory
 15 history. The citations are all wrong now, but all of
 16 those statutes exist today in -- in the -- in the -- in
 17 the formats that I've identified, so it's the same.
 18 JUDGE O'CONNELL: Okay. So would it still
 19 have -- would it still have value at all, then, how the
 20 ICC interpreted it -- its jurisdiction because all of
 21 that was brought in the same? Okay.
 22 MS. GOLDMAN: Yes.
 23 JUDGE O'CONNELL: I'm -- I'm seeing you
 24 nodding, but for the -- the court reporter, I want to
 25 make sure verbally yes, that's...

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1 MS. GOLDMAN: Yes, Your Honor, and I can't
 2 imagine there's any dispute about that because that's
 3 exactly what ICCTA said about its reorganization.
 4 JUDGE O'CONNELL: Okay. Does it -- does it
 5 matter that it is solid waste that's the item that is
 6 being collected from McKinley and Port Townsend Paper
 7 and put into the TOFC because -- well, let me give you
 8 the chance to respond.
 9 MS. GOLDMAN: No, it -- it doesn't matter
 10 for purposes of the impact of the TOFC. There's one
 11 point to be made about solid waste, which is separate
 12 from the TOFC, but it is to reference the jurisdictional
 13 statute, and I want to give you the cite, Your Honor.
 14 It's 49 USC Section 10501.
 15 JUDGE O'CONNELL: 10501?
 16 MS. GOLDMAN: 10501, and it's C, Sub C, Sub
 17 2, Sub B. And what that says, I'm going to read it to
 18 you, Your Honor, this is -- this is what follows after
 19 the statements in the statute that transportation by
 20 rail carrier that the jurisdiction of the board over
 21 that will be exclusive.
 22 Later as a result of many of the cases that
 23 Murrey's has brought to you regarding what happens at
 24 these transloading facilities and the concern about
 25 nobody being able to regulate the environmental impact

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1 because the -- the cases were saying well, this broad
 2 preemption means that none of these city and state and
 3 local environmental regulations apply, and -- and many of
 4 those cases that have been cited to Your Honor say
 5 that.
 6 Well, Congress then went back and it
 7 withdrew a small sliver of this broad authority,
 8 exclusive authority in -- in the statute that I quoted
 9 to you, and it says the board does not have -- except as
 10 provided in the unrelated paragraph, the board does not
 11 have jurisdiction over solid waste rail transfer
 12 facility, et cetera.
 13 So that confirms because it's only limited
 14 it very -- in a very small way that otherwise solid
 15 waste was interpreted as one of the many commodities
 16 that could be part of rail transportation and was
 17 subject to the exclusive jurisdiction.
 18 JUDGE O'CONNELL: That -- that's what I want
 19 to ask a question about. How should I resolve ICC
 20 rulings that state solid waste is not property for
 21 purposes of its regulations?
 22 MS. GOLDMAN: Well, Your Honor, I would
 23 point to what is -- I would point you to this statute,
 24 to this -- this jurisdictional statute, which carves out
 25 only the small piece of what at that time was a broad --

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1 broad case law saying that the case law, the courts,
 2 the -- the appellate courts of the United States saying
 3 that the preemption authority included preemption over
 4 the transport of solid waste. It was not treated any
 5 differently than any other commodity.
 6 And then Congress made only the small change
 7 to say, well, you know, if you're going to build a
 8 facility, which is really going -- getting a little far
 9 away from transportation anyway, we want -- you know, we
 10 want the Environmental Protection Agency and we want the
 11 local environmental agency to be able to regulate it.
 12 But other than that, Congress left undisturbed these
 13 cases that had said that transportation involving solid
 14 waste was subject to this preemption.
 15 JUDGE O'CONNELL: Okay. That -- so I
 16 will -- I am -- I still have more curiosity about this
 17 distinction between solid waste and whether it is or is
 18 not property within the jurisdiction of the ICC and now
 19 the STB. I'm still curious whether the distinction that
 20 some of ICC's cases, the distinction that it -- it -- it
 21 calls, whether that still holds any value in the -- in
 22 the jurisdictional evaluation.
 23 But what I've heard from you, I think, I'm
 24 going to give you a chance to -- to clarify, is that
 25 because of the ICCTA and the reorganization, any -- any

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1 distinction that solid waste was not property is -- is
 2 no longer of value?
 3 MS. GOLDMAN: Well, I -- I would say that
 4 the -- the statute, the statute that speaks for the
 5 breadth of the jurisdiction is what governs here. And
 6 the -- in -- in -- in interpreting that and interpreting
 7 the TOFC mandate of -- of authority, which allows for
 8 these exemptions, the ICC has never distinguished
 9 anything that travels on -- on this method, and it
 10 wouldn't be logical. It wouldn't make sense to -- to
 11 distinguish it in that fashion and it hasn't. And so
 12 that distinction does not matter for purposes of
 13 understanding the breadth of the jurisdiction of -- of
 14 Congress. There was no carve-out, in other words, solid
 15 waste.
 16 JUDGE O'CONNELL: I think -- I think I'm
 17 understanding your argument here, and I think I'm also
 18 understanding what I expect your -- your answer to my
 19 next couple questions to be. And so I think you could
 20 be -- it might just be a repetition of what you've
 21 already told me, but I want to make sure.
 22 The transportation of TOFC from McKinley or
 23 Port Townsend Paper to the Olympic View Transfer
 24 Station, that -- is that transportation provided by a
 25 rail carrier? And I guess my questions are, are either

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1 MJ Trucking or Daniel Anderson Trucking a rail carrier?
 2 MS. GOLDMAN: Absolutely not.
 3 JUDGE O'CONNELL: And -- and Waste
 4 Management of Washington --
 5 [Simultaneous talking].
 6 JUDGE O'CONNELL: Right. And Waste
 7 Management of Washington and Waste Management Disposal
 8 Services of Oregon, they're -- are they a rail carrier?
 9 MS. GOLDMAN: They are not.
 10 JUDGE O'CONNELL: Okay.
 11 MS. GOLDMAN: The component of the TOFC that
 12 confirms that this is TOFC that is by rail is by the
 13 rail carrier, by Union Pacific. And that is what TOFC
 14 is defined to mean. TOFC is a -- is accommodation.
 15 It's not one part. It's both parts, or in this case,
 16 multiple parts, but it's from door to door including the
 17 intermodal, the two modes of transportation. And in
 18 this case, none of the respondents are providing the
 19 rail mode.
 20 JUDGE O'CONNELL: Right. So how is the --
 21 the transportation provided by MJ Trucking and Daniel
 22 Anderson Trucking from McKinley and from Port Townsend
 23 to the Olympic View Transfer Station, how is that
 24 integrally related to transportation provided by a rail
 25 carrier? Is it just because it's TOFC?

