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 RESPONSE TO RESPONDENTS' PETITION FOR INTERLOCUTORY REVIEW

COMPLAINANT MURREY'S DISPOSAL COMPANY INC.'S RESPONSE TO RESPONDENTS' PETITION FOR INTERLOCUTORY REVIEW

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1 Pursuant to WAC 480-07-810(3)(b), Murrey's Disposal Company, Inc. ("Murrey's") files this Response to Respondents' Petition for Interlocutory Review and Reversal of Order 02 Denying Motion to Dismiss.

I. INTRODUCTION

2 The sole issue posed by Respondents' Motion to Dismiss, which was properly denied by the Administrative Law Judge, is whether solid waste collection services provided by a motor carrier via intermodal container that is subsequently transported by a rail carrier are preempted from state regulation under Section 10501(b) of Title 49, United States Code. That statute provides the Surface Transportation Board ("STB") with the sole jurisdiction over economic regulation of rail carrier transportation. Like their Motion to Dismiss and supplemental brief, Respondents' Petition for Interlocutory review ignores that none of the Respondents are authorized rail carriers and that the ICC and STB have never assumed jurisdiction over solid waste collection and transportation by motor carriers. Because they utterly fail to establish that this Commission is prohibited from regulating solid waste collection and transportation by Respondents, their Petition for Interlocutory review should be summarily denied.

II. ARGUMENT

A. Respondents' Statement of Facts includes procedurally inappropriate assertions regarding informal Staff opinions

3 Before addressing the flawed substantive arguments made by Respondents, it is important to note that this Petition comes before the Commission as an appeal of the Administrative Law Judge's order denying Respondents' Motion to Dismiss under WAC 480-07-380(1)(a), which sought a dismissal under the same standards as a motion made under CR12(b)(6).

4 When the Commission considers a motion to dismiss under CR 12(b)(6), it is required to accept the allegations in the complaint as true, and deny the motion if those facts would sustain the

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complaint.[1] Dismissal under 12(b)(6), is inappropriate unless there is no set of facts consistent with the complaint which could support a recovery.[2] In considering whether facts could support a claim, courts are also permitted to consider hypothetical facts not in the record that could support a claimant's complaint.[3] Accordingly, 12(b)(6) motions should be granted "'sparingly and with care,' and only in the unusual case in which the plaintiff's allegations show on the face of the complaint an insuperable bar to relief."[4]

5 In support of its Motion to Dismiss, Respondents attempt to assert new facts not addressed by Murrey's Complaint under the guise that they were documents relied upon in Murrey's complaint not physically attached thereto.[5] Murrey's Complaint is not made in any way upon the informal Staff opinion that Respondents attempt to use to support their assertion that Murrey's failed to state a claim upon which relief could be granted. Thus, it is procedurally inappropriate for Respondents to rely upon such extraneous records to claim their service is preempted.

6 Moreover, Respondents in the process ignore Commission orders that unequivocally conclude that Staff's legal opinions are merely advisory and that only official action in the form of a Commission order may resolve whether their services are subject to the Commission's jurisdiction.[6] Thus, the informal opinion improperly addressed by Respondents carries no weight in determining the Commission's jurisdiction over the highway TOFC solid waste collection and transportation service provided by Respondents. The ALJ was wholly correct to ignore Staff's 2011 informal opinion in denying Respondent's Motion to Dismiss. And as addressed herein although hardly dispositive to the current Petition, Staff's informal opinion was also incorrect.

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[1] *In re GHOSTRUCK, INC.*, Dkt. TV-161308, Order 03 Denying Motion to Dismiss, (Mar. 21, 2017) *citing Kinney v. Cook*, 159 Wn.2d 837, 842, 154 P.3d 206 (2007), *see also Rodriquez v. Loudeye Corp.* 144 Wn. App 709, 717-18, 189 P.3d 168 (2008)(On a 12(b)(6) motion, "[a]ll facts alleged in the plaintiff's complaint are presumed true.").
[2] *San Juan Cty. v. No New Gas Tax*, 160 Wn.2d 141, 164, 157 P.3d 831, 842 (2007)(addressing standards applicable to 12(b)(6) motion).
[3] *Keodalah v. Allstate Ins. Co.*, 194 Wn.2d 339, 362, 449 P.3d 1040, 1043 (2019).
[4] *San Juan Cty.*, 160 Wn.2d at 164.
[5] *See* Respondent's Petition, ⁋ 14.
[6] *In re GHOSTRUCK, INC.*, Dkt. TV-161308, Order 05, ⁋ 15 (May 31, 2017).

