**BEFORE THE WASHINGTON**
**UTILITIES AND TRANSPORTATION COMMISSION**

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| MURREY'S DISPOSAL COMPANY, INC.,<br><br>Complainant,<br><br>v.<br><br>WASTE MANAGEMENT OF WASHINGTON, INC., WASTE MANAGEMENT DISPOSAL SERVICES OF OREGON, INC., AND MJ TRUCKING & CONTRACTING,<br><br>Respondents. | DOCKET TG-200650 and TG-200651 (*Consolidated*)<br><br>**RESPONDENTS' PETITION FOR INTERLOCUTORY REVIEW AND REVERSAL OF ORDER DENYING MOTION TO DISMISS** |
| MURREY'S DISPOSAL COMPANY, INC.,<br><br>Complainant,<br><br>v.<br><br>WASTE MANAGEMENT OF WASHINGTON, INC., WASTE MANAGEMENT DISPOSAL SERVICES OF OREGON, INC., AND DANIEL ANDERSON TRUCKING AND EXCAVATION, LLC,<br><br>Respondents. | |



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## I. INTRODUCTION

1. The Honorable Andrew O'Connell, Administrative Law Judge ("ALJ"), improperly denied Respondents' Rule 12(b)(6) Motion to Dismiss complaints requesting that the Utilities and Transportation Commission (the "UTC") regulate container-on-flat-car ("COFC") transportation of solid waste that is preempted by federal law. The ALJ's order was erroneous as a matter of law because Congress has expressly, unambiguously, and broadly preempted state regulation of the highway transportation segment of a continuous intermodal movement of containerized solid waste involving rail transportation. The federal Surface Transportation Board ("STB") has exclusive jurisdiction to regulate the continuous intermodal transportation of containerized solid waste from Waste Management's customer to the landfill by rail carrier **and** motor carrier. The UTC, like all other state agencies, is preempted from regulating here.

2. As review and reversal by the UTC of Order 02 now will fully resolve this matter and ensure that the UTC does not interfere with exclusive federal jurisdiction, Respondents Waste Management of Washington, Inc. ("WMW"), Waste Management Disposal Services of Oregon, Inc. ("WMDSO") (WMW and WMDSO collectively are referred to as "WM"), MJ Trucking & Contracting ("MJ"), and Daniel Anderson Trucking and Excavation, LLC ("DAT") respectfully petition the UTC to accept interlocutory review, reverse the underling order, and dismiss this case.

## II. IMMEDIATE REVIEW IS NECESSARY

3. The UTC lacks authority to regulate MJ's and DAT's transportation of solid waste via COFC. Consequently, interlocutory review is warranted to preserve and respect exclusive federal authority. Moreover, dismissal now will prevent substantial prejudice to Respondents that will otherwise ensue from having to defend this preempted claim. And, immediate review will save the UTC and the parties substantial effort and expense litigating a dispute before a tribunal that lacks jurisdiction.



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4. The ALJ erred in four material ways. *First*, COFC service is subject to exclusive STB jurisdiction because it is intermodal transportation including both a rail **and** a trucking component, **not** merely because the solid waste "is collected in TOFC/COFC containers." Order 02 ¶ 11.[1] *Second*, the STB has exclusive jurisdiction over railroad operations, including railroad solid waste operations. *Third*, COFC service – which, as stated, includes a truck and a rail leg – is regulated by the STB only as rail transportation, not as "transportation by motor carrier." *Id.* ¶ 24. *Fourth*, the STB has jurisdiction over COFC transportation of solid waste irrespective of whether solid waste has "negative value." *Id.* ¶ 27.

## III. STATEMENT OF FACTS

5. For purposes of their underlying motion to dismiss and this petition for interlocutory review, Respondents assume as true each of the material facts alleged in Murrey's Disposal Company, Inc.'s ("Murrey's") now-consolidated Complaints.

### A. Murrey's Complaint in Docket TG-200651.

6. "Under the authority granted to it under Certificate G-009, Murrey's" previously "provided solid waste collection service to" Port Townsend Paper Company ("PTP") "in unincorporated Jefferson County," Washington "for disposal." 200651 Compl. ¶¶ 1, 4.

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

8. "[D]uring the week of June 15, 2020," WM began collecting and transporting solid waste "from PTP to the Olympic View Transfer Station, which is operated by WMW under a license from Kitsap County." *Id.* ¶ 2. "WMW is a solid waste collection company that holds Certificate G-237." *Id.* ¶ 5. "Certificate G-237 does not authorize WMW to provide solid waste collection service in [] Jefferson County." *Id.* ¶ 6.

[1] "TOFC" refers to trailer-on-flat-car service where the entire intermodal trailer is moved between rail and truck where as in COFC service the intermodal container is moved between rail and truck. *See infra* ¶¶ 23-24.



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

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

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

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

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

14. As part of the referenced communications with Murrey's counsel, *id.*, WM explained to Murrey's that WM had addressed this issue with the UTC Staff and that Assistant Director David Pratt agreed in a February 10, 2011 letter that this type of disposal service was



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preempted by the federal government and, hence, not regulated by the UTC.[2] WM forwarded Mr. Pratt's letter to Murrey's counsel. *See* **Attachment A**. Mr. Pratt explained that, "[b]ased on staff's review and the analysis of our attorney general staff, we believe the transportation of solid waste-filled containers by Atlas Trucking from Nippon Port Angeles[3] to the Olympic View Transfer Station in Port Orchard is exempt Trailer On Flat Car/Container On Flat Car (TOFC/COFC) service" and, hence, "is preempted from regulation by the commission." *Id.* A copy of the WM letter to which Mr. Pratt was responding also was forwarded to Murrey's counsel. *See* **Attachment B**.

**B. Murrey's Complaint in Docket TG-200650.**

15. Murrey's "is the holder of WUTC Certificate G-009" which authorizes Murrey's "to collect solid waste in, among other places, Clallam County." 200650 Compl. ¶ 3

16. For many years, WM has collected and transported solid waste from McKinley Paper Company ("McKinley") in Port Angeles, Clallam County, "to the Olympic View Transfer Station, which is operated by WMW under a license from Kitsap County." *Id.* ¶¶ 1, 9. WMW's "Certificate G-237 does not authorize WMW to provide solid waste collection service in any portion of Clallam County, Washington." *Id.* ¶ 6.

17. WMDSO "subcontracts with MJ to transport solid waste from" McKinley "to the Olympic View Transfer Station …." *Id.* ¶¶ 10, 12. "MJ collects and transports solid waste from McKinley solely for disposal." *Id.* ¶ 10. "MJ provides a through bill of lading for transportation from the paper mill to the Olympic View transfer station." *Id.* ¶ 14. "MJ does not hold a Certificate authorizing solid waste collection." *Id.* ¶ 8.

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[2] Where a complainant, like Murrey's, "asserts allegations in a complaint on specific documents but does not physically attach those documents, the documents may be considered in ruling on a CR 12(b)(6) motion for judgment on the pleadings" and doing so does not convert the motion to one for summary judgment. *Jackson v. Quality Loan Serv. Corp.*, 186 Wn. App. 838, 844, 347 P.3d 487 (2015); *accord Sebek v. City of Seattle*, 172 Wn. App. 273, 275, n.2, 290 P.3d 159 (2012).