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1 MS. GOLDMAN: Yes, it is precisely, and --
 2 and that's exactly what Judge Ginsburg held and that is
 3 what the board has held, that TOFC is the entire thing.
 4 It's not just putting something on a train. That's
 5 something else. TOFC involves these two modes of
 6 transportation, and it contemplates that one of the
 7 modes is going to be by truck or by boat in certain
 8 circumstances, which are not relevant here. And the
 9 second is going to be by train. You're going to put
 10 stuff in a container, that container is just going to
 11 move along like on a conveyer belt between these various
 12 modes.
 13 And so it's the combined fact of the TOFC
 14 service that makes this such different than anything
 15 else you regulate, Your Honor. It makes it -- why the
 16 question as posed by Murrey's is not indeed the question
 17 we're talking about here where you throw in a train
 18 under any circumstances and -- and the UTC's legs are
 19 cut out from under it for regulating.
 20 That's not the case. It's because it's part
 21 of this combo, this -- this TOFC service as defined both
 22 by the board and confirmed by the Supreme Court. The
 23 Supreme Court has defined it. You can find the
 24 definition of -- of -- of TOFC in the several cases
 25 we've cited including ICC versus Texas. And you can

1 find it again in -- in the decision by the board and in
 2 the decision by the DC Circuit that it's soup to nuts.
 3 JUDGE O'CONNELL: So how would the state
 4 requirement that a collector and transporter of solid
 5 waste, even if that solid waste is in TOFC, how would
 6 the state requirement that that entity hold a permit for
 7 solid waste collection be integrally related to
 8 transportation provided by a rail carrier?
 9 MS. GOLDMAN: So I think the analysis is I
 10 may start somewhere else. If you look at the entire --
 11 you look at the subject matter to determine if it's
 12 preempted. If it falls within the exclusive
 13 jurisdiction, it doesn't really matter what you're
 14 trying to do. You know, we're not talking about a
 15 preemption where -- conflict preemption where Congress
 16 has not expressly spoken, where you're trying to figure,
 17 you know, can we marry those two together, you know,
 18 does it really interfere with the federal piece if we do
 19 this. That's conflict preemption and that's not what's
 20 at issue here.
 21 This is express preemption. This is
 22 Congress saying straight up, States, this is not for
 23 you. And -- and this makes sense, Your Honor, because
 24 railroads have always been federally regulated, and
 25 the -- that is distinct here, that the very large

1 MS. GOLDMAN: Waste Management of Washington
 2 is the contracting entity of the -- the other entity
 3 owns the landfill in Oregon.
 4 JUDGE O'CONNELL: Right. Okay. And --
 5 MS. GOLDMAN: But, again, Your Honor --
 6 JUDGE O'CONNELL: -- so I'm -- I'm curious,
 7 then, who could be the -- consistent with the complaint,
 8 who could be the customer and would receive the bill of
 9 lading for the portion of TOFC provided by Union
 10 Pacific?
 11 MS. GOLDMAN: Waste Management.
 12 JUDGE O'CONNELL: Okay.
 13 MS. GOLDMAN: But, again, Your Honor, it
 14 doesn't matter. I mean, that's -- that's a matter of
 15 contract, right? I mean, it could be set up in any
 16 fashion and -- and none of it matters. It doesn't
 17 matter how you set up, who gets the bill of lading,
 18 because the entire thing is TOFC. The whole thing is
 19 TOFC by virtue of the intent to transport from a -- from
 20 a truck to a rail car or vice versa and in these
 21 containers from the beginning to the end. So that
 22 doesn't -- that does not matter. That's not a fact that
 23 matters one way or the other. You can assume what
 24 they've alleged, you can assume -- you can assume what
 25 they've imagined, it still wouldn't -- wouldn't make any

1 infrastructure of federal regulations from, you know,
 2 hundred years back has been to control railroads with
 3 very minor roles, if any, for states.
 4 So I don't know if that fully answers your
 5 question, but I think you start with the statute, which
 6 says it doesn't really matter. It doesn't really matter
 7 what the state is trying to do, the state cannot do it
 8 because it lacks jurisdiction or authority.
 9 JUDGE O'CONNELL: I have some questions
 10 about the complaint. Consistent with the complaint, who
 11 could be the -- the customer and receive the bill of
 12 lading from MJ Trucking and Daniel Anderson Trucking's
 13 portion of the TOFC transportation and would it matter
 14 who the customer is?
 15 MS. GOLDMAN: No, it would not matter. It's
 16 TOFC, so it would not matter, and you can see that the
 17 breadth of how the Commission has interpreted TOFC, but
 18 here the -- the -- the shipper is Waste Management.
 19 Though Waste Management typically shows up before you as
 20 a motor carrier, it's not a motor carrier here. The
 21 hauler is providing a service that is contracted through
 22 Waste Management as is the rail component.
 23 JUDGE O'CONNELL: Is it -- I'm sorry. So
 24 Waste Management Disposal Services of Oregon or Waste
 25 Management of Washington?