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B. Respondents failed to demonstrate that their highway TOFC solid waste collection service falls within the STB's exclusive jurisdiction to regulate rail carrier transportation

7 In attempting to create a new regulatory gap that would permit Respondents to provide motor carrier solid waste collection and transportation without oversight by the UTC and in violation of Murrey's certificate rights, Respondents repeatedly argue that the STB was granted exclusive jurisdiction over not just all rail transportation, but all TOFC service as well. Yet respondents fail to cite to a single authority supporting the premise that the STB concluded that its exclusive jurisdiction over rail carriers extends to highway TOFC service. This is because the Respondents' premise is demonstrably incorrect.

i. The STB's jurisdiction over different modes of transportation varies

8 First, Respondents claim that the ALJ was incorrect to determine that "COFC service" [sic] does not fall within the STB's exclusive jurisdiction over rail carrier transportation because "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."[7] This position, argued without citation to authority, completely ignores the statutory scheme that establishes differing jurisdiction over rail carriers and motor carriers in Subtitle IV of Title 49. That Subtitle is divided into three parts. Part A addresses the STB's exclusive jurisdiction over rail carriers. Part B addresses the STB's concurrent and limited jurisdiction over motor carriers, water carriers, brokers and freight forwarders. And Part C addresses its limited jurisdiction over Pipeline carriers. When considering that Respondents provide only motor carrier service that could be subject to the STB's jurisdiction, if at all, under Part B, it becomes obvious that it is not preempted under Section 10501(b), which falls under Part A.

a. Exclusive jurisdiction applies only to authorized rail carriers and their agents

9 The plain language used to describe the STB's exclusive jurisdiction over rail carrier

[7] Respondents' Petition, ¶ 23- 25 (emphasis in original).

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transportation in Part A, Section 10501(2)(b), demonstrates that it is limited to certain rail carriers and does not extend to other modes of transportation like motor carriers providing TOFC service. There, Congress describes the types of remedies, facilities, and rail carrier operations that fall with the STB's jurisdiction, but those provisions all modify the words "transportation by rail carriers":

> (b) 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.

The definition of "rail carrier," set forth in Section 10102(5), also demonstrates that the extent of the STB's jurisdiction in Section 10501 is limited to actual railroads:

> (5) "rail carrier" means 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;

Conspicuously, this provision lacks any words that could be construed liberally or expansively to include transportation by non-rail carriers that provide transportation *to* a rail carrier such as Highway TOFC service. Instead, applying the statutory definition of "rail carrier", Section 10501(b) applies only to "common carrier railroad for compensation."

10 If Respondents were nonetheless correct that they could apply preemption to their service simply by hiring a railroad to transport solid waste, they would certainly be able to identify *some* authority supporting the premise that the STB's exclusive railroad transportation jurisdiction extended beyond railroads. Instead, when construing the language in Section 10501(b), both the STB and the federal appellate courts have consistently held that only authorized rail carriers and

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their tightly-controlled agents fall within the statutory limits.

11 For example, in *Hi Tech Trans*, the Third Circuit Court of Appeals reviewed whether an entity lacking rail carrier authority, but loading C&D debris into/onto rail cars would come under the STB's exclusive jurisdiction.[8] Although the court acknowledged that the activities involved constituted "transportation", which is broadly interpreted under Section 10501(b), it then turned to the issue of whether the company was indeed a "rail carrier." After first noting that the company was not authorized by the STB as a rail carrier, the Court considered whether operating rail equipment could yet somehow make it a "rail carrier" under Section 10501(b). It rejected that notion, reasoning that if it were otherwise accepted:

> any nonrail carrier's operations would come under the exclusive jurisdiction of the STB if, at some point in a chain of distribution, it handles products that are eventually shipped by rail by a rail carrier. The district court could not accept the argument that Congress intended the exclusive jurisdiction of the STB to sweep that broadly, and neither can we.[9]

This holding accords with a number of court opinions over a period of many years which all determined that the preemptive effect of federal regulation of rail carriers applied only to rail carriers and their agents, and not to those companies who merely transported to a rail carrier.[10]

