NO. 101529-1

SUPREME COURT OF THE STATE OF WASHINGTON

WASTE MANAGEMENT OF WASHINGTON, INC., WASTE MANAGEMENT DIPSPOSAL SERVICES OF OREGON, INC., MJ TRUCKING & CONTRACTING, and DANIEL ANDERSON TRUCKING AND EXCAVATION, LLC,

Petitioners,

v.

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION, an agency of the State of Washington,

Respondent.

RESPONDENT'S ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION

To protect public health and safety and ensure universal solid waste collection services in Washington, the Legislature requires the Washington Utilities Transportation Commission to regulate motor carriers that collect and transport solid waste. The cornerstone of this regulatory scheme is RCW 81.77.040, which requires solid waste collection companies to obtain from the Commission a certificate of public convenience and necessity before providing service.

The petitioners (collectively Waste Management), a group of motor carriers who collect and transport solid waste, seek review of a published Court of Appeals decision holding that federal law granting the Surface Transportation Board exclusive jurisdiction over "transportation by rail carriers," 49 U.S.C. § 10501(b), does not preempt RCW 81.77.040 as applied to their operations.

This Court should deny the petition for review because Waste Management fails to raise any significant, open questions

of federal law under RAP 13.4(b)(3). The text of § 10501(b) and on-point federal authority dispose of the arguments that Waste Management makes here, namely that it can benefit from § 10501(b)'s preemption of state law despite the fact that it is not a rail carrier and that its motor vehicle trailer-on-flatcar service is somehow "rail transportation." That federal law is clear: entities like Waste Management are motor carriers and regulated under the motor carrier, not rail carrier, provisions in the Interstate Commerce Act (ICA). And the ICA's motor carrier provisions save state regulatory authority over motor carriers who collect and transport solid waste.

II. COUNTERSTATEMENT OF THE ISSUE PRESENTED

Did the Court of Appeals properly apply the text of § 10501(b) and on-point federal authority to hold that the Surface Transportation Board's exclusive jurisdiction over transportation by rail carriers does not preempt state regulation of companies that use highway-travelling motor vehicles to collect or transport solid waste?

III. COUNTERSTATEMENT OF THE CASE

Given the health and safety concerns involved, *see* RCW 81.77.100, Washington has a comprehensive program governing the collection and transport of solid waste. *See generally* chapter 81.77 RCW. No solid waste collection company may operate without first obtaining from the Commission a certificate of convenience and public necessity authorizing the service. RCW 81.77.040.

Waste Management consists of a group of solid waste and trucking companies that operate under state and federal motor carrier permits. AR at 8, 31, 32, 329-48. Waste Management does not have a certificate of public convenience and necessity issued by the Commission authorizing it to collect and transport solid waste in Clallam or Jefferson counties. AR at 356-59. Nor does Waste Management hold authority from the Surface Transportation Board (STB) permitting it to operate as a rail carrier. AR at 354-55.

Despite lacking the requisite certificate, Waste Management provided solid waste collection and transport services for pulp mills in Clallam and Jefferson counties. AR at 360-62, 371-76, 378-86, 388-403. The mills deposited their solid waste in intermodal cargo containers. AR at 373-74, 376. Waste Management used motor vehicles to collect those containers and transport them over the public highways to rail yards. AR at 371, 374. The containers were then loaded onto trains for shipment to a landfill. AR at 372, 375.

The carrier holding the certificate authorizing service to the mills (Murrey's Disposal Company) complained to the Commission, seeking an order requiring Waste Management to cease and desist from uncertificated operations. AR at 6-13, 593-601; *see* RCW 81.04.510. Waste Management did not contest that it lacked the requisite certificate, but argued it did not need one because § 10501(b) preempted state law as applied given the intermodal nature of its service. *E.g.*, AR at 479-94. Murrey's and Waste Management ultimately filed cross-motions for

summary determination on the issue. AR at 305-515; *see* WAC 480-07-380(2). The Commission denied Waste Management's motion, granted Murrey's, and ordered Waste Management to cease and desist. AR at 572-87.