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



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18. At the Olympic View Transfer Station, the McKinley "solid waste is loaded by WMW employees onto … UP … railcars." *Id.* ¶ 12. "WMW pays a license fee to Kitsap County for each container it transloads and an intercompany credit is then transferred from WMDSO to WMW." *Id.*

19. WMDSO "subcontracts part of hauling of" the McKinley "solid waste for disposal" from the Olympic View Transfer Station to Oregon via UP. *Id.* ¶ 13. "UP provides a second bill of lading upon delivery of the solid waste to the WMDSO landfill in Arlington, Oregon." *Id.* ¶ 14.

**C. Summary of Material Facts.**

20. In short, the parties agree to the following summary of the material facts alleged by Murrey's:

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

b. Solid waste is loaded into intermodal containers at the customers' facilities;

c. DAT and MJ transport those containerized solid wastes to an intermodal rail transfer facility, the Olympic View Transfer Station; and

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

## IV. ARGUMENT

21. The ALJ recognized that the Interstate Commerce Commission Termination Act of 1995 ("ICCTA") "authorizes the STB to regulate rail transportation." Order 02 ¶ 12 (citing 49 U.S.C. § 10501). In fact, that authority is "exclusive." 49 U.S.C. § 10501(b). While the ICCTA provides for exclusive jurisdiction of rail transportation – including **all** TOFC/COFC service – the ALJ failed to recognize ICCTA preemption over COFC transportation of solid waste because he could not find "any clear and manifest intent through the ICCTA's language to preempt state authority to regulate local solid waste collection by motor carriers." Order 02 ¶ 16.



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Congressional intent to preempt all rail transportation, including all TOFC/COFC service, no matter what commodity is being transported, is clear and manifest. Murrey's Complaints should be dismissed.

**A. COFC Service Requires a Rail Leg.**

22. The ALJ disregarded Murrey's' operative allegations and misunderstood the inherent nature of COFC service. Notwithstanding that Murrey's alleged that Respondents use continuous intermodal transportation that **always** includes **both** a rail and a trucking segment, 200650 Complt. ¶ 12 (containerized waste is hauled first by truck **and** then by rail), the ALJ incorrectly understood "[t]hat the motor carriers in this case have chosen TOFC/COFC containers for their collection of solid waste which *may*, at some point along its meandering journey, be transported via rail …." Order 02 ¶ 16 (emphasis original). He misunderstood "Respondents' argument" to be

> **[C]entered on the containers** in which the solid waste is collected and transported. The **use of TOFC/COFC containers** to collect and transport the solid waste, Respondents argue, is outside of Commission jurisdiction because the containers can be transported by truck **or** by rail and are therefore only regulable by the STB under authority granted to it by Congress in 49 U.S.C. Sections 10501 and 10502.

*Id.* ¶ 12 (emphasis added). The ALJ wrongly perceived the issue before him to be whether UTC authority was preempted "because the containers chosen for the collection of solid waste in this instance are TOFC/COFC containers." *Id.* ¶ 14.

23. Likewise, the ALJ misapprehended the very nature of COFC service. TOFC/COFC or "piggyback" service is "a form of mixed train **and** truck transportation" that "enables a carrier to transport a trailer [or a container] and its contents over rail on a flatcar and then to haul the trailer [or container] on the highway. The goods need not be unloaded and reloaded when they move from the rail mode to the truck mode," or vice versa; "the shipment



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remains within the trailer or container during the entire journey." *Interstate Comm. Comm'n v. Texas*, 479 U.S. 450, 451-52 (1987) (emphasis added).

24. The mere use on a highway of an intermodal container, without the continuous rail leg, as the ALJ understood the issue to be, is **not** TOFC/COFC service. The STB and its predecessor, the Interstate Commerce Commission ("ICC"), have regulated "[r]ail trailer-on-flatcar/container-on-flatcar (TOFC/COFC) service" for many decades. *Improvement of TOFC/COFC Regulation*, EP No. 230 (Sub-No. 5), 364 I.C.C. 731 (ICC 1981) ("Sub-No. 5"), *aff'd sub nom. Am. Trucking Assn's v. Interstate Commerce Comm'n*, 656 F.2d 1115 (5th Cir. 1981). The STB defines "[h]ighway TOFC/COFC service" to "mean[] the highway transportation, in interstate or foreign commerce," of a "freight-laden intermodal container" "**as part of a continuous intermodal movement that includes rail TOFC/COFC service**, and during which the trailer or container is not unloaded." 49 C.F.R. § 1090.1(b) (emphasis added). TOFC/COFC service, "**by definition** involves a prior or subsequent movement by rail carrier …." *Improvement of TOFC/COFC Regulations (Pickup and Delivery*), EP No. 230 (Sub-No. 7), 6 I.C.C.2d 208 (1989) ("Sub-No. 7") (emphasis added).

25. The COFC service alleged by Murrey's, as with any COFC service, includes a continuous intermodal rail component. It is that required intermodal rail component that preempts UTC regulation of the entire COFC service, including the trucking leg. Meanwhile, it is undisputed the mere use of an intermodal container – the focus of the ALJ's consideration – does not bring the transportation within the exclusive federal jurisdiction. In other words, **contrary to the COFC service at issue here**, an intermodal container placed on a truck for delivery from the customer to its final destination, without a rail leg, **is not** preempted COFC service. But that is not the issue presented here.



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## B. The STB Has Exclusive Jurisdiction Over Railroad Operations, Including Railroad Solid Waste Operations.

26. Federal regulation of railroads is "'among the most pervasive and comprehensive of federal regulatory schemes.'" *City of Auburn v. U.S.*, 154 F.3d 1024, 1027 (9th Cir. 1998) (quoting *Chicago & N.W. Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 318 (1981)). "National rather [than] local control of interstate railroad transportation has long been the policy of Congress." *City of Chicago v. Atchison, Topeka & Santa Fe R.R. Co.*, 357 U.S. 77, 87 (1958).

27. In the ICCTA, Congress added to its prior enactment in the Staggers Rail Act and acted to the full extent of its preemption authority. Under the ICCTA, STB jurisdiction over transportation by rail carriers "is exclusive":

> The jurisdiction of the Board over –
>
> (1) **transportation by rail carriers**, and the remedies provided in this part with respect to rates, classifications, rules (including car service, interchange, and other operating rules), practices, routes, services, and facilities of such carriers; and
>
> (2) the construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks, or facilities, even if the tracks are located, or intended to be located, entirely in one State,
>
> **is exclusive**. Except as otherwise provided in this part, the remedies provided under this part with respect to regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law.

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

28. The ICCTA was passed "with the purpose of expanding federal jurisdiction and preemption of railroad regulation." *Or. Coast Scenic RR, LLC v. Or. Dep't of State Lands*, 841 F.3d 1069, 1072 (9th Cir. 2016). The statutory changes were "'made to reflect the direct and complete preemption of State economic regulation of railroads.'" *Id.* (quoting H.R. Rep. No. 104-311 at 95 (1995)). The ICCTA "preempts all state laws that may reasonably be said to have the effect of managing or governing rail transportation…." *Ass'n of Am. R.R.s v. S. Coast Air Quality Mgmt. Dist.*, 622 F.3d 1094, 1097 (9th Cir. 2010) (quotation marks & citation omitted).



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Indeed, there may not be any clearer statement of federal preemption anywhere in federal law. The Ninth Circuit has noted on numerous occasions: "It is difficult to imagine a broader statement of Congress's intent to preempt state regulatory authority over railroad operations." *City of Auburn*, 154 F.3d at 1030; *accord Swinomish Indian Tribal Cmty. v. BNSF Ry. Co.,* 951 F.3d 1142, 1152 (9th Cir. 2020); *BNSF Ry. Co. v. Cal. Dep't of Tax & Fee Admin.*, 904 F.3d 755, 760 (9th Cir. 2018); *Or. Coast Scenic R.R.*, 841 F.3d at 1976.