12 A similar conclusion was reached by the STB itself. In *Town of Babylon & Pinelawn Cemetery – Pet. For Declaratory Order*, the STB considered a request for declaratory order that a particular transloading operation was not subject to the STB's jurisdiction as "rail transportation by a rail carrier."[11] In determining its own jurisdiction and whether activities would be subject to its preemptive effect, the STB found:

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[8] *Hi Tech Trans, LLC v. New Jersey*, 382 F.3d 295 (3d Cir. 2004).
[9] *Id.* at 309.
[10] *See Grosso v. Surface Transp.* Bd., 804 F.3d 110, 114 (1st Cir. 2015)("Whether an activity is conducted by a "rail carrier" is a case-by-case factual determination based on, inter alia, how much control a rail carrier is exercising over the activity."); *Texas Cent. Bus. Lines Corp. v. City of Midlothian*, 669 F.3d 525, 531 (5th Cir. 2012) (The STB considers the following factors to determine whether transloading is performed by a rail carrier: "whether the rail carrier holds out transloading as part of its business, (2) the 'degree of control retained by the [rail] carrier,' (3) property rights and maintenance obligations, (4) contractual liability, and (5) financing").
[11] *Town of Babylon & Pinelawn Cemetery--Petition for Declaratory Order*, FIN 35057, 2008 WL 275697 (S.T.B. Jan. 31, 2008).

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> As noted, the Board has jurisdiction over "transportation by rail carrier," 49 U.S.C. 10501(a). Accordingly, to be subject to the Board's jurisdiction and qualify for Federal preemption under section 10501(b), the activities at issue must be transportation, and that transportation must be performed by, or under the auspices of, a "rail carrier." A "rail carrier" is defined as "a person providing common carrier railroad transportation for compensation...." 49 U.S.C. 10102(5). Whether a particular activity constitutes transportation by rail carrier under section 10501(b) is a case-by-case, fact-specific determination.[12]

13 There, the STB applied a test developed by the Interstate Commerce Commission ("ICC") to determine whether specific activities constituted "by, or under the auspices of a 'rail carrier':

> The Board's jurisdiction extends to the rail-related activities that take place at transloading facilities if the activities are performed by a rail carrier or the rail carrier holds out its own service through the third party as an agent or exerts control over the third-party's operations.[13]

Thus, where a company is merely transporting *to* a rail carrier rather than operating under its control, the STB determined that its activities are not subject to its jurisdiction or regulation thereof preempted by federal law.[14]

14 In fact, following the passage of the Clean Railroads Act ("CRA"), which was enacted to ensure that solid waste transloading rail facilities did not fall into a regulatory gap like Respondents attempt to engineer in this case, the STB was asked to reopen its docket and reaffirm that transportation to a rail carrier remained outside of its jurisdiction. The STB in fact reopened its docket and then confirmed that its exclusive jurisdiction and the preemptive effect of Section 10501(b) applied only to rail carriers and their tightly-controlled agents.[15]

b. <u>The STB's jurisdiction over motor carriers is distinct and non-exclusive</u>

15 As noted, the STB also maintains limited and non-exclusive jurisdiction over motor carriers under Part B of Subtitle IV. The STB's general jurisdiction is set forth in Section 13501, which provides as follows:

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[12] *Id.* at 3.
[13] *Id.*
[14] *Id.*
[15] *Id.* The test for the level of control that must be exercised by the railroad is not pertinent to this proceeding, but was addressed in *Texas Cent. Bus. Lines Corp. v. City of Midlothian*, supra.

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> The Secretary and the Board have jurisdiction, as specified in this part, over transportation by motor carrier and the procurement of that transportation, to the extent that passengers, property, or both, are transported by motor carrier--
>
> **(1)** between a place in--
>
> **(A)** a State and a place in another State;
>
> **(B)** a State and another place in the same State through another State;
>
> **(C)** the United States and a place in a territory or possession of the United States to the extent the transportation is in the United States;
>
> **(D)** the United States and another place in the United States through a foreign country to the extent the transportation is in the United States; or
>
> **(E)** the United States and a place in a foreign country to the extent the transportation is in the United States; and
>
> **(2)** in a reservation under the exclusive jurisdiction of the United States or on a public highway.[16]

In turn, a "motor carrier" is defined in 49 U.S.C. Section 13102 as "a person providing motor vehicle transportation for compensation"[17] while a "motor vehicle" is defined further as;

