BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

MURREY'S DISPOSAL COMPANY, INC. Complainant, v. WASTE MANAGEMENT OF WASHINGTON, INC., WASTE MANAGEMENT DISPOSAL SERVICES OF OREGON, INC., AND MJ TRUCKING AND CONTRACTING, INC., Respondents.	DOCKETS TG-200650 and TG-200651 (Consolidated)
MURREY'S DISPOSAL COMPANY, INC. Complainant, v. WASTE MANAGEMENT OF WASHINGTON, INC., WASTE MANAGEMENT DISPOSAL SERVICES OF OREGON, INC., AND DANIEL ANDERSON TRUCKING AND EXCAVATION, LLC, Respondents.	

COMPLAINANT MURREY'S DISPOSAL COMPANY INC.'S SUPPLEMENTAL BRIEF IN OPPOSITION TO RESPONDENTS' MOTIONS TO DISMISS

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I. INTRODUCTION

1 As addressed in Murrey's Disposal Company, Inc.'s ("Murrey's") Answer in Opposition to Respondents' Motion to Dismiss and at the oral argument on same, the question of whether state regulation of Respondents' TOFC solid waste collection and disposal service is preempted by federal law is a question that is answered in the negative by the jurisdiction of the Surface Transportation Board ("STB") (previously the Interstate Commerce Commission). The Administrative Law Judge requested additional briefing from the parties addressing the additional issue of whether the definition of "property" impacts the preemption question before the Commission. This brief will demonstrate that because Respondents' TOFC service is provided by a motor carrier and not a rail carrier, the controlling precedent unquestionably holds that solid waste is not "property" and therefore is not preempted under the Federal Aviation Administration and Authorization Act of 1994 ("FAAAA"). Consequently, Respondents' Motions to Dismiss should be denied.

II. ISSUE PRESENTED

2 Whether the term "property" as used in statutes conferring jurisdiction on the Surface Transportation Board includes the solid waste transported by Respondents.

III. ARGUMENT

A. Whether solid waste constitutes "property" is properly evaluated under statutes relating to motor carriage rather than rail transportation.

3 Although the facts upon which Respondents' Motions to Dismiss have been adequately addressed in Murrey's Complaints, Respondents' Motions to Dismiss and Murrey's Answers in Opposition, some additional context is necessary here.

4 These consolidated proceedings involve the collection, transportation and disposal of solid waste by motor carriers. Because the specific solid waste collection service involved utilizes containers that can be transloaded onto rail cars, and are in fact transloaded onto rail cars owned and

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transported by a separate rail carrier, the service also meets the definition of Highway TOFC/COFC service as set forth in federal regulation.[1] However, nothing about the type of container or its continuous movement via motor carrier and rail alters the essential nature of Respondents' solid waste collection service as "transportation by motor carrier".

5 Federal statutory definitions leave no room for doubt here. "Rail carrier" is defined "as a person providing common carrier railroad transportation for compensation, but does not include street, suburban, or interurban electric railways not operated as part of the general system of rail transportation."[2] A "motor carrier" is defined as "a person providing motor vehicle transportation for compensation."[3] Moreover, as addressed in Respondent's Complaint and Answers in Opposition, all of the Respondents save for Waste Management Disposal Services of Oregon, hold motor carrier authority from the Department of Transportation, but none of the Respondents hold rail carrier authority. Thus, they are motor carriers and not rail carriers.

6 This distinction is important in the context of not just this brief, but the overall disposition of this proceeding because the Surface Transportation Board ("STB"), like the Interstate Commerce Commission ("ICC") before it, was granted differing jurisdiction over transportation by rail carriers versus transportation by motor carriers. For example, the STB's jurisdiction over transportation by rail carrier and the remedies with respect to rates, classifications, rules, practices, routes, services and facilities is expressly exclusive.[4] Conversely, the STB's jurisdiction over motor carriers is limited to interstate transportation and is shared with the Department of Transportation,[5] while preemption of state regulation of price, route or service of motor carrier transportation is not the result of its exclusive jurisdiction, but instead set forth in 49 U.S.C. § 14501, which is expressly limited to "transportation of property."

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[1] 49 CFR § 1090.1(b).
[2] 49 U.S.C. § 10102(5).
[3] 49 U.S.C. § 13102(14).
[4] 49 U.S.C. § 10501.
[5] 49 U.S.C. § 13501.