Waste Management petitioned for judicial review. CP at 1-27. On direct review, *see* CP at 215-17, Division Two affirmed the Commission, holding that § 10501(b) did not apply given that Waste Management was not a rail carrier. *Waste Mgmt. of Wash., Inc. v. Wash. Utils. & Transp. Comm'n*, ___ Wn. App. 2d ___, 519 P.3d 963, 970-74 (2022).

Waste Management now seeks review of the Court of Appeals' decision.

IV. REASONS WHY THIS COURT SHOULD DENY REVIEW

Waste Management seeks review under RAP 13.4(b)(3), which authorizes this Court to grant review if a petition presents "a significant question of law under the Constitution of the State

of Washington or of the United States."[1] *E.g.*, Pet. for Review at 6. That argument should fail, because there is no real question warranting review here: the STB and the federal courts have uniformly held or concluded that § 10501(b) does not apply to the operations of non-rail carriers, including those involved in the intermodal transportation of solid waste. Other on-point federal authority forecloses Waste Management's unsupported counterargument that it somehow provides "rail transportation." This Court, accordingly, should deny Waste Management's petition.

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[1] At least, Waste Management appears to seek review under RAP 13.4(b)(3). Waste Management does not cite RAP 13.4(b) or explicitly present argument on the issue, but it references the Supremacy Clause, U.S. Const. art. VI, cl. 2, and claims the Court of Appeals' holding conflicts with federal law. Pet. for Review at 6. And Waste Management does not appear to seek review under any of the other provisions of RAP 13.4(b), failing to contend that the Court of Appeals' decision conflicts with an opinion from this Court or with another published Court of Appeals decision, *see* RAP 13.4(b)(1), (2), or that its petition presents a public policy question that only this Court, and not the Court of Appeals, should decide. *See* RAP 13.4(b)(4); *cf. McKee v. AT&T Corp.*, 164 Wn.2d 372, 387, 191 P.3d 845 (2008) (preemption is a question of law).

A. The Interstate Commerce Act and the Preemption of State Regulation of Rail and Motor Carriers

Congress enacted the Interstate Commerce Act (ICA) in 1887, creating the Interstate Commerce Commission (ICC) and beginning federal regulation of railroad common carriers. *See generally* An Act to Regulate Commerce, 24 Stat. 379 (1887). Subsequent amendments to the ICA gave first the ICC, then the STB, jurisdiction over other forms of common carriers as well. *See DHX, Inc. v. STB*, 501 F.3d 1080, 1082 (9th Cir. 2007).

The ICA currently grants the STB "jurisdiction over transportation by rail carrier that is . . . only by railroad." 49 U.S.C. § 10501(a)(1)(A). That jurisdiction is "exclusive." §10501(b). This jurisdictional exclusivity preempts state laws governing the same subject matter. *N.Y Susquehanna & W. Ry. Corp. v. Jackson*, 500 F.3d 238, 252 (3d Cir. 2007).

Section 10501(a)'s jurisdictional grant limits § 10501(b)'s preemptive effect. *N.Y. & Atl. Ry. Co. v. STB*, 635 F.3d 66, 72 (2d Cir. 2011). Accordingly, every level of federal tribunal that has considered the issue has concluded that § 10501(b) does not

preempt state regulation of an activity unless it is "both 'transportation and operated by a 'rail carrier.'" *Del Grosso v. STB*, 804 F.3d 110, 114 (1st Cir. 2015); *e.g.*, *Hi Tech Trans, LLC v. New Jersey*, 382 F.3d 295, 308-09 (3d Cir. 2003) (§ 10501(b) does not preempt state regulation of solid waste trucking and transloading operations undertaken by a non-rail carrier); *Grafton & Upton R.R. Co. v. Town of Milford*, 417 F. Supp. 2d 171, 176 (D. Mass 2006) ("Congress intended the transportation and related activities undertaken by rail carriers to benefit from federal preemption, but did not mean such preemption to extend to activity related to rail transportation undertaken by non-rail carriers."); *Hi Tech Trans LLC – Pet. for Decl. Order*, FD 34192 (Sub-No. 1), 2003 WL 21952136, slip op. at 5-7 (STB served Aug. 14, 2003) (*Hi Tech II*) (§ 10501(b) does not preempt state regulation of intermodal solid waste activities undertaken by non-rail carriers).