1 difference.
 2 JUDGE O'CONNELL: Okay. I am seeing the
 3 trend in your answers to my questions, but I still think
 4 I need to make sure that I at least voice my questions
 5 and give you a chance to -- to say it.
 6 Does it matter whether McKinley or Port
 7 Townsend Paper intends to send this solid waste to
 8 Oregon?
 9 MS. GOLDMAN: No.
 10 JUDGE O'CONNELL: Okay. Is it clear from
 11 the complaint whether Union Pacific and Waste Management
 12 Disposal Services of Oregon or Waste Management of
 13 Washington jointly provide the collection of solid waste
 14 and transportation services to McKinley and Port
 15 Townsend Paper?
 16 MS. GOLDMAN: Well, they don't provide the
 17 collection. I don't believe that's alleged. They
 18 provide the transportation service. I mean, they're
 19 just a train that -- and that's as alleged in -- in the
 20 complaint. But, again, it wouldn't matter. It wouldn't
 21 matter so long as it's part of this type of trans- --
 22 rail transportation. Rail transportation is something
 23 that the State of Washington can't regulate even if
 24 there was -- if there was no trucking part of this, if
 25 there was no motor carrier part of this and the rail

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<p>1 carrier was doing the entire transit of solid waste, 2 that would not be something within the UTC's 3 jurisdiction. 4 JUDGE O'CONNELL: Right. I'm -- I'm not 5 sure that that's -- I'm going to give Murrey's Disposal 6 a chance to talk about that, but I don't think that's 7 what is alleged in the complaint. I think it revolves a 8 lot around the transportation, the motor transportation 9 from the -- the source to the Olympic View Transfer 10 Station. So -- but is that -- is the entire 11 transportation of the TOFC, is that offered jointly by 12 Union Pacific and Waste Management? 13 MS. GOLDMAN: Well, would -- do you mean 14 jointly as in there's a contract whether they do it 15 together? It -- it's -- it's offered jointly in the 16 sense of a through transport. It's intended by 17 everybody that it's going to be coming in on a truck in 18 a container and then it's going to be a through transit 19 to a train and -- and then it's going to go to its 20 destination. That's what -- that's what this is about. 21 JUDGE O'CONNELL: Does it matter -- sorry. 22 Does it matter that there's two bills of lading? I'm -- 23 MS. GOLDMAN: No. 24 JUDGE O'CONNELL: -- guessing you're going 25 to say no. Okay.</p>	<p>1 the exercise of jurisdiction by the Commission by the 2 board to exempt from authority this broad type of -- of 3 conduct. It's not any specific one. 4 I mean, there are various different types of 5 situations that are contemplated by the exemption. So 6 what it is doing is saying this is an appropriate 7 exercise, this authority was delegated by Congress to 8 the board, the DC Circuit is saying you, the board, have 9 exercised your -- your authority well within the 10 jurisdiction, and based on your experience, because 11 between each of these rulemakings, they did a lot of 12 information gathering to see how is this working. Does 13 this matter? Does this permutation matter or does this 14 permutation matter as far as how it impacts the market, 15 which is what they care about, right, for purposes of 16 federal transportation. 17 And -- and what the DC Circuit is saying 18 here is not to any specific fact matter, but simply to 19 say you have the authority to make this determination 20 based on your exclusive jurisdiction and your -- and 21 that's what -- that's what the -- that's what Judge 22 Ginsburg says when she says -- when she confirms that 23 the exercise -- and, Your Honor, this is on page 1102 of 24 Central States, just above where it says Roman numeral 25 III two paragraphs up, she says, (as read) The exercise</p>
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<p>1 MS. GOLDMAN: No, I mean, it -- and you can 2 look again at the regulation and its very permutations 3 and -- and in Central States what Judge Ginsburg says is 4 this is effectively everything. They -- they have 5 contemplated now with this third rulemaking really any 6 scenario that you can piece it together of -- of, you 7 know, who contracts, what the -- what the mechanical 8 arrangement is and what the contractual arrangement is. 9 And any of it is -- is part of this exemption and is 10 part of this authority. 11 JUDGE O'CONNELL: My -- my last question is 12 about Central States and that decision from DC Circuit. 13 Isn't that case based upon circumstances where all motor 14 carriers are agents of the rail carrier? And why would 15 that case show that there is exclusive federal 16 jurisdiction over circumstances where the rail carrier 17 is the agent of the motor carrier? 18 MS. GOLDMAN: Well, the -- the rail 19 carrier's not the agent of the motor carrier here. I 20 mean, the motor carrier is -- is DAT or MJ. It's not 21 Waste Management. Nobody's alleging that a Waste 22 Management truck has anything to do with anything here. 23 That's not -- that's not in the complaint and it's not 24 even imaginably within the complaint. But what Central 25 States is doing, Your Honor, is it is affirming the --</p>	<p>1 of the ICC's section 10505 exemption authority neither 2 lodges nor dislodges agency jurisdiction. It 3 presupposes ICC jurisdiction over the persons or 4 services as exempted. So it's talking here, she -- she 5 is reviewing a regulation, not a regulation's 6 application with specific fact pattern to the exclusion 7 of others. 8 Now, I don't know if that longwinded answer 9 actually addressed exactly what you were asking for, so 10 if you would please tell me if I missed it. 11 JUDGE O'CONNELL: No, I think you did 12 address it, so thank you. And that is all of my 13 questions that I have for Respondents, so thank you, 14 Ms. Goldman. 15 For Murrey's Disposal -- 16 MS. GOLDMAN: Thank you, Your Honor. 17 JUDGE O'CONNELL: You're welcome. 18 Mr. Fassburg, some of my questions for you 19 are the same or very similar to the points that I asked 20 of Respondents. This -- this occasion asked me to 21 resolve a 12(b)(6) motion to dismiss. You -- you note 22 that there is a presumption against preemption in areas 23 where the States have traditionally exercised their 24 police powers. The collection and transportation of 25 solid waste is one such field, rail transportation is</p>