> a vehicle, machine, tractor, trailer, or semitrailer propelled or drawn by mechanical power and used on a highway in transportation, or a combination determined by the Secretary, but does not include a vehicle, locomotive, or car operated only on a rail, or a trolley bus operated by electric power from a fixed overhead wire, and providing local passenger transportation similar to street-railway service.[18]

Thus, it is indisputable that the STB's jurisdiction over rail carriers and motor carriers is distinct and separate, and any question of preemption or jurisdiction over solid waste transported by motor carrier must be analyzed in the context of the appropriate statutory scheme set forth in Section 13501.

ii. Respondents do not provide rail transportation

16 Despite the irrefutable fact that the STB's jurisdiction over rail and motor carriers is distinct and separate, Respondents nonetheless gratuitously argue their motor carrier transportation service is

[16] 49 U.S.C. § 13501 (emphasis added).
[17] 49 U.S.C. § 13102(14).
[18] 49 U.S.C. § 13102(16) (emphasis added).

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preempted under Section 10501 because the solid waste they collect and transport will eventually include being transloaded to a third party rail carrier. Reality must be acknowledged, here, however. Respondents are not rail carriers. Waste Management of Washington is both a certificated solid waste collection company, albeit one without authority in Clallam or Jefferson Counties, and an authorized motor carrier. Respondents MJ Trucking and Contracting, Inc. ("MJ") and Daniel Anderson Trucking and Excavation, LLC ("Dan Anderson") are simply authorized motor carriers. None transport any materials by rail. Instead, MJ and Dan Anderson operate under separate agreements with WM to collect and transport solid waste via intermodal containers to the transfer station (or other transloading facility). At the transloading facility, Waste Management of Washington loads intermodal containers onto rail cars, but does not own any rail facilities or operate a railroad. And none are the agent of a railroad. Thus, Respondents fail to demonstrate that their preemption arguments should be analyzed in the context of Section 10501(b).

C. Exemption is not synonymous with preemption of TOFC service

17 Despite the utter lack of authority establishing that Congress intended to preempt state regulation of TOFC service, Respondents plow ahead nonetheless, insisting that the STB's exemption authority under Section 10502 and related court opinions establish that TOFC service is preempted.[19] Not only is this argument legally incorrect, but it is also contradictory.

18 In their Motions to Dismiss, Respondents argued that federal exemptions for certain types of TOFC/COFC service set forth in 49 C.F.R. Section 1090.2 are irrelevant to their positions because that section exempts motor carriers only from federal regulation.[20] Yet, every one of the court opinions Respondents rely upon to assert that TOFC service is *preempted* discuss only the STB's authority to *exempt* TOFC service. Thus, taking Respondents at their word, cases addressing the STB's exemption authority are irrelevant to their claims.

[19] Respondent's Petition, ¶ 33-45.
[20] Respondents' Motion to Dismiss, ¶ 25.

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19 Aside from their contradictory position, the cases cited by Respondents also fail to demonstrate that the TOFC service falls within the STB's exclusive railroad transportation jurisdiction. Instead, the question addressed in those cases was whether the ICC had in fact been granted the statutory authority to exempt motor carriers from the federal statutory and regulatory requirements applicable to interstate motor carriers. For example, *Central States Motor Freight Bureau, Inc. v. ICC*, addressed whether the STB's exemption authority, which had been expanded by the Staggers Rail Act of 1980, authorized the STB to exempt from federal regulation motor carriers that were not owned or affiliated with a railroad, but which provided TOFC service.[21] As addressed by the D.C. Circuit, at the time of the opinion, motor carriers providing TOFC service were licensed by the STB under the Motor Carrier Act ("MCA"), and the effect of the STB's exemption under Section 10505 was merely to make the compliance with certain provisions of the MCA unnecessary:

> Central States argues that the Commission's exemption will "moot" or "nullify" provisions of the MCA that liberalized TOFC motor carrier licensing procedures. See 49 U.S.C. §§ 10322(b)(2), 10922(k), 10923(b). We are not persuaded that the ICC's exercise of its exemption authority genuinely conflicts with these provisions. Section 10322(b)(2) requires the ICC to rule within 180 days on applications to provide motor service incidental to TOFC/COFC operations. The effect of the Commission's order is simply to make such applications unnecessary, unless the Commission revokes its exemption under section 10505(d), and except as to "Plan I" service, which the Commission's order did not deregulate (see supra note 1). The Commission could reasonably interpret section 10322(b)(2)—which was enacted before the Staggers Act broadened section 10505(a) to permit large-scale exemptions—as applicable only so far as the Commission's exemption authority lies dormant.[22]

20 Thus, at the time, the STB's jurisdiction over motor carrier TOFC service was hardly derived from the ICCTA. And rather than establishing anything regarding the scope of the ICC's exclusive jurisdiction over rail carriers, the sole question was whether the STB had indeed been authorized by Congress to deregulate interstate motor carriage when offered in conjunction with a railroad.