29. The ALJ properly recognized that "[w]hen Congress expresses its clear intent that federal law is 'to regulate a part of commerce, state laws regulating that aspect of commerce must fall. This result is compelled whether Congress's command is explicitly stated in the statute's language or implicitly contained in its structure and purpose.'" Order 02 ¶ 20 (quoting *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977)). However, he wrongly focused on run-of-the-mill motor carrier transportation of solid waste, instead of TOFC/COFC transportation of **anything**, including solid waste: "However, when Congress legislates in a field traditionally occupied by the states, like the collection of solid waste, preemption analysis starts with the assumption that states' historic police powers were not to be superseded unless that was the clear and manifest purpose of Congress." Order 02 ¶ 20. But in the ICCTA, Congress legislated in a field traditionally occupied by **the federal government**: rail transportation.

30. Reliance on this rule of construction to divine whether Congress intended to preempt state regulation of **all** TOFC/COFC service, no matter the commodity, ignores the bedrock rule applicable here. "[A]n 'assumption' of nonpre-emption is **not** triggered when the State regulates in an area where there has been a history of significant federal presence." *U.S. v. Locke*, 529 U.S. 89, 108 (2000) (emphasis added). As noted above, Congress has created an extensive federal statutory and regulatory scheme to regulate railroad transportation broadly – which includes TOFC/COFC service – and, here, "there is no beginning assumption that concurrent regulation by the State is a valid exercise of its police powers." *Id.* The ALJ erred in imposing a "presumption against preemption" of rail transportation that "must be overcome" by



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the Respondents and then concluding that the improper presumption was not overcome. Order 02 ¶¶ 22, 29.

31. Where Congress expressly preempts state law, the plain text of the statute "begins and ends our analysis." *Puerto Rico v. Franklin Cal. Tax-Free Trust*, __ U.S. __, 136 S. Ct. 1938, 1946 (2016). A statute with an express preemption "necessarily contains the best evidence of the Congress' pre-emptive intent." *Id.* (quotation marks & citation omitted). In *AGG Enterprises v. Washington County*, to which the ALJ cites, Order 02 ¶ 21, the Ninth Circuit emphasized that Congress is the arbiter of preemption: when Congress expressly says it is preempting state regulation, state regulation is preempted. 281 F.3d 1324, 1328 (9th Cir. 2002).

32. Congress defined rail "transportation" to make plain the breadth of its preemption. *Del Grosso v. S.T.B.*, 898 F.3d 139, 149 (1st Cir. 2018) ("transportation" in "ICCTA-speak" is "expansive"). Congress directs that, for the ICCTA's purposes,

> '[T]ransportation' includes –
>
> (A) A locomotive, car, vehicle, vessel, warehouse, wharf, pier, dock, yard, property, facility, instrumentality, or equipment of any kind **related to the movement of** passengers or **property**, or both, **by rail**, **regardless of ownership** or an agreement concerning use; and
>
> (B) **services related to that movement**, including receipt, delivery, elevation, transfer in transit, refrigeration, icing, ventilation, storage, handling, and interchange of passengers and property.

49 U.S.C. § 10102(9) (emphasis added).

33. The federal government's authority to preempt state regulation of the transportation of solid waste as an article of commerce is unquestioned. *Philadelphia v. New Jersey*, 437 U.S. 617, 622-23 (1978). The courts and the STB have recognized the broad meaning of the ICCTA's "rail transportation," including rail transportation of solid waste. *See, e.g.*, *Canadian Nat. Ry. Co. v. City of Rockwood*, No. COV-04-40323, 2005 WL 1349077, *4 (E.D. Mich. June 1, 2005) ("activities which take place at [railroad] transload facilities are considered 'transportation' by the ICCTA"); *Waste Mgmt. of N.J., Inc. v. Union Cnty. Utils.*



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*Auth.*, 945 A.2d 73, 86 (Superior Ct. of N.J., App. Div. 2008) ("As to the nature of the conduct regarding the storage and handling of waste – what has been referred to as 'transloading' – it now seems settled that transloading activities fall within [the ICCTA]'s definition of 'transportation.'") (quotation marks, citations, & n. omitted); *In re New England Transrail, LLC*, FD No. 34797, 2007 STB LEXIS 391, *33 (STB June 29, 2007) (ICCTA preemption applies because "we find that bailing and wrapping activities (including such handling as would be required to prepare the [municipal solid waste] for bailing and wrapping) would also be integrally related to transportation").

34. "Congress enacted the ICCTA as a means of reducing the regulation of the railroad industry." *Canadian Nat. Ry.*, 2005 WL 1349077 at *3. To this end, Congress expressly preempted state regulation by granting exclusive jurisdiction over railroad operations to the STB. In *City of Seattle v. Burlington Northern Railroad Co.*, the Washington Supreme Court affirmed that the ICCTA "unambiguously express[es] a clear congressional intent to regulate railroad operations as a matter of federal law" and in that case preempted the City's railroad switching and blocking ordinances. 145 Wn.2d 661, 663, 41 P.3d 1169 (2002). The Court recognized that the purpose of the ICCTA "was to significantly reduce regulations of surface transportation industries. The ICCTA placed with the STB complete jurisdiction to the exclusion of the states, over the regulations of railroad operations." *Id.* at 665-66 (quotation marks & citations omitted). The statute "unambiguously reserves jurisdiction over" the subjects listed "to the STB." *Id.* at 667. "Congress gave the ICCTA broad preemptive power to enable uniform regulation of interstate rail operations." *Id.* at 669. The Ninth Circuit also has confirmed the breadth of the statute's preemption: "there is no evidence that Congress intended any such state role under the ICCTA to regulate the railroads." *City of Auburn*, 154 F.3d at 1031 (affirming the STB's finding of federal preemption regarding local environmental laws). The Ninth Circuit has further recognized the need to defer to the STB for guidance on the scope of ICCTA preemption. *Ass'n of Am. R.R.*, 622 F.3d at 1097.



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## C. COFC Service – Which Must Include a Truck and a Rail Leg – is Regulated by the STB Only as Rail Transportation, Not as "Transportation by Motor Carrier."

35. The legal issue raised by Murrey's Complaints is whether the STB's exclusive regulation of rail transportation, including TOFC/COFC service, preempts the UTC from regulating Respondents' COFC service. However, the ALJ failed to recognize this determinative issue and, instead, accepted Murrey's unfounded argument that "the federal regulatory authority granted to the STB and to its predecessor the ICC, **over motor carrier transportation** does not preempt Commission **regulation of solid waste**," and so, the UTC is free to regulate COFC transportation of solid waste. Order 02 ¶ 13 (emphasis added). However, as the ALJ acknowledged, the STB regulates TOFC/COFC service **only** under its ICCTA exclusive jurisdiction, **not** under Murrey's proffered "motor carrier transportation" authority. The absence of preemption under federal motor carrier transportation cannot overcome – and is not in conflict with – the express preemption of the regulation of rail transportation.