The ICA also grants the STB jurisdiction over "transportation by motor carrier." 49 U.S.C. § 13501(1), (2). Its

motor carrier provisions also preempt state law. 49 U.S.C. § 14501(c)(1). Specifically, no state may "enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of any motor carrier . . . with respect to the transportation of property." *Id.* Congress used "property" in § 14501(c)(1) to adopt ICC case law concluding that motor carriers transporting solid waste did not transport "property." H.R. Conf. Rep. No. 103-677, at 85 (1994). Courts have relied on that choice to hold that Congress clearly indicated its intent "*not* to preempt state" regulation of motor carriers who collect and transport solid waste. *AGG Enters. v. Washington County*, 281 F.3d 1324, 1329 (9th Cir. 2002).

B. There is no Significant Question of Federal Law Because § 10501(b) Does Not Apply to the Operations of a non-Rail Carrier

The Court of Appeals held that: (1) Waste Management is not a rail carrier, and (2) § 10501(b) therefore does not preempt chapter 81.77 RCW as applied. *Waste Mgmt.*, 519 P.3d at 970-73. The first holding was compelled by the undisputed evidence,

and the second by the plain text of § 10501(b). Nothing about either presents a significant question of federal law warranting review.

Under the ICA, the term "rail carrier" means, as relevant, "a person providing common carrier railroad transportation for compensation." 49 U.S.C. § 10102(5). A carrier providing service via motor vehicle "certainly" does not provide "transportation . . . by rail." *In re Right of R.R. Cos. to Exchange Free Transp. with Local Transfer & Baggage Cos.*, 12 I.C.C. 39, 42 (1907).[2]

As the Court of Appeals held, the undisputed facts compel the conclusion that Waste Management is not a rail carrier, *Waste Mgmt.*, 519 P.3d at 971, and Waste Management does not argue otherwise here. It operates under motor carrier permits (although

[2] Though Congress abolished the ICC and replaced it with the STB, the ICC's orders remain valid and effective until the STB abrogates or overrules them. Interstate Commerce Commission Termination Act of 1995 § 204(a), 109 Stat. 803, 941.

not under the certificate required by RCW 81.77.040). It holds no rail carrier authority from the STB. *See Hi Tech Trans*, 382 F.3d at 305 (a person must obtain a certificate from the STB before operating as a rail carrier and the lack of such a permit indicates the person is not a rail carrier). It provides service with motor vehicles, not locomotives and rail cars. Its motor vehicles travel over the public highways, not rail tracks. Indeed, some combination of those facts prompted Waste Management to concede below that it was a motor carrier, not a rail carrier. AR at 532.

That correct holding ends the matter. Because Waste Management is not a rail carrier, § 10501(b) does not preempt state regulation of its solid waste operations. *Hi Tech*, 382 F.3d at 305-06, 308-10 (§ 10501(b) does not preempt state regulation of the motor carriage and intermodal transloading of solid waste); *see J.P. Rail, Inc. v. N.J. Pinelands Comm'n*, 404 F. Supp. 2d 636, 650-52 (D. N.J. 2005) (§ 10501(b) does not preempt state regulation of a non-rail carrier performing

intermodal solid waste service); *see Hi Tech II* at 5-7 (§ 10501(b) does not preempt state regulation of non-rail carrier solid waste operations).

Waste Management, however, contends that the Court of Appeals erred by focusing on whether it is a rail carrier rather than on its claim that it provides "rail transportation." *E.g.*, Pet. for Review at 12-13, 21. Setting aside whether Waste Management provides "rail transportation" (and it does not, as discussed below in Section IV.C), Waste Management's argument fails for two reasons.