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7 In the context of Respondents' Motions to Dismiss, this distinction is critical because their preemption argument rests upon the STB's exclusive jurisdiction over rail carriers and its separate authority to exempt services "related to a rail carrier providing transportation subject to the jurisdiction of the Board…"[6] Yet, because there are no regulations of price, route or service over motor carrier transportation authorized by Section 10501, any exemption of Highway TOFC service would necessarily provide relief from regulations established under the STB's (or ICC's) jurisdiction derived from Part B of Subtitle IV. In other words, the exemption authority set forth in Section 10502 does not expand the STB's jurisdiction under Section 10501(b), it merely reaches its jurisdiction set forth in different parts of Subtitle IV of Title 49. This distinction was recognized by the D.C. Circuit Court of Appeals opinion relied upon by Respondents, *Central States Motor Freight Bureau Inc. v. I.C.C.*, which discussed at length the legislative history of the Motor Carrier Act of 1980, and whether Congress intended to deregulate Highway TOFC service in the subsequent enactment of the Staggers Act, which permitted the ICC to deregulate "incidental-to-rail trucking."[7] Consequently, any analysis of the preemption of Respondents' Highway TOFC service must be conducted in relation to 49 U.S.C. Sections 13501 and 14501 and not under Section 10501.[8] To do otherwise would mean that any solid waste collection service related to rail transportation would be preempted under this expansive view. Considering that solid waste collection was not within the federal government's jurisdiction under those sections in the first place (addressed below), the notion that Congress intended to completely preempt every type of Highway TOFC service through nothing more than

[6] 49 U.S.C. § 10502.
[7] 24 F.2d 1099, 1103 (D.C. Cir. 1991).
[8] And to hold that the preemptive effect of Section 10501(b)(1) is as broad as the scope of Section 10502, would ultimately result in the preemption of every service that relates to rail transportation whatsoever. Because such a result would be inconsistent with the presumptions against preemption, particularly when recognized interests of the state such as involving solid waste collection are at issue, and because the 3rd Circuit Court of Appeals subsequently rejected that premise in *Hi Tech Trans* when it determined non-rail carrier's transloading facilities were not preempted, Respondents' preemption analysis is deeply flawed.

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the exemption authority it granted the STB over incidental-to-rail trucking is inconceivable.[9]

B. No authority addressing the STB's jurisdiction over rail carriers held that solid waste is "property".

8 Before addressing the definition of "property" under Sections 13501 and 14501, however, it is necessary to foreshadow Respondents' anticipated argument on this topic. As they did in their Motions to Dismiss, Respondents are likely to ignore the distinction between the regulation of motor carriers and rail carriers addressed above and instead cite to cases analyzing preemption under Section 10501. These cases analyzed state regulation affecting authorized rail carriers that were in fact transporting solid waste.[10] As addressed in detail below, however, answering the question in the appropriate context of motor carrier transportation would result in permissible state regulation of Respondents' service. Yet, even assuming *arguendo* that the cases cited were otherwise relevant, none of the cases involving rail transportation of solid waste address the question of what constitutes "property" under the definition of "transportation" in 49 U.S.C. § 10102.[11] Instead, in a series of a cases involving "the apparent constant attempts of rail carriers to alter their contractual relationships in order to avoid state regulations"[12] the courts were repeatedly asked to determine whether various transloading facility schemes constituted both "transportation" and "by a rail carrier."[13] And in none of these cases did the court pass upon the question of whether solid waste constitutes "property" under 49 U.S.C. Section 10102. And when the courts did determine that solid waste transloading facilities could be preempted, Congress took action to ensure the STB had no jurisdiction over solid waste transloading

[9] *See Pleasant Hill Bayshore Disposal, Inc. v. Chip-It Recycling, Inc.*, 91 Cal. App. 4th 678, 690, 110 Cal. Rptr. 2d 708, 716 (2001), as modified on denial of reh'g (Sept. 13, 2001)(finding it inconceivable that Congress intended to make itself the sole authority in the field of solid waste collection where local authority "has been traditionally accepted as preeminent.")

[10] For instance, Respondents cited to cases involving transloading facilities. Respondents' Mot. to Dismiss, ¶¶ 20-21.