### a. The ICC regulates TOFC/COFC.

36. In 1980, Congress addressed the economic and competitive condition of the rail industry when it enacted the Staggers Rail Act and explicitly stated that: "In regulating the railroad industry, it is the policy of the United States government [] to allow, to the maximum extent possible, competition and the demand for services to establish reasonable rates for transportation by rail …." 49 U.S.C. § 10101(1). In the Staggers Rail Act, Congress directed the STB's predecessor, the ICC, to exempt from regulation any service "whenever the Board finds that the application in whole or in part of a provision of this part [] is not necessary to carry out the transportation policy" of the federal government. *Id.* § 10502(a)(1). Congress also provided that "[t]he Board may revoke an exemption" when necessary to carry out federal transportation policy. *Id.* § 10502(d). The ALJ properly recognized that "[t]he exemption authority as it relates to TOFC/COFC transportation is not a limitation, but an example of exemption authority granted to the STB." Order 02 ¶ 25; *see also Central States Motor Freight Bureau, Inc. v. ICC*, 924 F.2d 1099, 1102 (D.C. Cir. 1991) ("Exercise of the ICC's section [10502] exemption authority neither



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lodges nor dislodges agency jurisdiction; instead, it *presupposes* ICC jurisdiction over the persons or services exempted."); *Fayus Enters.v. BNSF Ry. Co.*, 602 F.3d 444, 451-52 (D.C. Cir. 2010) (In the Staggers Act, Congress "'reaffirm[ed] that where the [ICC] has withdrawn its jurisdiction to regulate, the State could not assume such jurisdiction.'") (quoting the congressional record).

37. Congress expressly granted the ICC jurisdiction over the highway leg of the "continuous intermodal movement" of freight. 49 U.S.C. § 10502(f) ("The Board may exercise its authority under this section to exempt transportation that is provided by a rail carrier as part of a continuous intermodal movement.").

38. The ALJ correctly noted that "[t]he STB exercised" its "authority to exempt TOFC/COFC transportation" in 49 C.F.R. § 1090.2. Order 02 ¶ 25. Hence, the STB's exemption of COFC services from federal regulation in 49 C.F.R. § 1090.2 confirms those services are subject to exclusive STB jurisdiction under 49 U.S.C. § 10501(b). The authority to exempt presupposes the STB having jurisdiction.

39. Initially, in 1981, the ICC exercised its authority to exempt from regulation – *i.e.*, to deregulate – the highway portion of the "continuous intermodal movement" if **the rail carrier itself** was performing the highway transportation in rail-owned trucks. Sub-No. 5, 364 I.C.C. 731. The exemption was limited to "service provided by railroads," including both the rail and the truck legs. *Id.* at 733.

40. The ICC's exemption was challenged and the United States Supreme Court held that the exemption prohibited Texas from regulating the motor portion of TOFC/COFC service:

> The ICC's statutory authority includes jurisdiction to grant exemptions from regulation as well as to regulate. In 1980, Congress enacted the Staggers Rail Act, 94 Stat. 1895, 49 U. S. C. § 10101 et seq., which authorizes the ICC to exempt from state regulation "transportation that is provided by a rail carrier as a part of a continuous intermodal movement."

*ICC v. Tex.*, 479 U.S. at 452.



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41. Several years later in 1987, the ICC expanded the TOFC/COFC exemption to include highway transportation by a motor carrier **either as the agent or the joint rate partner of a rail carrier**. *Improvement of TOFC/COFC Regulations (Railroad-Affiliated Motor Carriers and Other Motor Carriers)*, EP No. 230 (Sub-No. 6), 3 I.C.C.2d 869 (1987) ("Sub-No. 6"). The ICC noted that "[i]t has long been recognized that the rail and highway … portions of TOFC/COFC service are integrally related, because no single mode of transportation standing alone normally satisfies the needs of a TOFC/COFC shipper." *Id.* at 872. "'[A]ll piggyback service is, by its essential nature, bimodal' because 'its basic characteristic is the combination of the inherent advantages of rail and motor transportation.'" *Id.* (quoting *Am. Trucking v. A.T.& S.F.R. Co.*, 387 U.S. 397, 420 (1967) (brackets omitted). Moreover,

> [M]otor TOFC/COFC service that is part of a continuous rail/motor movement is obviously 'relat[ed] to a rail carrier providing transportation subject to' the Commission's jurisdiction. A railroad cannot provide such intermodal service without first receiving a trailer or container, which is generally moved over-the-road by truck. The highway movement of containers and trailers is an integral and necessary element of TOFC/COFC service.

*Id.* at 873-74 (quoting 49 U.S.C. § 10505(a), now codified as 49 U.S.C. § 10502(a)). "[W]hether they are owned by the railroad partners, affiliated with them, or independent companies, the motor carriers involved in the over-the-road segment of TOFC/COFC services are business partners of the railroads that are plainly participating in matters 'related to a rail carrier' and are thus within the literal and philosophical scope of § 10505(a) [now codified as 49 U.S.C. § 10502(a)]." *Id.* at 874. The ICC rejected the argument of the motor carriers that "the exemption may be applied *only* to rail transportation …." *Id.* at 875 (emphasis original).

42. Pursuant to Sub-No. 6, the ICC adopted 49 C.F.R. § 1090.2:

> Except as provided in 49 U.S.C. §10505(e) and (g), §10922(1), and §10530, rail TOFC/COFC service and highway TOFC/COFC service provided by a rail carrier either itself or jointly with a motor carrier as part of a continuous intermodal freight movement, is exempt from the requirements of 49 U.S.C. Subtitle IV,



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> regardless of the type, affiliation, or ownership of the carrier performing the highway portion of the service. Tariffs heretofore applicable to any transportation service exempted by this section shall no longer apply to such service.

*Id.* at 886.

43. The ALJ extensively referenced Sub-No. 6, the ICC's 1987 rulemaking. Order 02 nn.21-26, 28. However, he did not mention at all the ICC's final TOFC/COFC rulemaking in 1989. In 1989, the ICC took the final step to exempt TOFC/COFC service "arranged **independently** with the shipper or receiver (or its representative/agent) and performed immediately before or after a TOFC/COFC movement provided by a rail carrier …." Sub-No. 7, 6 I.C.C.2d at 227 (emphasis added). The ICC again **rejected** the motor carriers' argument that the expansion of the TOFC/COFC service exemption did not involve "'a matter related to a rail carrier providing transportation subject to the jurisdiction of the … Commission ….'" *Id.* at 211 (quoting 49 U.S.C. § 10505(a), now codified as 49 U.S.C. § 10502(a)). "Their view seems to be that the 'related-to-rail' language really means 'provided by rail.' We reject the motor carriers' arguments, as we did earlier, and find that the motor carrier services at issue here are related to rail carriers providing transportation subject to Commission jurisdiction …." *Id.* The ICC found under its authority at 49 U.S.C. § 10505 (now codified as 49 U.S.C. § 10502(a)), that "TOFC/COFC pickup and delivery services performed by motor carriers as part of continuous intermodal movement are related to rail carrier transportation" and should be exempted from economic regulation. *Id.* at 222, 226.

44. In Sub-No. 7, the ICC revised 49 C.F.R. § 1090.2 as follows (additions emphasized):

> Except as provided in 49 U.S.C. §10505(e) and (g), §10922(1), and §10530, rail TOFC/COFC service and highway TOFC/COFC service provided by a rail carrier either itself or jointly with a motor carrier as part of a continuous intermodal freight movement, is exempt from the requirements of 49 U.S.C. Subtitle IV, regardless of the type, affiliation, or ownership of the carrier performing the highway portion of the service. **Motor carrier TOFC/COFC pickup and delivery services arranged**



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> **independently with the shipper or receiver (or its representative/agent) and performed immediately before or after a TOFC/COFC movement provided by a rail carrier are similarly exempt.** Tariffs heretofore applicable to any transportation service exempted by this section shall no longer apply to such service. **The exemption does not apply to a motor carrier service in which a rail carrier participates only as the motor carrier's agent (Plan I TOFC/COFC), nor does the exemption operate to relieve any carrier of any obligation it would otherwise have, absent the exemption, with respect to providing contractual terms for liability and claims**.