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[21] 924 F.2d 1099 (D.C. Cir. 1991).
[22] *Id*. at 1103.

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21 And because Respondents provide motor carrier transportation, not rail carrier transportation, the authority they cite regarding the scope of the STB's rail carrier transportation jurisdiction is wholly irrelevant. For example, Respondents cite to a number of cases regarding the meaning of "transportation" under Section 10501(b).[23] But the pertinent question is not whether the service constitutes "transportation;" it is whether independent motor carrier transportation can be preempted as "rail carrier" transportation simply by subcontracting part of a haul to a railroad. Because these cases do not answer that question, they do not support Respondents' flawed and ill-conceived premise that state regulation of motor carrier solid waste TOFC service is preempted.

22 Neither do cases relating to the STB's jurisdiction over exclusively rail carrier transportation aid Respondents' unique interpretation here. For example, Respondents cite to *City of Seattle v. Burlington N. R. Co.* to demonstrate the exclusive jurisdiction of the STB to regulate railroads.[24] But that case addressed local regulation over an actual rail carrier – the Burlington Northern. Thus, it offers no guidance whatsoever as to whether motor carrier solid waste TOFC service can be regulated.

23 Respondents similarly cite to *City of Auburn City of Auburn v. U.S. Gov't*, but it too addressed an authorized railroad (once again, the Burlington Northern).[25] Thus, it again offers no guidance as to whether solid waste collection and transportation by highway TOFC is subject to rail carrier preemption.

24 In the context of solid waste transloading cases, Respondents cite further to orders of the STB involving actual rail carrier operations. First, they rely upon *In re: New England Transrail, LLC* for the premise that intermodal containers of solid waste transferred directly from trucks to rail cars were subject to the STB's jurisdiction under Section 10501(b).[26] Notably, that order was

[23] Respondents' Petition, ¶ 33.
[24] 145 Wn.2d 661, 41 P.3d 1169, 1170 (2002).
[25] 154 F.3d 1025, (9th Cir. 1998), as amended (Oct. 20, 1998).
[26] Fed. Carr. Cas. (CCH) ¶ 37241 (S.T.B. June 29, 2007).

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issued before the enactment of the Clean Railroads Act. Moreover, rather than motor carrier operations transporting solid waste to a transloading facility, that order actually addressed a proposed facility for which the proponent sought authority from the STB to operate as a rail carrier.[27] In fact, in determining that the operation was subject to its jurisdiction, the STB issued a specific finding that expressly depended upon both the company's plan to become an authorized rail carrier and its actual operation of rail equipment and facilities, stating:

> [The company] plans to transport a variety of different materials for the shipping public, operating its own trains with its own locomotive operated by its own employees to a connection with other carriers. Itplans to offer its service to the general public in its own name and not on behalf of any other carrier. Accordingly, it would be a rail carrier subject to Board jurisdiction.

Conversely, neither MJ nor Dan Anderson have sought or hold authority to operate as rail carriers, nor do either actually operate rail equipment or facilities of any kind. Similarly, Waste Management of Washington merely loads containers onto rail cars and does not hold rail carrier authority from the STB. Consequently, none of the Respondents are "rail carriers" under the STB's jurisdiction.

25 Next, Respondents cite to an STB rulemaking that followed the enactment of the CRA in 2008.[28] But that rulemaking had nothing to do with motor carrier TOFC service, and addressed only certain regulations of solid waste transloading facilities. Thus, it too, provides zero guidance to the Commission in the context of this proceeding.