[11] And because the definition of "transportation" is limited to "passengers or property" the scope of preemption under Section 10501 should appropriately be limited to the transportation of passengers or cargo deemed to be "property."

[12] *Waste Mgmt. of New Jersey, Inc. v. Union Cty. Utilities Auth.*, 399 N.J. Super. 508, 527, 945 A.2d 73, 84 (N.J. Super. Ct. App. Div. 2008).

[13] *Id.*; *New York Susquehanna & W. Ry. Corp. v. Jackson*, 500 F.3d 238 (3d Cir. 2007)*; Hi Tech Trans, LLC v. New Jersey*, 382 F.3d 295 (3d Cir. 2004)

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facilities.[14] Thus, these cases do not stand for the proposition that solid waste must be considered "property" when transported by the Respondents even if improperly analyzed under Section 10501 and do not demonstrate an intent by Congress to preempt state regulation of Respondents' Highway TOFC solid waste collection and disposal service.

C. The ICC and courts consistently held that solid waste is not "property" and therefore does not fall within their jurisdiction

9 Addressing this issue in the correct context leaves no room for preemption of Respondents' Highway TOFC service because solid waste has consistently been determined not to be property under either Sections 13501 or 14501(c). Starting with 49 United States Code, Section 13501, which again provided the ICC's general jurisdiction over motor carriers, and now authorizes the same to the STB, the ICC consistently determined that solid waste was not property. As the Commission is well aware, prior to the Motor Carrier Act of 1980, motor carriers transporting passengers or property in interstate commerce were economically regulated by the ICC. Over the course of decades, the ICC issued a number of orders that consistently determined that solid waste was not "property" due to its negative value and the fact that the collection and disposal of solid waste are essentially local in character with limited basis for federal rather than state regulation, and therefore its transportation was not subject to the ICC's jurisdiction.

10 The most notable of those decisions was *Joray Trucking Corp. v. Common Carrier Application*.[15] *Joray* involved the application to the ICC for a certificate of public convenience and necessity by an interstate common carrier of rock, debris and other materials from excavations and demolitions hauled to landfill for disposal. In considering the application, the ICC noted that the first issue it must consider in whether the transportation at issue was subject to the economic regulation of the Interstate Commerce Act was whether the material was in fact "property." Because the material was disposed of in a landfill, and not taken to a destination of

[14] 49 U.S.C. § 10501(c)(2)(b).
[15] 99 M.C.C. 109 (ICC Jun. 29, 1965).

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any concern to the shipper, and not actually purchased from the shipper, it was deemed to have "negative value as a commodity."[16] Thus, the ICC determined that the material was not "property" and therefore not subject to the ICC's jurisdiction.

11 Following *Joray*, the ICC considered whether other "negative value" commodities were to be treated as property over a number of years. Although in that era the ICC was concerned for a time with regulating "dangerous traffic whether it be valuable nuclear fuel or radioactive waste" it remained convinced that solid waste collection and disposal was essentially local in character and therefore should not be subject to its jurisdiction as "property."[17] That solid waste collection is a local concern rather than an area that should fall within federal jurisdiction has been recognized again and again by the Courts.[18] Indeed, in considering the definition of "property" under the FAAAA (addressed below) the 9th Circuit stated "[o]ne could hardly imagine an area of regulation that has been considered to be more intrinsically local in nature than collection of garbage and refuse, upon which may rest the health, safety, and aesthetic well-being of the community."[19] Thus, consistent with the United States Supreme Court's holding that states' authority to regulate is at its zenith in areas of local health and safety,[20] the ICC continued to decline jurisdiction over solid waste collection and transportation.

12 A useful discussion of these post-*Joray* determinations is included in the order of the United States District Court for the Northern District of Alabama in *I.C.C. v. Browning-Ferris Indus., Inc.*[21] There, the district court considered a request for injunction by the ICC against a company transporting hazardous wastes without a certificate. The dispositive issue in that case was once