*Id.* at 227. Thus, not only did the ICC confirm that it had jurisdiction to regulate the highway portion of the "continuous intermodal transportation," its jurisdiction included trucking companies performing the highway portion of TOFC/COFC and operating "independently" of the rail carrier. *Id.*

45. The ALJ correctly pointed out that, under the final language added in 1989 to 49 C.F.R. § 1090.2 (quoted immediately above), the STB did not exempt Plan I TOFC/COFC service. Order 02 ¶ 25. Of course, the very inclusion of this provision confirms that the STB has jurisdiction over Plan I TOFC/COFC service – which is not alleged by Murrey's – as it does with all TOFC/COFC service.

**b. The ALJ ignored the ICC's final 1989 TOFC/COFC regulation codified in 49 C.F.R. § 1090.2.**

46. The ALJ correctly recognized that "[t]he STB has authority to regulate TOFC/COFC containers transported by rail carriers pursuant to the authority granted by Congress in 49 U.S.C. Section 10501 and authority to exempt TOFC/COFC transportation that is 'related to a rail carrier' pursuant to 49 U.S.C. Section 10502." *Id.* However, his view of what are "matters related to a rail carrier" is limited to the 1987 ICC rulemaking, not the final and governing 1989 rule codified in 49 C.F.R. § 1090.2. He noted:

> 'Matters related to a rail carrier,' in the context of exempting TOFC/COFC transportation from federal regulation has been interpreted to mean the transportation of TOFC/COFC containers via rail *or* truck **as long as the transportation is offered jointly**



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> **by the rail and motor carrier or the motor carrier is the agent of the rail carrier**.

*Id.* n.22 (italics original, underline added). For this proposition, the ALJ looked solely to the **1987** ICC rulemaking, ignoring the ICC's 1989 expansion to TOFC/COFC services including those "arranged **independently** with the shipper or receiver (or its representative/agent) and performed immediately before or after a TOFC/COFC movement provided by a rail carrier." Sub-No. 7, 6 I.C.C.2d at 226 (emphasis added); 49 C.F.R. § 1090.2.

47. Although he cites to 49 C.F.R. § 1090.2, he ignores the language the ICC added to the rule in 1989 (quoted immediately above). The ALJ stated: "The exemption applies where a motor carrier **is the agent of the rail carrier or provides the transportation jointly with the trail carrier, regardless of the ownership or type of the motor carrier**." Order 02 ¶ 25. For this proposition too, he cites only to the 1987 rulemaking. *Id.* n.25.

48. Contrary to the ALJ's recitation, the STB, under its present-day rule, regulates independent TOFC/COFC arrangements just like the ones alleged by Murrey's here, **irrespective** of whether the transportation is offered jointly by the rail carrier and motor carrier or the motor carrier is the agent of the rail carrier. 49 C.F.R. § 1090.2.

**c. The ALJ failed to recognize that the STB regulates TOFC/COFC only as rail transportation.**

49. The ALJ further misapprehended the source of the STB's (and before it, the ICC's) authority to regulate TOFC/COFC. He stated:

> The STB has authority to regulate TOFC/COFC containers both when they are transported via rail and when they are transported via motor carrier because they are bimodal and **cannot be compartmentalized into only the regulation of rail transportation or transportation by motor carrier**.

Order 02 ¶ 24 (emphasis added). As noted, the STB regulates TOFC/COFC **service**, not the mere use of intermodal containers, which the ALJ – but not the STB – refers to as "TOFC/COFC containers." *See supra* ¶¶ 22, 24-25. Moreover, while he recognized that TOFC/COFC service is "bimodal" – meaning that it must include a rail and a truck segment – he improperly



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concluded that the entire service "cannot be compartmentalized into only the regulation of rail transportation." Order 02 ¶ 24. That "compartmentalization" is precisely what the ICC did in its three, successive rulemakings regarding regulation of the entire TOFC/COFC service.

50. In support of the proposition quoted above, the ALJ offered two authorities, footnote 10 in *American Trucking Associations v. Atchison, Topeka, & Santa Fe Ry. Co.*, 387 U.S. 397 (1967), and Sub-No. 6, the ICC's 1987 rulemaking. Order 02 n.21. Neither supports the proposition that the rail and trucking legs of TOFC/COFC are to be disconnected and regulated separately, one as rail transportation, one as motor carrier transportation. In *American Trucking*, the Supreme Court in 1967 considered the ICC's mandate that railroads provide TOFC/COFC service to common carriers under the Interstate Commerce Act, 13 years before Congress passed the Staggers Rail Act and 22 years before the ICC conducted its third and final rulemaking regarding TOFC/COFC under the Staggers Rail Act. In footnote 10, the Court observed the uncontroversial proposition that TOFC service is "bimodal," involving both rail and motor legs. *Am. Trucking*, 387 U.S. at 420 n.10. Meanwhile, in the cited 1987 rulemaking, the ICC said the opposite of the ALJ: "whether they are owned by their railroad partners, affiliated with them, or independent companies, the motor carriers involved in the over-the-road segment of TOFC/COFC services are business partners of the railroads that are plainly participating in matters "related to a rail carrier" and **are thus within the literal and philosophical scope of § 10505(a)** [now codified at 49 U.S.C. § 10502(a)]," which regulates rail transportation. Sub-No. 6, 3 I.C.C.2d at 873-74 (emphasis added). As noted, the ICC went even further in its 1989 rulemaking, ignored by the ALJ.

51. Disregarding the ICC's repeated regulation of **all** components of TOFC/COFC service – including the highway leg – under the Staggers Rail Act, the ALJ reached the untenable conclusion that "the STB's regulatory framework for both" rail transportation and motor carrier transportation "must be considered." Order 02 ¶ 24. He then concluded: "The STB has authority to regulate TOFC/COFC containers when transported interstate by a motor carrier pursuant to



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the authority granted by Congress in 49 U.S.C. Section 13501," the motor carrier transportation statute. *Id.* ¶ 26. Again, this confuses what the AL calls "TOFC/COFC **containers**" – *i.e.*, intermodal containers – and TOFC/COFC **transportation.** The ALJ notes that "TOFC/COFC **containers** are capable of being transported solely via motor carrier from origin to destination." *Id.* ¶ 26 (emphasis added). It is undisputed that intermodal containers are used in this fashion. However, when an intermodal container is "transported solely via motor carrier from origin to destination," it is **inherently not** TOFC/COFC transportation, the issue presented here.

52. Moreover, the ALJ offered no support for his contention that the STB's motor carrier transportation authority is relevant here and notes, in fact, that there is no supporting authority: "The Commission is unaware of any rules, regulations, or exemptions issued or granted by the ICC or the STB pursuant to its interstate motor carrier authority over TOFC/COFC containers. This does not mean, however, that the ICC or STB lack the authority to issue such rules, regulations, or exemptions pertaining to the regulation of TOFC/COFC containers within its jurisdiction." *Id.* n.27. He also accepted Murrey's contention that solid waste collection is "'not within the federal government's jurisdiction'" to regulate motor carriers. *Id.* ¶ 28 (quoting and agreeing with Murrey's Supplemental Brief). Notwithstanding that the STB **does not** regulate TOFC/COFC service under any motor carrier authority, nor does it regulate solid waste collection under any such authority, the ALJ concluded that "the STBS's regulatory framework for both must be considered." *Id.* ¶ 24.