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<p>1 definitely not. How -- how should I resolve that 2 conflict?</p> <p>3 MR. FASSBURG: I think it's actually a 4 fairly simple proposition to resolve. What you have not 5 seen in any of the case law or citations addressed by 6 the Respondents is any authority for the actual 7 preemption of TOFC service. It's Ms. Goldman's argument 8 that because there is reference in cases reviewing the 9 exemption authority of the ICC, that it has jurisdiction 10 to regulate. She therefore says as a result of the 11 jurisdiction to regulate, therefore the service -- all 12 TOFC service is preempted. That is not addressed in any 13 authority, only the exemption authority. And as I 14 mentioned earlier, the ICC had regulatory authority over 15 trucking in 1989, 1987, and 1991. And what is not 16 clearly addressed here is whether the -- the authority 17 to regulate or not regulate is the same exact authority 18 as broad preemption like as claimed by Respondents.</p> <p>19 Without connecting those dots through 20 authority, it is a guess, but courts require the clear 21 intent of Congress to preempt particularly in fields 22 whether there's a strong state interest in regulation 23 like we have here. If this were transportation by a 24 rail carrier with STB rail carrier authority, we might 25 be talking about -- well, we might not be talking about</p>	<p>1 regulation of solid waste because solid waste is not 2 property.</p> <p>3 Well, what's preempted, what is clearly 4 preempted when it relates to a rail carrier, which these 5 respondents are not, is the transportation of passengers 6 and property. Same word is used. And so even if there 7 is preemption, there's a remaining question of whether 8 or not preemption extends to solid waste.</p> <p>9 JUDGE O'CONNELL: Okay. So I want to come 10 back to that. Your argument based on the text of the 11 ICCTA states that federal jurisdiction is only over 12 transportation by a rail carrier, but since the ICCTA 13 states that the Surface Transportation Board will have 14 jurisdiction over all matters related to rail carrier 15 providing transportation, doesn't the Surface 16 Transportation Board have deference on interpreting the 17 extent of its jurisdiction if any amount of 18 transportation by rail exists?</p> <p>19 MR. FASSBURG: I believe it does have 20 deference with respect to interpreting its own 21 jurisdiction, but it has not interpreted its own 22 jurisdiction as having broad preemptive effects. 23 Instead it has determined it has the right and authority 24 to be exempt from regulation. And where it has not so 25 acted to exempt, there is not to be presumed preemption</p>
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<p>1 this at all here today.</p> <p>2 What we are talking about is transportation 3 by a trucking company and whether or not that 4 transportation by a trucking company is preempted by a 5 statute that is expressly limited to transportation by a 6 rail carrier.</p> <p>7 JUDGE O'CONNELL: So if there is this broad 8 preemption by federal jurisdiction over the 9 transportation of TOFC in any form, how could the 10 complaint assert any claim upon which the Commission 11 could grant relief?</p> <p>12 MR. FASSBURG: Well, there is another 13 element here that needs to be addressed, but this is -- 14 this is primarily the issue that's being addressed by 15 the movement. They did not address whether property 16 would -- would or would not in fact be preempted, and 17 you raised good questions about that earlier. The fact 18 that they made clear, that Congress made clear it does 19 not intend to preempt the regulation of transloading 20 facilities does not by a converse indicate the clear 21 intention to regulate or to preempt, I mean.</p> <p>22 So these -- these cases that you were 23 referencing, the ICC cases, are very much analogous to 24 cases that we've cited in which it is determined under 25 the FAAAA there is not federal preemption of state</p>	<p>1 of -- or I'm sorry, a presumption of preemption. The 2 authority to regulate is not synonymous with preemptive 3 authority.</p> <p>4 JUDGE O'CONNELL: So have there been -- in 5 what has already been submitted to me, are there STB -- 6 sorry, Surface Transportation Board decisions that 7 address whether it has jurisdiction over all of TOFC 8 transportation regardless of whether it's by a rail 9 carrier or by a motor carrier?</p> <p>10 MR. FASSBURG: The -- that's a good 11 question. I -- I believe its exemption authority has 12 been interpreted. That's a different statute, by the 13 way, than the jurisdiction, and that's a clear 14 distinction that should be made here, the exemption 15 authority in the -- in the ICCTA, but it's set forth in 16 a different statute. And so its exemption authority has 17 been interpreted to be broad to anything related to a 18 rail carrier.</p> <p>19 JUDGE O'CONNELL: So -- okay. But how could 20 Congress delegate the Surface Transportation Board 21 authority to exempt things that are not within its grant 22 of authority to regulate?</p> <p>23 MR. FASSBURG: Well, that doesn't --</p> <p>24 JUDGE O'CONNELL: Does one necessarily imply 25 the other?</p>

1 MR. FASSBURG: Authority -- again, authority
2 to regulate is not the same as preemption. You can have
3 both state and federal regulation over the same field,
4 and this is not a broad field preemption argument. This
5 is an argument made by the Respondents that 49 USC 10501
6 broadly preempts all TOFC service. That language does
7 not exist.

8 And so, again, you can have federal -- as an
9 example that I gave earlier, there was -- there was
10 federal regulation of interstate trucking that did not
11 preempt state regulation of intrastate trucking. Those
12 were contemporaneous. Here we can have federal
13 regulation of railroad and of interstate TOFC/COFC
14 service that falls within its exemptions, but that does
15 not preclude the state's regulation of solid waste
16 transportation to a rail carrier.

17 JUDGE O'CONNELL: Okay. So it is --
18 changing the topic just slightly, is TOFC a type of
19 container that is presumed to be related to
20 transportation by rail?

21 MR. FASSBURG: TOFC service is intermodal
22 service that is transportation of a container that can
23 be interchanged between multiple modes of
24 transportation. You could have intermodal service that
25 does not include rail. So the type of container is not

1 it is reaching out and contracting to provide service to
2 a generator of solid waste. But in order to evade the
3 regulatory scheme, it has devised a way to -- to use the
4 railroads preemption to claim that it is preempted. And
5 so what it does as we've alleged is first it contracts
6 with the generator of waste, then it arranges to
7 subcontract the haul to a trucking company who then
8 takes it to Waste Management's transloading facility at
9 the Olympic View Transfer Station, loads it onto Union
10 Pacific's train, and we believe Waste Management is the
11 one arranging for and paying for transportation, but is
12 in fact a motor carrier using this scheme to avoid
13 regulation.

14 JUDGE O'CONNELL: So if subcontracting makes
15 an entity -- if subcontracting with a motor carrier to
16 provide the transportation makes you a motor carrier
17 yourself, would subcontracting with a rail carrier make
18 you a rail carrier?

19 MR. FASSBURG: No, there is a difference.
20 Waste Management of Washington is a motor carrier, and
21 if it arranges to transport for freight that it does not
22 own, it is owned by a third party, and then a trucking
23 company it subcontracts to receives the load, that's an
24 assignment of a load. It is still a motor carrier, it
25 still has motor carrier authority. It has simply

1 specific to rail. It is specific to intermodal service.
2 But the definition of TOFC is in fact transportation of
3 a container that can go from truck to rail.