Initially, Waste Management cannot reconcile its argument with the text of § 10501(b). As mentioned, § 10501(a) grants the STB jurisdiction that § 10501(b) makes exclusive. *N.Y & Atl. Ry. Co.*, 635 F.3d at 72. The Court of Appeals thus had it right: the question is whether Waste Management provides "transportation by rail carrier that is . . . only by railroad" subject to the STB's exclusive jurisdiction, § 10501(a)(1)(A), not whether it somehow provides "rail transportation." And, as

Waste Management has conceded, AR 532, it does not provide "transportation . . . only by railroad." § 10501(a)(1)(A).

Further, Waste Management's argument runs contrary to federal authority holding or concluding that § 10501(b) does not preempt state regulation of intermodal solid waste operations by non-rail carriers. The Third Circuit, for example, held that § 10501(b) does not preempt state regulation of entities that use motor vehicles to transport solid waste to an intermodal facility for loading onto a rail carrier's trains, *Hi Tech Trans*, 382 F.3d at 305-06, 308-10, operations effectively identical to Waste Management's. The court distinguished between "transport to rail carrier" and transportation *by* rail carrier and reasoned that intermodal solid waste operations by a non-rail carrier involve the former, not the latter. *Hi Tech Trans*, 382 F.3d at 308. The federal district court for New Jersey has reached a similar conclusion about § 10501(b)'s inapplicability to intermodal solid waste operations by a non-rail carrier, *J.P. Rail*, 404 F. Supp. 2d at 650-52; as has the STB. *Hi Tech II* at 5-7.

Waste Management attempts to distinguish those cases, contending that none involved trailer-on-flatcar (TOFC) service. Pet. for Review at 23 n.9. Its attempt fails, for two reasons.

First, Waste Management's argument offers a distinction without a difference. As discussed next, federal law has always treated motor carriers providing TOFC service as motor carriers, not rail carriers, and regulated them as such, just like the motor carriers at issue in the Third Circuit's *Hi Tech* opinion.

Second, Waste Management's distinction is irrelevant. As Waste Management notes, without irony, rail-yard transloading operations fall within 49 U.S.C. § 10102(9)'s definition of "transportation." Pet. for Review at 9-12 (collecting cases). Accordingly, those operations constitute "transportation by rail carrier" when performed *by a rail carrier*. *E.g.*, *Jackson*, 500 F.3d at 247-57. But *Hi Tech*, *J.P. Rail*, and *Hi Tech II* all stand for the common sense proposition that even solid waste operations that otherwise might be "transportation" within the

meaning of § 10501(b) are not "transportation by rail carrier" when not performed by a rail carrier.

Section 10501(b) preempts state regulation of transportation by rail carrier. Waste Management is not a rail carrier. § 10501(b) does not apply. There is no significant federal question warranting review under RAP 13.4(b)(3).

C. Waste Management Does Not Provide "Rail Transportation"

Waste Management nevertheless seeks review by claiming § 10501(b) applies to its operations because motor carriers providing TOFC service provide "rail transportation" under (1) 49 U.S.C. § 10102(9)'s definition of "transportation" and (2) the STB's TOFC exemption rules. Again, Waste Management does not present a significant, open question warranting review. On-point federal authority renders each of Waste Management's arguments meritless. Under that authority, Waste Management is a motor carrier that provides a motor carrier service. The relevant preemption provision is thus not § 10501(b) (governing rail carriers), but is instead § 14501(c)(1)

(governing motor carriers). And § 14501(c)(1) saves state regulatory authority over services like Waste Management's. *AGG*, 281 F.3d at 1329.

1. The trucking of solid waste to rail yards does not constitute "transportation" within the meaning of § 10501(a).

Waste Management contends that the Court of Appeals erred because its trucking operations fall within § 10102(9)'s definition of "transportation," which includes "[s]ervices related to" the "movement of passengers or property . . . by rail." But Waste Management cannot create a significant question of federal law by offering an implausible and improper reading of § 10102(9) already rejected by the STB.