53. Bootstrapping from the nonexistent STB regulation of "TOFC/COFC containers" under the motor carrier statute, the ALJ then wrongly concludes:

> Bearing in mind that the regulatory framework for TOFC/COFC containers is not limited to only STB authority over rail transportation and matters related to rail carriers, it is important to also consider the limits of ICC and STB motor carrier authority. Such limits have long been established: the ICC, STB, and federal authority over motor carriers does not extend to the local collection of non-nuclear solid waste.



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*Id.* ¶ 26. Even if the STB were someday to regulate the exclusive highway transportation of intermodal containers – with no rail component, today the STB exclusively regulates as rail transportation TOFC/COFC service – which by definition includes a rail component.

### D. The STB has Jurisdiction Over COFC Transportation of Solid Waste Irrespective of its "Negative Value."

54. Having thus backed into STB's motor carrier "authority," the ALJ wrongly determined that "material that has a negative or no value as a commodity and is transported solely for disposal is not subject to [STB] regulation." *Id.* ¶ 27. He reached this conclusion after asking the parties to submit supplemental briefs on an issue neither side had raised: was the ICC's 1965 decision in the *Joray Trucking* common carrier application relevant to the meaning of the ICCTA's preemption? *Id.* ¶ 7.

55. In their supplemental brief, none of which the ALJ addressed in Order 02, Respondents explained that the answer is: No. The rail transportation of solid waste, like any other commodity, is regulated exclusively by the STB. *See supra* § IV.B. The ICC **did not** "create[] the 'negative value' test for determining whether it had authority to regulate" under the ICCTA. Order 02 ¶ 27. Notably, none of the cases the ALJ relied upon concern rail transportation or the ICCTA. *See, e.g., id.* n.31 (*ICC v. Browning-Ferris Indus., Inc.*, 529 F. Supp. 287 (N.D. Ala. 1981) (Motor Carrier Act of 1980); *Wilson v. IESI N.Y. Corp.*, 444 F. Supp. 2d 298 (M.D. Pa. 2006) (Motor Carrier Act of 1935)).

#### a. The ICC's understanding of "property" in the 1960s was muddled.

56. "Prior to its abolishment in 1996, the Interstate Commerce Commission ('ICC') was vested with jurisdiction over interstate transportation by a motor carrier transporting passengers and property." *Polesuk v. CBR Sys., Inc.*, No. 05 CV 8324(GBD), 2006 WL 2796789, *7 (S.D.N.Y. Sep. 29, 2006). In the context of a common carrier application 55 years ago, the ICC issued a short 700-word opinion, citing only Black's Law Dictionary, in which it ruled that "debris," which "has a negative value as a commodity," "does not have the attributes



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commonly associated with the word property." *Joray Trucking Corp.*, 99 M.C.C. 109, 110 (ICC 1965). Hence, the ICC concluded that "debris and rubble should not be considered property as affects the jurisdictional scope **of the Interstate Commerce Act**." *Id.* (emphasis added).

57. But, even in the context of the Interstate Commerce Act ("ICA"), the ICC's rulings were not "consistent on this point." *Raymond v. Mid-Bronx Haulage Corp.*, No. 15 Civ. 5803 (RJS), 2017 WL 1251137, *3 n.2 (S.D.N.Y. Mar. 31, 2017) (citing other conflicting rulings). The *Joray* "negative value" test has not fared well over the past 55 years. "In another ruling on whether nuclear waste constituted 'property,' the ICC indicated that having a value, whether negative or positive, was not conclusive, but rather that 'property' connotes ownership as well as value. Something that is owned can be 'property' notwithstanding its lack of economic value." *Id.* (quoting *Nuclear Diagnostic Labs., Inc.*, 133 M.C.C. 578, 580 (1979)). The federal courts of appeal have recognized the ICC's jurisdiction over such value-less waste. *See, e.g.*, *Akron, Canton & Youngstown R.R. Co. v. I.C.C.*, 611 F.2d 1162 (6th Cir. 1979); *Consolidated Rail Corp. v. I.C.C.*, 646 F.2d 642 (D.C. Cir. 1981).

58. Over the past 55 years since *Joray*, courts have taken inconsistent positions with respect to *Joray*'s reliance on whether something must have value to be property.[4] The ALJ completely ignored this authority, concluding instead that "[s]ince *Joray*, the negative value test has been implemented and used" outside the scope of the ICA. Order 02 ¶ 27. The ALJ failed to note that the *Joray* test has also been rejected outside the scope of the ICA. *See, supra* n.4. Even

[4] *See, e.g., Graham v. Town & Country Disposal of W. Mo., Inc.*, 865 F. Supp. 2d 952, 957 (W.D. Mo. 2011) ("An interpretation of trash as property is reasonable under the natural and ordinary meaning of 'property,' which is not limited to goods with a positive economic value."); *Vanartsdalen v. Deffenbaugh Indus.*, No. 09-2030-EFM, 2011 WL 1002027, at *3 (D. Kan. Mar. 18, 2011) ("Because the DOT is exercising such jurisdiction, it must necessarily have adopted the position that trash is property, otherwise it would have no basis for regulating Defendant's residential trash hauling business. Therefore, in light of this exercise of authority, the Court concludes that the DOT treats trash as being property."); *Raymond*, 2017 WL 1251137 at *3 ("But even if the materials hauled by Plaintiffs were limited to garbage without scrap metal, the Court would still find that garbage constitutes property for the purposes of the MCA exemption."); *but see I.C.C. v. Browning-Ferris Indus., Inc*., 529 F. Supp. 287, 293 (N.D. Ala. 1981).



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the Black's Law Dictionary definition of "property," on which *Joray* relied, does not support the economic value criteria. Black's Law Dictionary (11th ed. 2019) ("property" includes "any external thing over which the rights of possession, use, and enjoyment are exercised"); *see also Raymond,* 2017 WL 1251137 at *4 ("treating garbage as property, and thus subjecting garbage haulers to the jurisdiction of the Secretary of Transportation, accords with the ordinary meaning of 'property'.").

**b. The old ICC cases are irrelevant in interpreting the ICCTA preemption.**

59. In 1995, Congress enacted the ICCTA. It abolished the ICC, transferred regulatory functions to the STB, and significantly reduced regulation of the railroad industry. *BNSF Ry.*, 904 F.3d at 760. "The regulation of railroad operations has long been a traditionally federal endeavor, to better establish uniformity in such operations and expediency in commerce and it appears manifest that Congress intended the ICCTA to further that exclusively federal effort." *Friberg v. Kan. City S. Ry. Co.*, 267 F.3d 439, 442 (5th Cir. 2001).

60. The ICCTA's express preemption clause is the best reflection of Congress' intent. *Sprietsma v. Mercury Marine*, 537 U.S. 51, 62-63 (2002). That clause is 49 U.S.C. § 10501(b), which originated in the Staggers Rail Act, and provides that the STB has "exclusive" jurisdiction over "transportation by rail carriers." The STB and the courts recognize its breadth. "It is difficult to imagine a broader statement of Congress' intent to preempt state regulatory authority over railroad operations." *City of Auburn*, 154 F.3d at 1030. The STB has ruled that "there can be no state or local regulation of matters directly regulated by the Board …." *CSX Transp., Inc. – Pet'n for Decl. Order*, FD 34662, 2005 WL 1024490, *2 (S.T.B. May 3, 2005); *accord New Orleans & Gulf Coast Ry. Co. v. Barrois*, 533 F.3d 321, 332 (5th Cir. 2008) (approving STB ruling).