26 Finally, Respondents cite to the Washington Supreme Court's opinion in *Regional Disposal Co. v. City of Centralia* for the premise that it "relied on ICCTA preemption applying to the transportation of solid waste."[29] There, rather than relying upon the actual court opinion, however, Respondents cite to everything else. While the identity of the legal counsel to the

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[27] *Id.*

[28] Respondents' Petition, ¶ 61; *Solid Waste Rail Transfer Facilities*, EP 684, 2012 WL 5873121 (S.T.B. Nov. 14, 2012).

[29] Respondents' Petition, ¶ 63; 147 W.2d 69 (2002).

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parties and the arguments they made may make for interesting trivia, even a charitable reading of the Washington Supreme Court's opinion there demonstrates it cannot support Respondents' premise. In fact, rather than addressing anything relating to preemption under Section 10501(b) whatsoever, the Washington Supreme Court's opinion was limited to its analysis under 49 U.S.C. Section 11501(b)(4). And rather than finding that a solid waste collection company's services fell within Section 10501(b), the court did nothing more than hold the local tax to violate Section 11501(b)(4)'s prohibition on taxes that discriminate against rail carriers.[30]

D. Solid waste was never within the ICC or STB's motor carrier jurisdiction

27 Having established that the ICC and STB were not granted jurisdiction over motor carrier TOFC operations under Part A of Subtitle IV, the only question remaining is whether the STB has jurisdiction over solid waste when transported as part of Respondent's motor carrier TOFC service. Contrary to Respondent's arguments, which all address actual railroad operations rather than motor carrier Highway TOFC operations, this question is answered just as it would be for any other motor carrier: the STB has never assumed jurisdiction over solid waste because it is not considered "property" under 49 U.S.C. Section 13501.

28 Indeed, as addressed by Murrey's in its supplemental brief, the ICC has never assumed jurisdiction over the economic regulation of the collection and transportation of solid waste, which has long been considered an issue of paramount local public health and safety. The ICC first reached that conclusion based upon its interpretation of the word "property" in Section 13501 in *Joray Trucking Corp. v. Common Carrier Application.*[31] *Joray* involved the application to the ICC for a an interstate motor carrier license to collect, transport and dispose of rock, debris and other materials from excavations and demolitions. The ICC determined that based on the materials transported, the fact that the "shipper" had no interest in where they were taken for disposal because they were merely discarded and disposed of at a landfill, they were not

[30] *Id.*
[31] 99 M.C.C. 109 (ICC Jun. 29, 1965).

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considered "property." Thus, commencing with *Joray*, the ICC consistently determined that the collection and transportation of solid waste was subject to local and not ICC regulation.[32]

29 And although following *Joray*, the ICC temporarily regulated "dangerous traffic whether it be valuable nuclear fuel or radioactive waste" in order to avoid a regulatory gap, it consistently treated solid waste collection as essentially local in character and maintained the negative value test for determining whether a particular waste stream was "property" for purposes of determining its jurisdiction.[33]

30 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, state and federal.[34] 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."[35] Thus, consistent with the United States Supreme Court's holding that states' authority to regulate is at its apex in areas of local health and safety,[36] the ICC continued to decline jurisdiction over solid waste collection and transportation.

31 As noted in Murrey's Supplemental Brief (which, together with Murrey's Answer to Respondents' Motion to Dismiss, is incorporated by reference here), the ICC's post-*Joray* determinations are discussed in great detail in the order of the United States District Court for the Northern District of Alabama in *I.C.C. v. Browning-Ferris Indus., Inc.*[37] There, the district court

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[32] *Id.* at 110.
[33] *Long Island Nuclear Service Corp., Common Carrier Application*, 110 M.C.C. 395 (ICC Sep. 9, 1969).
[34] *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).
[35] *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)).
[36] *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).
[37] 529 F. Supp. 287 (N.D. Ala. 1981).

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concluded that the "[ICC] has not, however, held that it has jurisdiction over non-nuclear wastes that are not to be recycled or reused."[38] Thus, because the waste at issue had negative value, the Court found it was not subject to the ICC's jurisdiction as "property."[39]

32 Like in *Joray* and subsequent determinations of the ICC's jurisdiction, the material at issue here has negative value and is ordinary solid waste being collected for disposal. Prior to Respondents' involvement, it was transported for disposal at a different landfill by Murrey's. And from the perspective of the generator, the only thing that has changed now that Respondents are collecting and transporting the generators' solid waste is the container into which it is loaded and the identity of the company collecting it for disposal. Thus, 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. Rather than property in which the generator has an interest, it has a decisively negative value and is not "property" under Section 10501. Consequently, neither the ICC nor the STB would have exercised jurisdiction over its economic regulation.[40]