Initially, Waste Management ignores basic principles of statutory interpretation in reading of § 10102(9) and § 10501. This Court reads a statute as a whole, considering each provision "in relation to" the statute's other provisions," *State v. Young*, 125 Wn.2d 688, 888 P.2d 142 (1995) (internal quotation omitted), generally applying the more specific statute rather than

the more general one. *Waste Mgmt. of Seattle, Inc. v. Wash. Utils. & Transp. Comm'n*, 123 Wn.2d 621, 629-30, 869 P.2d 1034 (1994). Waste Management reads the ICA's rail provisions in isolation, utterly ignoring its motor carrier provisions. Given that Waste Management operates as a motor carrier, and admits as much, the ICA's motor carrier provisions are the more specific and thus the governing ones. Those motor carrier provisions, as noted, save state regulatory authority over services like Waste Management's. *AGG*, 281 F.3d 1329.

Waste Management's reading of § 10501(b) also ignores basic principles for interpreting preemption provisions. For such provisions, a court must give effect to Congress's intent. *Medtronic v. Lohr*, 518 U.S. 470, 485, 116 S. Ct. 2240, 135 L. Ed. 2d 700 (1996). And a court must, if reasonably possible, avoid an interpretation that preempts state law. *Altria Group v. Good*, 555 U.S. 70, 77, 129 S. Ct. 538, 172 L. Ed. 2d 398 (2008). Again, Waste Management ignores these principles, urging this Court to ignore Congress's manifest intent to save state

regulatory authority over companies that use motor vehicles to collect and transport solid waste. Waste Management also urges this Court to interpret § 10501(b) as preempting state law where it can reasonably avoid doing so by reading preemption under § 10501(b) as confined to rail carrier operations, a reading compelled by the statute's plain text and on-point authority, as described above.

Further, the STB has already concluded that the motor carriage of solid waste to a rail yard does not constitute "transportation" in the context of § 10501(a) and (b), and thus does not fall within its exclusive jurisdiction. In doing so, the STB explained that its jurisdiction over rail carriers extends to "activities . . . integrally related to a railroad's ability to provide rail transportation services." *Hi Tech Trans, LLC – Petition for Declaratory Order – Hudson County, NJ* – FD 34192, slip op. at 3 (STB served Nov. 20, 2002) (*Hi Tech I*); *id.* at 4. But it reasoned that where a state law or regulation falls "on truck shipments within the state, not on interstate rail shipments," the

service lacks the necessary integral relation. *Id.* at 3.[3] In reaching its conclusion, the STB rejected the argument that a motor carrier's participation in "one continuous intermodal movement" transformed the motor carrier's operations into transportation by rail carrier. *Id.* at 3.

The STB reads *Hi Tech I* as standing for the proposition that it obtains jurisdiction over intermodal transportation under § 10501(a) at the point the motor carrier delivers the shipment to a rail yard. *E.g., City of Alexandria, VA – Petition for Declaratory Order*, FD 35157, slip op. at 3 (STB served Feb. 17, 2009) (parenthetically citing *Hi Tech I* for that proposition); *Town of Babylon & Pinelawn Cemetery – Petition for Declaratory Order*, FD 35057, slip op. at 4 (STB served Feb. 1, 2008) (same). That rule harmonizes the STB's motor and rail

[3] The STB subsequently made clear that its determination that Hi Tech's operations were not "transportation by rail carrier" in *Hi Tech I* turned on the transportation prong, stating that it had not previously considered whether Hi Tech was a rail carrier. *Hi Tech II* at 6-7 & n.8.

carrier jurisdictions and the relevant definitions of "transportation" incorporated into each. *Compare* § 10102(9) *with* 49 U.S.C. § 13102(23).

Hi Tech I forecloses the argument that Waste Management makes here. RCW 81.77.040 regulates over the road truck shipments, not interstate rail shipments. It applies to operations occurring before Waste Management delivers the solid waste to rail. Waste Management's operations are thus not "transportation" within the meaning of § 10102(9) and § 10501(a)(1)(A). § 10501(b) does not preempt state regulation of Waste Management's operations. No open federal question warrants review here.

2. Motor carrier TOFC service is not "rail transportation."

Waste Management also argues that the STB's TOFC exemption rules show that it provides "rail transportation." But Waste Management cannot square that argument with nearly a hundred years of federal law, all of which makes clear that a

motor carrier providing TOFC service is regulated as a motor carrier, not a rail carrier.