61. Interpreting ICCTA preemption, the STB and the courts have **not** looked to the conflicting old ICC decisions regarding "property" under the ICA and repeatedly have ruled that



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rail transportation of solid waste is preempted.[5] The STB held that intermodal containers of municipal solid waste "which would be transferred directly from trucks to rail cars" were subject to its exclusive jurisdiction. *New England Transrail*, 2007 WL 1989841 at *8-*9. The transfer of pre-baled municipal solid waste from trucks to rail cars also was subject to exclusive STB jurisdiction. *Id.* Likewise, the STB had exclusive jurisdiction over bulk municipal solid waste unloaded from trucks onto the floor where it was stored temporarily for later loading into rail cars. *Id.* All these "activities would be integrally related to transportation and therefore would be covered by the section 10501(b) preemption." *Id.* at *9. In 2012, the STB reaffirmed that "the Board's preemptive jurisdiction extended to solid waste rail transfer facilities owned or operated by rail carriers." *Solid Waste Rail Transfer Facilities*, EP 684, 2012 WL 5873121, *1 (S.T.B. Nov. 14, 2012).

62. Likewise, the courts agree that solid waste handling associated with rail carriage is "transportation" pursuant to the ICCTA. In regard to a facility that transloaded solid waste from trucks to railroad cars, the Third Circuit considered solid waste to be STB-regulated "cargo":

> [O]perations of the [waste handling] facilities include dropping off cargo, loading it onto Susquehanna trains, and shipping it. Thus the facilities engage in the receipt, storage, handling, and interchange of rail cargo, which the [ICCTA] explicitly defines as 'transportation.' *See* 49 U.S.C. § 10102(9)(B). These operations fit within the plain text of the [ICCTA] preemption clause.

*N.Y. Susquehanna & W. Ry. Corp. v. Jackson*, 500 F.3d 238, 247 (3rd Cir. 2007); *accord Waste*

[5] The same is true for the Carmack Amendment to the ICA, also enforced by the STB. It imposes liability upon interstate carriers for "the actual loss or injury to the property" occurring during transportation. 49 U.S.C. § 14706(a)(1). In determining the scope of the Amendment's preemption of "property" regulation, the Southern District of New York also noted and disregarded the ICC's conflicting old interpretations of "property." *Polesuk*, 2006 WL 2796789 at *7. The language of the Amendment along with its purpose "reveals that the term 'property,' as used therein was intended to refer generally to any interstate shipment of a tangible item … as oppose[d] to denoting a particular type or category of property. The Amendment was intended to completely dominate the area of interstate carriers[']liability for the loss or damage to an item during transportation without regard to the nature of the matter being shipped." *Id*. at *8 (shipment of umbilical cord blood for the parents of a newborn was "property").



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*Mgmt. of N.J.*, 945 A.2d at 86.

**c. The Washington Supreme Court also recognized that the ICCTA preemption includes rail transportation of solid waste.**

63. The Washington State Supreme Court also has relied on ICCTA preemption applying to the transportation of solid waste. In *Regional Disposal Co. v. City of Centralia*, 147 Wn.2d 69, 51 P.3d 81 (2002), the Court reviewed a similar transportation arrangement whereby Regional Disposal Company ("RDC") and its hauler LeMay Enterprises[6] ("LeMay") provided COFC services through the City of Centralia. RDC and LeMay challenged a city tax on the rail transportation of solid waste. Represented by the same counsel who represents Murrey's here, RDC and LeMay successfully relied on the fact that the rail transportation of solid waste falls within the ICCTA's exclusive grant of STB jurisdiction. RDC and LeMay argued that the tax violated the Railroad Revitalization and Regulatory Reform Act ("4-R A") because it discriminated against rail transportation of solid waste. *Id.* at 74. That statute prohibits a "tax that discriminates against a rail carrier providing transportation subject to the jurisdiction of the [STB] under this part." 49 U.S.C. § 11501(b)(4). "This part," is Part A, governing "rail." The "jurisdiction of the Board" in Part A is set forth only in 49 U.S.C. § 10501 which makes "exclusive" the STB's jurisdiction over "transportation by rail carriers." *Id*. § 10501(b).

64. RDC and LeMay's challenge was predicated on the solid waste it transported being "property" under the ICCTA. The trial court agreed and "ruled that 49 U.S.C. § 10501(b)(2) preempts Centralia's tax because the [STB] is given exclusive jurisdiction …." Brief of City of Centralia, *Regional Disposal Co. v. City of Centralia*, 2001 WL 34797765, *9 (Oct. 19, 2001).[7] The Supreme Court affirmed. 147 Wn.2d at 77. If solid waste were not

[6] LeMay and Murrey's are both owned by Waste Connections, Inc. *See* http://www.lemayinc.com/AboutUs.html (last visited Sept. 25, 2020); https://www.murreysdisposal.com/ (last visited Sept. 25, 2020).

[7] Respondents were unable to obtain the trial court's decision and therefore rely on the quotation of that decision in the Supreme Court briefs.



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property under the ICCTA, ICCTA preemption would not apply, and the Washington Supreme Court could not have reached its holding.

**d. The federal Clean Railroads Act of 2008 confirms STB jurisdiction over the rail transportation of solid waste.**

65. Recognizing the broad scope of ICCTA preemption, Congress slightly limited its scope in the Clean Railroads Act of 2008 ("CRA"), while confirming the STB's exclusive jurisdiction over rail transportation of solid waste. The CRA added a carve-out from the grant of "exclusive" jurisdiction to the STB over "transportation by rail carriers," 49 U.S.C. § 10501(b): "Except as provided in paragraph (3), the [STB] does not have jurisdiction under this part over … a solid waste rail transfer facility as defined in section 10908 of this title, except as provided under sections 10908 and 10909 of this title." *Id.* § 10501(c)(2)B). So, with some exceptions, Congress withdrew from STB jurisdiction authority over solid waste rail transfer facilities, which "shall comply with all applicable Federal and State requirements." *Id.* § 10908(a).

66. The STB recognized that:

> [S]olid waste rail transfer facilities, which, **in the absence of the CRA were, or would have been, subject to the Board's jurisdiction and thus shielded from state and local regulation by federal preemption**, must now comply with certain types of federal and state requirements in the same manner as non-rail solid waste management facilities that do not fall within the Board's jurisdiction or qualify for federal preemption under 49 U.S.C. 10501(b).

*Town of Babylon & Pinelawn Cemetery – Pet'n for Decl. Order*, FD 5057, 2009 WL 3329242, *5 (S.T.B. Oct. 15, 2009) (emphasis added); accord *Solid Waste Rail Transfer Facilities*, EP 684, 2012 WL 5873121 at *1.

67. In the CRA, Congress defined a "solid waste rail transfer facility" as: "the portion of a facility owned or operated by or on behalf of a rail carrier … where **solid waste, as a commodity to be transported for a charge**, is collected, stored, separated, processed, treated, managed, disposed of, or transferred, **when the activity takes place outside of original**



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**shipping containers** …." 49 U.S.C. § 10908(e)(1)(H)(i) (emphasis added). The STB regulation that followed confirmed that the CRA's withdrawal of STB jurisdiction, did not apply to:

> The portion of a facility to the extent that activities taking place at such portion are comprised **solely of the railroad transportation of solid waste** after the solid waste is loaded for shipment on or in a rail car, including railroad transportation for the purpose of interchanging railroad cars containing solid waste shipments; or … a facility where **solid waste is solely transferred or transloaded** from a tank truck directly to a rail tank car.