4 JUDGE O'CONNELL: Okay. Regarding the 49
5 CFR 1090.2, you -- you argue that consistent with the
6 complaint, the circumstances fall under that fourth
7 sentence, which says that motor carrier service in which
8 a rail carrier participates only as the motor carrier's
9 agent is -- is not under the exemption in 49 CFR 1090.2.
10 Consistent with the complaint, is Waste Management in
11 Washington or Waste Management Disposal Services of
12 Oregon a motor carrier?

13 MR. FASSBURG: Waste Management of
14 Washington is a motor carrier, and consistent with our
15 complaint, unlike the -- the statements made by counsel
16 for Respondents, which were not consistent with the
17 complaint, we've alleged that Waste Management of
18 Washington is subcontracting the haul to the trucking
19 company. Waste Management of Washington is indeed a
20 motor carrier. It holds motor carrier authority from
21 the Department of Transportation. It holds a
22 certificate of public necessity and convenience from the
23 UTC. It's a solid waste transportation company.

24 Here, as we've alleged and we believe the
25 discovery will reveal these are in fact the facts here,

1 assigned a load to a third party.

2 It does not become a rail carrier, as a
3 matter of fact or as matter of authority, to contract
4 with a rail carrier to replace a leg of its own
5 transportation. In fact, that's -- that's what plan one
6 TOFC service is, which has not been exempted and is
7 clearly not being exempted. That's something
8 Ms. Goldman did not address accurately in her
9 description earlier.

10 She states to Justice Ginsburg an opinion
11 about the extent authority -- or the extents, sorry, of
12 the exemption, but the actual rulemaking in 1989, and
13 I'm sorry, I -- I'm trying to pull that up, I believe
14 we've actually already cited to that. It specifically
15 states that plan one TOFC service was not exempted. And
16 plan one TOFC service is where a motor carrier -- and
17 I -- and I'll -- I'll remind you at the time these rules
18 were made, there was economic regulation of trucking.
19 And so they had to have tariffs that were approved and
20 they had to have posted rates and they had to charge the
21 rates.

22 So if a trucking company replaced its own
23 line haul with the railroad line haul so that the
24 trucking company did the pickup, they took it to a
25 terminal, then it was taken by container to a rail

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1 facility, a railhead, then taken by a rail, but the
 2 railroad is not the one posting the tariff, and it's
 3 really trucking service where the trucking company
 4 subcontracts the rail company. That was not exempt.
 5 JUDGE O'CONNELL: Okay.
 6 MR. FASSBURG: That -- that is exactly what
 7 is happening here.
 8 JUDGE O'CONNELL: So as regarding my
 9 question, it sounds like Waste Management -- Waste
 10 Management of Washington by fact that it does have a
 11 certificate to haul solid waste from the Commission
 12 that, you know, you are saying that they are a motor
 13 carrier because they have that authority.
 14 I'm curious about the situation where if
 15 it's an entity that doesn't have already a certificate
 16 from the UTC as a motor carrier, if they were to
 17 independently arrange or, you know, contract with a
 18 motor carrier that transported TOFC to the -- to the
 19 transfer station, would they -- would they be considered
 20 a motor carrier or would they be more aligned as an
 21 independent shipper or receiver?
 22 MR. FASSBURG: Well, I think you didn't
 23 provide enough facts to answer your question. I would
 24 suggest in a situation like that, they probably should
 25 at least have brokerage authority and then it would be a

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1 good question as to whether they're serving as a broker
 2 or in some other relationship. These are -- and -- and
 3 this is one of the reasons why the motion to dismiss
 4 should be denied so that discovery can be conducted if
 5 the Third Circuit addressed in the High-Tech
 6 Transportation case, although contracts typically are
 7 used to define the relationships of the parties, they
 8 can be used to misdefine essentially the relationships
 9 of the parties in order to, in this case, attempt to
 10 avoid regulation. All these questions that you're
 11 asking are ones that would be answered in this case more
 12 clearly through discovery.
 13 JUDGE O'CONNELL: Yes, so that goes to some
 14 of the questions I asked of Ms. Goldman, which is, does
 15 it -- does it matter about these relationships at this
 16 point?
 17 MR. FASSBURG: Well, to the extent they're
 18 relying on exemptions at all, the answer is yes, it
 19 would matter. And these exemptions they just claimed
 20 are the actual only authority under which they could
 21 potentially avoid regulation, because there is no
 22 authority to support that TOFC has been preempted.
 23 Again, the cases expressly relied upon by the
 24 Respondents in their motion deal with the exemption
 25 authority and do not even use the word preemption.

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1 I've reviewed them again both this morning.
 2 I'll tell you Central States and ICC v. Texas both deal
 3 exclusively with exemptions from regulation and, again,
 4 as I mentioned earlier, ICC v. Texas talks about
 5 exemption from state regulation, not from federal
 6 regulation. If there was broad preemption as the
 7 Respondents claim, there would be no need to exempt from
 8 state regulation.
 9 JUDGE O'CONNELL: Okay. And so in my review
 10 of 49 CFR 1090.2, the question I asked Ms. Goldman, and
 11 in the sense the regulation's almost wholly the same as
 12 the regulation previously written by the ICC, does --
 13 does it have any value at all, then, how the ICC
 14 interpreted its jurisdiction?
 15 MR. FASSBURG: You raise a good question.
 16 It's one that I don't think we can clearly answer today,
 17 but what I will tell you is the exemption authority that
 18 was utilized by the ICC when these rules were written is
 19 not identical to exemption authority of the STB. In
 20 fact, it's been recodified. If you read the specific
 21 exemption authority address in Central States in ICC v.
 22 Texas, that was codified in 49 USC 10505, and the
 23 language that's used there is quoted in the case.
 24 The current exemption authority is in 49 USC
 25 10502 and the wording is not identical, and, in fact, in

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1 the prior version of that statute, it specifically
 2 referenced the authority to exempt regulation in respect
 3 to motor carriers in intermodal rate movements. The
 4 current exemption statute is, in fact, more limited in
 5 it only refers to the rail carrier and intermodal
 6 freight movements.
 7 JUDGE O'CONNELL: Okay. I -- I want to ask
 8 about the distinction between solid waste and property.
 9 How should I consider ICC ruling that states solid waste
 10 is not property for purposes of ICC regulation?
 11 MR. FASSBURG: I think that those should be
 12 adhered to. With respect to the transportation of
 13 freight, again, things that are of value, we probably
 14 wouldn't be here today. The reason why solid waste is
 15 regulated is because of the public health and safety
 16 concerns, and typically in consideration of whether or
 17 not the State has the right to regulate, the
 18 determination is based upon whether or not the item has
 19 value.
 20 This -- both of these two proceedings deal
 21 with items that are conceded to be solid waste and do
 22 not have positive value, they're not being sold. And so
 23 the Commission shouldn't take that fact and consider
 24 this to be solid waste, not property consistent with ICC
 25 rules.