33 Nor would the ICCTA's creation of the STB make a difference in the outcome of this proceeding. While Respondents have attempted to cast doubt on whether the ICC's decisions continue to have merit, 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.[41] Federal courts have continued to hold that solid waste collection and transportation do not fall within the jurisdiction established by Section 13501.[42] Moreover, were Respondents correct, the

[38] *Id.* at 291.
[39] *Id.* at 293.
[40] 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).
[41] H.R. CONF. REP. 104-422, 201, 1995 U.S.C.C.A.N. 850, 886.
[42] *See Wilson v. IESI N.Y. Corp.*, 444 F. Supp. 2d 298, 309 (M.D. Pa. 2006).

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Commission's authority to regulate solid waste that is collected in the state but disposed of outside of the state would be preempted as interstate motor carrier transportation under Section 13501 and in contravention of RCW 81.77.100. Because the STB has never assumed jurisdiction over solid waste transportation under Section 13501, and no court has held that the Commission is prohibited from regulating the collection and transportation of solid waste under such circumstances, Respondents' attempt to exploit the railroads to establish preemption should be roundly rejected.

E. TOFC Exemptions do not apply to Respondents' Service

34 Despite their earlier objection that 49 CFR § 1090.2 does not control the outcome of this proceeding, they nonetheless now take issue with the related findings in Order 02.[43] Because 49 CFR Section 1090.2 was not the basis for Respondents' Motion to Dismiss, and because of their representation that 49 CFR § 1090.2 has no impact on state regulation, this challenge to Order 02 should be completely disregarded. However, because Respondents mischaracterize the applicability of Section 1090.2 to their service, it merits mention here nonetheless.

35 Specifically, Respondents insist that their service constitutes a service "arranged independently with the shipper or receiver."[44] Yet, for that provision to apply it must be both "pickup and delivery service," which reference Respondents conveniently excluded from their quotation of Section 1090.2. As addressed in Murrey's Response to Respondents' Motion to Dismiss, pickup and delivery service occurs within a terminal area or commercial zone. Because Respondent's service is not so limited, it does not qualify under this exemption. Moreover, that local pickup and delivery service must be arranged independently with the shipper from other TOFC services to qualify for this exemption. Yet, Respondents admit that Waste Management Disposal Services of Oregon is the company that contracts directly with each, the generator, the subcontracted

[43] Respondents' Petition, ¶ 46-48.
[44] Respondent's Petition, ¶ 46.

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motor carrier and the railroad.[45] And they further admit that they subcontract to the railroad, rather than act as its joint-rate partner or agent.[46] Consequently, it cannot be said that either MJ or Dan Anderson is providing pickup and delivery services arranged by the shipper or receiver *independently* from other TOFC transportation services. Thus, the ALJ was fully correct in holding that Respondents, who subcontract *to* the railroad, thereby provide non-exempt Plan 1 TOFC service under 49 CFR Section 1090.2.

III. CONCLUSION

36 As the ALJ also correctly concluded, when a field is traditionally occupied by the states, such as solid waste collection, the courts engage in a preemption analysis that starts with a presumption against preemption unless it was the "clear and manifest purpose of Congress."[47] In fact, the 9th Circuit Court of Appeals has already made clear that there exists a strong presumption against federal preemption of solid waste collection and transportation.[48] To overcome that presumption, Respondents are required to show that it was the clear and manifest purpose of Congress that state regulation be preempted. Their Motion to Dismiss, Supplemental Brief and Petition for Interlocutory Review individually or in the aggregate fall well short of accomplishing that standard. Instead, they merely establish that state regulation of STB-authorized actual rail carriers' transportation services is preempted. Because this proceeding does not involve rail carrier transportation, their Petition for Interlocutory Review should be denied.

[45] Respondents' Motion to Dismiss, ¶ 5.
[46] *Id*. ¶ 7.
[47] *Id*.; *AGG Enterprises v. Washington Cty.*, 281 F.3d 1324, 1328 (9th Cir. 2002)
[48] *AGG Enterprises v. Washington Cty.*, 281 F.3d 1324, 1328 (9th Cir. 2002)

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RESPECTFULLY SUBMITTED this 9th day of November, 2020.

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