49 C.F.R. § 1155.2(a)(10) (emphasis added).

68. Congress and the STB thus affirmed that "solid waste, as a commodity to be transported for a charge," 49 U.S.C. § 10908(e)(1), is subject to the STB's exclusive jurisdiction except when it concerns a solid waste rail transfer facility. Moreover, Congress did not withdraw from the STB's exclusive jurisdiction the handling of solid waste by a rail carrier that **does not** "take[] place outside of original shipping containers," as is the case with TOFC/COFC transportation. *Id.* The rail transportation of solid waste in intermodal containers that remain sealed from pickup at the customer until delivery to a landfill was not of concern in the CRA because the containerized solid waste is not "collected, stored, separated, processed, treated, managed, disposed of, or transferred" at a solid waste transfer facility.

69. Congressional intent is clear. The House sponsor of the CRA emphasized that TOFC/COFC services are regulated exclusively by the STB and nothing in the new statute changed this. "[T]he amendment does not apply to containerized facilities. **They still are subject to the Federal preemption**." Federal Railroad Safety Improvement Act of 2007, 153 Cong. Rec. H11671-02, H11691, 2007 WL 3024635 (Oct. 17, 2007) (emphasis added). The legislative history makes it clear that the purpose was to curtail the use of federal preemption in siting solid waste transfer facilities at rail yards and not federal preemption of rail transportation of solid waste itself. *Id.* ("[T]here is a growing concern in the Northeast that some railroads are using Federal preemptions standards to shield themselves from important State and local



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environmental laws which are leading to a lack of environmental and health-related oversight of [municipal waste transfer facilities].").

70. The STB recognized that the CRA "excludes from the definition the portion of a facility where the only activity is **railroad transportation of solid waste** after the waste has been loaded for shipment in or on a rail car, including interchanging rail cars of solid waste," as is the case with TOFC/COFC. "In such cases, assuming the facility, or portion thereof, meets the other necessary qualifications, **it would be subject to the Board's general jurisdiction over rail transportation and entitled to preemption from most state and local laws** …." *Solid Waste Rail Transfer Facilities*, EP 684, 2009 WL 94517, *4 (S.T.B. 2009) (emphasis added). If rail transportation of solid waste were not already within the STB's jurisdiction – which is exclusive – this provision of the statute would be meaningless. Congress would not need to exempt state permitting regulations from federal preemption if it did not otherwise fall within the scope of the ICCTA preemption.

71. The CRA carve-out had immediate effect. In *New Jersey Department of Environmental Protection v. J.P. Rail, Inc.*, the court reconsidered federal preemption based on the CRA's passage while the case was pending. No. C-41-06, 2009 WL 127666 (N.J. Super. Ct., App. Div. Jan. 21, 2009). The trial court initially had ruled the solid waste transfer facility and the transloading process preempted by the ICCTA: "federal preemption barred [New Jersey] from requiring defendants to obtain permits and approvals …." *Id*. at *2-*3. The appellate court concluded that the intervening action by Congress now allowed for state regulation over the facility. *Id*. at *8.

72. The CRA confirmed that rail transportation of solid waste was part of the STB's exclusive jurisdiction of "transportation by rail carrier" under 49 U.S.C. § 10501(b) as the STB and the courts had previously held. *See Solid Waste Rail Transfer Facilities*, EP 684, 2009 WL 94517 at *4 (prior to the CRA, solid waste rail transfer facilities "came within the Board's jurisdiction **as part of transportation by rail carrier**") (emphasis added). Other than



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withdrawing solid waste transfer facilities from the STB's jurisdiction, Congress left untouched the longstanding rulings that the STB regulated the transportation by rail carrier of solid waste. *Wash. Natural Gas Co. v. Pub. Util. Dist. No. 1*, 77 Wn.2d 94, 98, 459 P.2d 633 (1969) (*expressio unius est exclusio alterius*). Those rulings govern.

**e. Congress clearly intended the FAAAA not to preempt solid waste regulation.**

73. The ALJ wrongly looked to the Federal Aviation Administration Authorization Act of 1994 ("FAAAA") to support his conclusion "that the regulation of solid waste collection is outside the jurisdiction of federal authority" under the ICCTA. Order 02 ¶ 27. Unlike the ICCTA, Congress expressly intended to exclude solid waste regulation from the FAAAA. In the FAAAA, **a statute that does not implicate rail transportation**, Congress narrowly preempted transportation of "property." "[A] State … may not enact or enforce a law, [or] regulation … related to a price, route, or service of any motor carrier … or any motor private carrier, broker, or freight forwarder with respect to the transportation of property." 49 U.S.C. § 14501(c).

74. As noted, in determining the scope of preemption, congressional intent is "the ultimate touchstone." *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 138 (1990). So, in considering whether the FAAAA preempted UTC regulation, the Washington Court of Appeals looked to Congress:

> 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.

*Wash. Utils. Trans. Comm'n v. Haugen*, 94 Wn. App. 552, 555, 972 P.2d 1280 (1999) (quoting H.R. Conf. Rep. No. 103-677, at 85 (1994)) (emphasis added). Therefore, the Court easily concluded that Congress did not intend in the FAAAA to preempt garbage from state regulation. *Id*.



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75. While Congress' intent for the FAAAA was plain, the ICC regulatory history was not. *See supra* § IV.D.a. The Ninth Circuit – in a case the ALJ cites but misapprehends, Order 02 ¶ 32 – concluded that the ICC precedent "which Congress was told did not consider garbage and refuse 'property'" was of "debatable" import because the old ICC rulings were "equivocal as to whether it could be 'property' or not." *AGG Enters*, 281 F.3d at 1329. The lack of clarity in the ICC rulings was irrelevant, though: "**We are not concerned with what ICC case law says**, but with what Congress intended in its statute and at most with what Congress *thought* ICC case law said." *Id.* (underlined emphasis added); *accord Polesuk*, 2006 WL 2796789, *7 ("the ICC case law interpreting the term 'property' is irrelevant for purposes of a preemption analysis"). "Even if Congress was misinformed as to what ICC case law held, it believed that **the statute it was passing** would not affect local regulation of garbage and refuse collection." *AGG Enters*., 281 F.3d at 1329 (emphasis added). The Ninth Circuit too found "unambiguous" "Congress' intent not to preempt the area of solid waste collection" **in the FAAAA**. *Id.* at 1330. Congress's intent with the FAAAA was wholly different than Congress's intent with its governance of railroad transportation under the Staggers Act and the ICCTA. *See supra* § IV(B, D).

## V. CONCLUSION

76. The determinative law here is the ICCTA. It is undisputed that the UTC cannot regulate a train's transportation of solid waste. This is so notwithstanding the "inherently local nature of collecting solid waste." Order 02 ¶ 22. It also is undisputed that a state cannot regulate the COFC transportation – with its requisite rail and truck legs – of any commodity or property. So, the narrow issue presented by Murrey's Complaints is whether, somehow, COFC transportation of solid waste may escape federal preemption. That question is answered in the negative by the ICCTA, not by federal regulation of motor carriers.

77. The ICCTA preempts states from regulating all COFC transportation, including the COFC transportation of solid waste and including the trucking leg of such intermodal service. Such COFC intermodal transportation is distinct from the general transportation of solid



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waste solely by motor carrier from origin to destination which is regulated by the UTC. Because Respondents' COFC service is subject to the STB's exclusive jurisdiction, Murrey's Complaints about such service should be dismissed.

78. Respondents respectfully request that the UTC dismiss Murrey's challenge to their COFC intermodal transportation of solid waste.

RESPECTFULLY SUBMITTED this 29th day of October, 2020.

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**CERTIFICATE OF SERVICE**

I hereby certify that I have this day served the foregoing document upon all parties of record in this proceeding, by the method as indicated below, pursuant to WAC 480-07-150.

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