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1 JUDGE O'CONNELL: So Murrey's Disposal and
 2 for that matter, not -- neither side, not the
 3 Respondents either, made any argument based on
 4 whether -- based on the fact that the item being
 5 transported is solid waste in this instance. And I'm
 6 curious if the reason why neither raised it, is it
 7 because that this issue of the distinction between
 8 property and solid waste, does it no longer matter
 9 whether the solid waste is the item being collected and
 10 transported --
 11 MR. FASSBURG: No.
 12 JUDGE O'CONNELL: -- for sake of
 13 determining -- okay.
 14 MR. FASSBURG: Go ahead. I'm sorry. I did
 15 not mean to speak over you.
 16 JUDGE O'CONNELL: Yeah. Does it -- does it
 17 matter for the sake of determining Surface
 18 Transportation Board jurisdiction? Obviously, the ICC
 19 made those decisions, but is it now something that has
 20 changed with the new -- the new act from Congress and
 21 new regulations and interpretations by the board?
 22 MR. FASSBURG: That's a good question. I
 23 don't know the distinction between solid waste and
 24 property has any bearing on things that you would find
 25 might have changed in the jurisdiction between the ICC

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1 and the board. So I think their jurisdiction's the
 2 same, the question is whether they are -- whether
 3 they're preempting the transportation of solid waste. I
 4 would think the rulings from the ICC with respect to
 5 property, are going to be the same under the STB's
 6 authority.
 7 JUDGE O'CONNELL: Okay. So -- so, again,
 8 about the fourth sentence in 49 CFR 1090.2, your
 9 argument is that the circumstances here fall within that
 10 description of the -- the agency between the rail
 11 carrier being the agent of the motor carrier in this
 12 instance. If the Surface Transportation Board has
 13 authority to state whether or not that agency
 14 arrangement is exempt from federal regulation, doesn't
 15 that imply that the Surface Transportation Board has
 16 authority to revoke that exemption and regulate that
 17 particular agency arrangement?
 18 MR. FASSBURG: Again, it does. Authority to
 19 regulate, though, does not mean that it is automatically
 20 preempted. So when the federal government has authority
 21 to regulate, that does not -- the case law is clear.
 22 There is not a presumption in paper regulation and field
 23 preemption based on extensiveness of regulation,
 24 requires some specific findings that have not been made
 25 and are not even being argued.

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1 JUDGE O'CONNELL: Okay. How should I
 2 resolve the questions as to whether the transportation
 3 provided by MJ Trucking and Daniel Anderson Trucking is
 4 integrally related to the transportation provided by a
 5 rail carrier?
 6 MR. FASSBURG: When it comes to the claim of
 7 preemption, and, again, I hope I'm not just repeating
 8 myself, but if there's no preemption, it doesn't matter
 9 if it's integrally related because -- and preemption is
 10 limited to transportation by a rail carrier. I've said
 11 that before. It's pretty limited. The regulation
 12 authority is broader. So if there is not authority --
 13 or I'm sorry, let me rephrase that. If it is not
 14 clearly preempted as courts require, just because there
 15 is authority to regulate, does not mean it has been
 16 preempted. And that -- so this question of related to,
 17 that falls within the exemption authorities here and
 18 that is a different question of whether preemption has
 19 occurred.
 20 JUDGE O'CONNELL: Okay. I'm noticing the --
 21 the difference between the -- the two arguments about
 22 exclusive preemption. I heard from Respondents that the
 23 exclusive preemption is clear and that we -- we don't
 24 get to point where the state is allowed to coregulate.
 25 But you're arguing that the exclusive preemption is

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1 limited to when that transportation is by a rail
 2 carrier?
 3 MR. FASSBURG: So let me -- let me hopefully
 4 rephrase this and be a little bit more clear. This idea
 5 of coregulation and whether or not there's preemption I
 6 think can be, again, clearly analyzed in the context of
 7 the FAAAA. So you have federal preemption of state
 8 regulation of transportation of property by motor
 9 carriers and yet, because it is not property, the state
 10 is clearly allowed under the case law to regulate the
 11 transportation of solid waste.
 12 If this is not transportation by a rail
 13 carrier, it is not preempted, and therefore, we're
 14 talking about motor carrier transportation. Again,
 15 under the FAAAA, there would be federal preemption if
 16 this were property, but because it is not, it is subject
 17 to state regulation.
 18 The dividing line between motor carrier
 19 transportation and rail carrier transportation is pretty
 20 clearly delineated within 42 -- 49 USC 10501 and it that
 21 states that it must be transportation by a rail carrier,
 22 which as defined there in the statute, says a -- a
 23 company with rail carrier authority and the Third
 24 Circuit interpreted same language. Again, there are
 25 pretty clear standards as to who is a rail carrier.

1 And so that's -- you know, sorry for lack of
2 clarification in my earlier explanation, but that's the
3 dividing line, are they a rail carrier, are they a motor
4 carrier? The Federal Government has the right to
5 regulate motor carriers or to deregulate the motor
6 carrier with respect to transportation of property.

7 Here we're still talking about a motor
8 carrier. We're just talking about one transporting
9 solid waste and therefore until it reaches the rail
10 carrier and is then transported by a rail carrier, it is
11 clearly subject to state regulation. The question of
12 whether or not it is continuing to be subject to state
13 regulation when it's being transported by a rail carrier
14 I think still depends on the definition of property.
15 That has been less clearly determined by courts.

16 JUDGE O'CONNELL: Okay. Well, consistent
17 with the complaint, does it -- what is the significance
18 of the two bills of lading in these circumstances and
19 does it matter who the customer is who is receiving
20 those bills of lading and organizing the transportation?