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[16] *Id.* at 110.
[17] *Long Island Nuclear Service Corp., Common Carrier Application*, 110 M.C.C. 395 (ICC Sep. 9, 1969).
[18] *See, e.g. Ventenbergs v. City of Seattle*, 163 Wn.2d 92, 109, 178 P.3d 960, 969 (2008), *Kleenwell Biohazard Waste & Gen. Ecology Consultants, Inc. v. Nelson*, 48 F.3d 391, 398 (9th Cir. 1995*); Smith v. City of Spokane*, 55 Wash. 219, 221, 104 P. 249, 250 (1909).
[19] *AGG Enterprises v. Washington Cty.*, 281 F.3d 1324, 1328 (9th Cir. 2002)(citing *California Reduction Co. v. Sanitary Reduction Works of San Francisco*, 199 U.S. 306, 318, 26 S.Ct. 100, 50 L.Ed. 204 (1905)).
[20] *See Hunt v. Washington State Apple Advert. Comm'n*, 432 U.S. 333, 349, 97 S. Ct. 2434, 2445, 53 L. Ed. 2d 383 (1977).
[21] 529 F. Supp. 287 (N.D. Ala. 1981).

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again whether the material at issue had negative value as a commodity. And although the court noted that the ICC's had vacillated in its interpretation of whether certain radioactive wastes were subject to its jurisdiction, it found that the "[ICC] has not, however, held that it has jurisdiction over non-nuclear wastes that are not to be recycled or reused."[22] Consequently, the court concluded that because the waste had negative value, it was not subject to the ICC's jurisdiction as "property."[23]

13 Here, the material being transported is indisputably solid waste being disposed of in a landfill selected by Respondents. The generators have no interest in the particular landfill at which it is disposed, do not receive payment for the material transported, and are instead paying for both the collection and transportation for disposal. Thus, rather than property in which the generator has an interest, it has a decisively negative value. Moreover, the collection and disposal of solid waste have been consistently characterized as an essential local interest of the states rather than the federal government. Thus, there should be no dispute that it is not considered "property" under Chapter 131 of Title 49, United States Code. Consequently, neither the ICC nor the STB would have exercised jurisdiction over its economic regulation.[24]

14 And the subsequent termination of the ICC and creation of the STB should make no difference to the outcome of this proceeding. When the ICC was terminated and the STB created by the Interstate Commerce Commission Termination Act ("ICCTA"), no modifications were made to the pertinent definitions, or agency powers and jurisdictional sections set forth in Chapter 131.[25] Moreover, relying on ICC determinations, federal courts have continued to hold that solid waste collection and transportation do not fall within the jurisdiction established by Section 13501.[26]

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[22] *Id.* at 291.
[23] *Id.* at 293.
[24] The UTC has followed a similar analysis to determine whether RCW 81.77 requires a G-Certificate to haul a particular commodity. *See In re: Application of Inland Transportation, Inc.*, Order M.V. No. 142137 (Oct. 17, 1990).
[25] H.R. CONF. REP. 104-422, 201, 1995 U.S.C.C.A.N. 850, 886.
[26] *See Wilson v. IESI N.Y. Corp.,* 444 F. Supp. 2d 298, 309 (M.D. Pa. 2006).

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D. Congress made clear it did not intend to preempt the collection of solid waste by its enactment of the FAAAA

15 Similarly, all those courts that have considered the question have determined that the transportation of solid waste is not preempted under the FAAAA.[27] First, as held by the United States Supreme Court, preemption of state economic regulation of motor carriers is narrow and applies only when motor carriers are transporting property.[28] However, the term "property" is not defined in the FAAAA nor in Part B of Subtitle IV of Title 49, United States Code. Thus, in determining what constitutes property for purposes of preemption, courts have considered both the ICC case law addressed above and the legislative history of the FAAAA.

16 The first court to consider whether state regulation of solid waste was preempted by the FAAAA appears to have been the Court of Appeals of Washington, Division 2, in *Wash. Util. and Transp. Com'n v. Haugen*.[29] That proceeding involved a lawsuit filed by the Commission to enjoin a company which continued to collect biomedical waste without a G-Certificate after the UTC had previously determined a certificate was required.[30] After the Commission was granted an injunction, the company appealed, arguing that state regulation had been preempted by the FAAAA. Noting that the ICC had previously determined that the regulation of solid waste collection and transportation was not within its exclusive jurisdiction in *Joray*, and that Congress did not intend to alter that ruling by adopting the FAAAA, the Court of Appeals affirmed the superior court's injunction against the company.[31]