21 MR. FASSBURG: It does under the exemption
22 authority. So as opposed to preemption again, under the
23 exemption authority, and I probably articulated this
24 poorly before, but the purposes of these exemptions was
25 to put the railroads on the same footing as the motor

1 motion and this case, it has been admitted that it is
2 subcontracted to Union Pacific Railroad.

3 JUDGE O'CONNELL: So is that the -- how I
4 should interpret the use of the word "joint" is whether
5 it's -- who it's contracted to and the contractual
6 relationship?

7 MR. FASSBURG: Well, at the time the
8 exemption was written, companies, both railroad and
9 motor carriers, typically provided service under
10 tariffs. And so there were joint rate tariffs that were
11 provided jointly by railroads and motor carriers, and I
12 believe when it was for private carriage, they could
13 provide a contract for joint rate. And I believe that's
14 the way it's to be interpreted. This is joint rate.
15 Whether it's in a public tariff or a private contract,
16 if it's a joint rate provided by jointly the motor
17 carrier and the railroad.

18 JUDGE O'CONNELL: Okay. I want to -- my
19 last question, I want to ask you about the Central
20 States' decision. That decision appears that -- it
21 presupposes that if the transportation of property
22 involves a railroad, it's preempted from state
23 regulation. There were also two bills of lading under
24 the circumstances considered in Central States. How --
25 how should I think about and how should I distinguish

1 carriers in order to provide door-to-door service. The
2 motor carriers didn't need the railroads to do that. It
3 was to provide a competitive benefit to railroads. If a
4 motor carrier uses a railroad to replace part of its
5 line haul, it is not a necessary component of motor
6 carrier transportation service to compete with
7 railroads. It already had line haul service that was,
8 in fact, faster than rail service.

9 And so they did not provide this exemption
10 benefit in both directions. Rail carriers or rail
11 carriers operating jointly with rail -- with motor
12 carriers obtained this benefit of 49 CFR 1090.2. It did
13 not work in the reverse, and that was clearly
14 articulated within the rulemakings, particularly in the
15 one that was the basis of the Central State holding. In
16 that rulemaking, they made clear that motor carriers
17 that were replacing their line haul the railroad service
18 were not preempted -- I'm sorry, to be clear, they were
19 not exempted.

20 JUDGE O'CONNELL: Okay. On that, is it
21 clear from the complaint whether Union Pacific and Waste
22 Management jointly provide the collection of solid waste
23 transportation services?

24 MR. FASSBURG: It is clear they do not and
25 it is admitted in the answer. For purposes of this

1 Central State and those elements in particular from the
2 circumstances presented here?

3 MR. FASSBURG: Sure. Central State dealt
4 with local pickup and delivery service, which is, again,
5 a completely different exemption statute -- or I'm
6 sorry, exemption rule. So as we articulated in our
7 brief, and, again, this relates back to the similar
8 concepts, when a motor carrier was required to obtain a
9 certificate of public necessity and convenience, it was
10 typically authorized to provide service over a
11 particular route. And that route often included local
12 pickup and delivery service within a terminal area.

13 There was significant litigation. If this
14 really becomes a big issue in this case, which I don't
15 believe it will be, we can brief this more extensively.
16 But the pickup and delivery service within the terminal
17 area was part of the authority provided.

18 What the ICC did in its exemptions was say
19 when the freight has reached the terminal area, you do
20 not need to be the rail carrier or operating jointly
21 with the rail carrier to do the pickup and delivery.
22 And, again, that's in the rulemaking that I discussed
23 earlier. That was in part because it is frequently the
24 case under trucking that when -- or it was at least at
25 that time, it may still be the case -- there's just a

1 lot of additional arrangements that now occur now that
2 deregulations occurred. But the shipper or receiver
3 might arrange for local pickup and delivery service via
4 a different company, and so once the freight had reached
5 the terminal area, it was not uncommon for a different
6 company to provide that local service.

7 And so in Central States what was being
8 addressed was whether or not the ICC had the exemption
9 authority to go ahead and exempt that service where it
10 was no longer even related to the rail carrier. This
11 was service by a third party arranged for by the shipper
12 or receiver within that local commercial zone or
13 terminal area.

14 JUDGE O'CONNELL: Okay. That's -- that's
15 all the -- the substance I had for my questions of each
16 side.

17 Ms. Goldman, I -- I see that you would like
18 to be recognized. If you can be extremely brief in your
19 comments, I'll let you make any summary or clarify
20 anything that was discussed.

21 MS. GOLDMAN: Thank you, Your Honor. I
22 appreciate that, and as the moving party here, I want
23 to -- I want to just focus, Your Honor, again on the
24 statute. The exemption statute, which is 49 USC Section
25 10502, that is not a grant of authority. It is a

1 MS. GOLDMAN: Oh, sorry, sorry, I have a dog
2 in the background. I want to -- I guess to conclude,
3 you can -- you should, Your Honor, and you're required
4 to assume all of the facts they've alleged, and we're
5 not disputing that. For purposes of this motion, the
6 facts as they believe them to be are what you should
7 assume them to be. And you can also rearrange those
8 facts and you can make Waste Management the truck that's
9 actually picking up the -- the -- the -- the waste in
10 the container and transporting it. What matters here is
11 the mode of transportation. This -- this -- this
12 regulatory mechanism that allows for intermodal
13 transportation of solid waste. So you should assume as
14 they had alleged.

15 I also think that -- I want to make clear to
16 Your Honor, and if you go back and you read Central
17 States, you will not find anything that suggested local
18 pickup and deliveries were what they're talking about.
19 You don't find those words in that case.

20 What you find is this description of soup to
21 nuts, picking it up from the beginning to door to door.
22 That's what -- that's what it's being contemplated to
23 be. So this idea that somehow local pickup and delivery
24 means something else and that the limit of what Central
25 States was considering, you just will not find that word

1 statute which presupposes jurisdiction. That's what it
2 says. It says the first sentence, (as read) in a matter
3 related to a rail carrier providing transportation
4 subject to the jurisdiction of the board under this
5 part. The DC Circuit held this is not a grant of
6 jurisdiction. It was a recognition of jurisdiction.