17 Another pertinent case addressing solid waste in the context of the FAAAA is the opinion of the 9th Circuit in *AGG Enterprises v. Washington County*. In that case, the court of appeals addressed whether the transportation of mixed loads of recyclable material and solid waste are preempted

[27] 49 U.S.C. § 14501.
[28] *Dan's City Used Cars, Inc. v. Pelkey*, 569 U.S. 251, 252, 133 S. Ct. 1769, 1773, 185 L. Ed. 2d 909 (2013).
[29] 94 Wn. App. 552 (1999).
[30] *Id.*; *See also In re: Classification of Haugen*, Order M.V. No. 148521 (Apr. 25, 1995)(determining that a G-Certificate was required and that the FAAAA did not preempt state regulation of solid waste collection and transportation).
[31] *Id.* at 554.

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under Section 14501. The court first noted that its interpretation of the FAAAA must be made in the context of the strong presumption against preemption of traditional state police powers such as the collection and transportation of solid waste absent a clear expression of Congress.[32] The Court then noted that Congress clearly only intended to preempt the transportation of "property" but failed to define the term. Thus the Court turned to the FAAAA's legislative history, quoting a House Report which made transparent that Congress did not intend for the FAAAA to preempt the transportation of solid waste:

> The conferees further clarify that the motor carrier preemption provision does not preempt State regulation of garbage and refuse collectors. The managers have been informed by the Department of Transportation that under ICC case law, garbage and refuse are not considered "property". Thus garbage collectors are not considered "motor carriers of property" and are thus unaffected by this provision.[33]

18 Accordingly, the 9th Circuit held "Congress' intent not to preempt the area of solid waste collection is unambiguous."[34] As a result, there is no basis upon which to deem Respondents' solid waste collection service preempted under the FAAAA.[35]

19 Finally, a similar result was recently reached by the 10th Circuit in *Boyz Sanitation Serv., Inc. v. City of Rawlins, Wyoming*.[36] That case involved a dispute by a franchised solid waste collection company over a newly enacted flow control ordinance. As a result of the ordinance, the company was no longer able to select the transfer station or landfill at which the solid waste it collected would be disposed. In challenging the city's authority to enact the ordinance, the company made a number of arguments, including that regulation over price, route and service was preempted under the FAAAA. Just like the Division 2 of the Washington Court of Appeals and the 9th Circuit, however, the 10th Circuit determined that the dispositive issue was whether solid waste

[32] *AGG Enterprises v. Washington Cty*., 281 F.3d 1324 (9th Cir. 2002)
[33] *Id* at 1329 (*quoting* H.R. CONF. REP. 103-677, 83, 1994 U.S.C.C.A.N. 1715, 1755).
[34] *Id*.
[35] *See also Woodfeathers, Inc. v. Washington Cty*., Or., 180 F.3d 1017, 1021 (9th Cir. 1999)(determining that Congress's intent to preempt local solid waste ordinances was not readily apparent to defeat Younger abstention).
[36] 889 F.3d 1189, 1200 (10th Cir. 2018).

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was considered property. And because Congress clearly indicated that solid waste is not "property" for purposes of the FAAAA, federal law did not preempt flow control ordinances affecting solid waste collection and transportation by motor carrier.[37]

IV. CONCLUSION

20 Respondents may continue to fashion ways to attempt the avoidance of state regulation of their motor carrier-based Highway TOFC solid waste collection and transportation service, but the decades-old principles at issue in this proceeding remain unwavering in favor of local and state regulation. As has been addressed by Congress, the ICC and the courts, solid waste is not property and not subject to federal economic regulation. Moreover, the courts have consistently held that solid waste collection and disposal is an inherently local concern[38] that will not be found to have been preempted absent a clear and unambiguous intent to do so by Congress.[39] Congress in fact made its intentions clear that state regulation of motor carriers transporting solid waste is not preempted. Consequently, Respondents' Motions to Dismiss should be denied and the Commission should find that providing solid waste collection by TOFC containers does not remove from the Commission's jurisdiction its authority to regulate this inherently local concern under RCW 81.77.040.

[37] *Id.*
[38] *See Smith v. City of Spokane*, 55 Wash. 219, 221, 104 P. 249, 250 (1909).
[39] *AGG Enterprises*, 281 F.3d at 1328.

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RESPECTFULLY SUBMITTED this 8th day of October, 2020.

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