7 So the only grant of jurisdiction is the one
8 that says it's exclusive. That's it. There is no other
9 grant of jurisdiction to the board over rail
10 transportation other than the exclusive one that is
11 found in RCW -- or sorry, in 49 USC Section 10501. So
12 this idea that there is preempt jurisdiction and then
13 this other stuff that -- that -- that -- that Commission
14 and the board can do whatever they want in this other
15 area, but it wasn't really subject to the jurisdiction
16 that is preempted is -- is -- is -- it just doesn't make
17 sense. There is no other authority.

18 So I wanted to -- to make that point, Your
19 Honor. There's one grant of authority here to the board
20 over the regulation of rail transportation. One and
21 only, and it says that it's exclusive. I wanted to --

22 JUDGE O'CONNELL: I understand that there is
23 a disagreement between the sides as to what is the
24 exclusive jurisdiction granted by the act. Any last
25 thoughts, Ms. Goldman?

1 or that concept in the case.

2 So we respectfully request that this be
3 dismissed. There is no jurisdiction here. The sole
4 jurisdiction over the transportation, rail
5 transportation is that authority in the one statute that
6 is provided to the board, and it has exercised its
7 jurisdiction in multiple ways including precisely the
8 one that is at issue here.

9 JUDGE O'CONNELL: Okay. Thank you. I -- I
10 feel like I kind of sprung the topic on the parties
11 about the distinction between solid waste and property
12 in prior ICC decisions as neither side brought it up or
13 addressed it. And I -- I'm somewhat unsatisfied by
14 the -- the responses that you've necessarily had to give
15 on the spot when I asked you about it.

16 I think what I -- I think that I need some
17 more brief analysis from the parties regarding that
18 question about whether the fact this is solid waste in
19 the TOFC containers, whether that has an impact on my
20 evaluation for whether there's jurisdiction including in
21 the way, Ms. Goldman, that you've characterized the
22 exclusive jurisdiction of the STB, because I -- I do
23 think that there is some -- some value in what the ICC
24 interpreted as to its jurisdiction.

25 Now, whether the interpretation has changed

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1 over time since the change from the ICC to the STB, I --
2 I expect to be addressed and explained. So I'd like to
3 ask that the parties provide short, ten-page limit
4 briefs regarding whether it matters that it's solid
5 waste being transported in TOFC for purposes of
6 jurisdiction.
7 So -- go ahead, Ms. Goldman.
8 MS. GOLDMAN: Your Honor, so that we can be
9 sure that we actually address the precise question you
10 are concerned about, what are the decisions that you're
11 referring to?
12 JUDGE O'CONNELL: Okay. I can give you one
13 side in particular, and another you've -- you've both
14 discussed before, which is the -- I believe it's the
15 1989 improvement of transportation rulemaking decision.
16 But then there's another case, the -- the name is Joray,
17 J-o-r-a-y, and I will give you the -- the cite that I'm
18 familiar with is 99 MCC 109.
19 And there may be -- there may be other cases
20 that are pertinent, there may be other decisions that
21 explain, contradict and -- and that is the issue that I
22 am interested in. At least is -- is there -- should I
23 be concerned about the fact that this is solid waste,
24 and if I should be, to what extent.
25 So that -- that is the question that I'd

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1 like very short briefs on. I want to talk about how
2 much time the parties would need to provide that short,
3 ten-page brief. Now, I -- I'd like to have the briefs
4 at approximately the same time as I expect to get a
5 transcript, because I want to -- I want the -- I want
6 the ability to go back and use the transcript from
7 today's hearing to help formulate my decision.
8 Typically, we receive our transcripts within two weeks
9 of our hearings.
10 So my question to the parties is, would that
11 two weeks be sufficient time for you to write a short,
12 ten-page brief?
13 MS. GOLDMAN: Yes, Your Honor.
14 MR. FASSBURG: And I'd like to check my
15 calendar quickly before we can say that. Mr. Wiley and
16 I both have a brief due next Thursday that it would
17 obviously take up quite a bit of our time. That one is
18 a 30-page brief that's due to the Commission. It would
19 be beneficial if we could have two weeks from that date
20 in order to submit our brief. That -- that would be
21 October 8th. I'm sorry, yeah. Yeah, that is October
22 8th.
23 JUDGE O'CONNELL: Ms. Goldman, what are your
24 thoughts? Would you benefit from that additional week?
25 MS. GOLDMAN: Your Honor, we will provide

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1 you the brief whenever you want it.
2 JUDGE O'CONNELL: Okay. Well, then, I'm
3 going to set a date, a deadline of October 8th for a
4 limited ten-page brief on that issue. I expect to get a
5 transcript within two weeks, and I typically would
6 intend and would tell the parties to expect an order
7 within ten days from when I get the transcript.
8 But given that I'm going to be receiving
9 these briefs a little bit later than I would expect the
10 transcript, I am going to tell the parties that you can
11 expect that my intention is to issue an order on the
12 motion to -- the 12(b)(6) motion to dismiss within ten
13 days of receiving the briefs. And I note that there --
14 there isn't any time constraint on issuing an order, but
15 I do want to be forward and forthcoming with what the
16 parties should be able to expect. Okay. Is there --
17 MS. GOLDMAN: Thank you.
18 JUDGE O'CONNELL: Parties, is there anything
19 else we need to address today?
20 MS. GOLDMAN: Nothing for -- from us. On
21 behalf of the Respondents, Your Honor, we're grateful
22 for the time you gave us this afternoon and the
23 attention to the briefs and the questions. We're --
24 we're grateful to the time.
25 JUDGE O'CONNELL: Okay. Thank you,

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1 Ms. Goldman, Mr. Fassburg. Thank you. Both of you,
2 well -- well argued and your representation of your
3 clients should be appreciated, so thank you both.
4 So with that, we are adjourned for the day
5 and we will be off the record. Thank you.
6 (Adjourned at 3:36 p.m.)
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CERTIFICATE

STATE OF WASHINGTON
COUNTY OF THURSTON

I, Tayler Garlinghouse, a Certified Shorthand Reporter in and for the State of Washington, do hereby certify that the foregoing transcript is true and accurate to the best of my knowledge, skill and ability.

~~Tayler Garlinghouse~~
Tayler Garlinghouse, CCR



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