Initially, Waste Management's argument is inconsistent with Congress's treatment of motor carriage within the ICA. As noted, Congress in 1935 gave the ICC jurisdiction over motor carriers *as motor carriers*. Motor Carrier Act of 1935, Pub. L. No. 74-255, 49 Stat. 543. Since then, where Congress intended the law to treat a motor carrier service as a rail carrier service, it has explicitly said so. In 1940, Congress provided that terminal-area "transportation by motor vehicle by a carrier by railroad . . . shall be considered to be and shall be regulated as transportation subject to" the ICA's rail carrier provisions. Interstate Commerce Act of 1940 § 17(c)(1), 54 Stat. 898, 920.[4] That amendment to the ICA "withdr[ew] railroad operation of motor carriers in terminal services from the scope of motor carrier regulation," and

[4] Congress made similar provision for the terminal area motor vehicle operations of rail carrier agents. Interstate Commerce Act of 1940 § 17(c)(2), 54 Stat. 920.

subjected it to the ICA's rail provisions. *ICC v. Parker*, 326 U.S. 60, 66, 65 S. Ct. 1490, 89 L. Ed. 2051 (1945). Congress has never enacted a similar measure to withdraw motor carrier TOFC services from regulation under the ICA's motor carrier provisions, and its failure to do so strongly implies that it did not intend any such treatment.

Further, consistent with Congress's manifest intent, the ICC always treated non-terminal-area-motor-vehicle TOFC services as transport by motor carrier, not transport by rail carrier. It thus regulated those services under the ICA's motor carrier provisions. For example, the ICC:

- Required a motor carrier certificate in order to provide motor carrier TOFC service. *E.g.*, *Substitute Serv. – Charges & Practices of For-Hire Carriers & Freight Forwarders*, 322 I.C.C. 301, 331 (1964); *Nat. Auto. Transp. Ass'n Pet. for Decl. Order*, 91 M.C.C. 395, 409-10, 412-13 (1962). Notably, this was true even for rail carriers performing non-terminal area motor

vehicle operations. *E.g.*, *Substitute Serv.*, 322 I.C.C. at 331-32; *Substitute Freight Serv. – In re Substitution of Motor Vehicle Serv. for Rail or Water Serv. and of Rail or Water Serv. for Motor Vehicle Serv.*, 232 I.C.C. 683, 688, 691 (1939);

- Analyzed motor carrier TOFC service in terms of the ICA's motor carrier provisions. *E.g.*, *Substitute Serv.*, 322 I.C.C. 338-51 (analyzing TOFC service under § 216 and § 217 of the ICA); *id*. at 361 (analyzing motor carrier TOFC service under the ICA's certificate requirements, *see* Interstate Commerce Act of 1940 § 206, 54 Stat. at 551); *Gordon's Transp. Inc. v. Strickland Transp. Co.*, 318 I.C.C. 395, 400-01 (1962) (forbidding motor carriers from evading routing limitations in their certificates through substituted rail TOFC service);
- Warned rail carriers repeatedly not to aid and abet violations of the ICA by performing TOFC service

with a motor carrier lacking a certificate. *E.g.*, *Substitute Serv.*, 322 I.C.C. at 365-66; *Movement of Highway Trailers by Rail*, 293 I.C.C. 93, 107 (1954) (rail carriers encouraged to verify that motor carriers performing TOFC service had the necessary certificate);

- Enacted rules governing TOFC service based, in part, on its authority over motor carriers. *E.g.*, *Petition for Enlargement of the Operational Circuity Reduction Permitted Motor Carriers of Property Under Certain Provisions of the Trailer-On-Flatcar Service Rules*, 353 I.C.C. 1 (1976) (stating the rules were based on the ICC's authority over motor carriers, which was then codified in Part II of the ICA); *Substitute Serv.*, 322 I.C.C. at 303 (same); and
- Stated that it had no jurisdiction over TOFC service if it lacked jurisdiction over the motor carrier portion of

the service.[5] *Substitute Serv.*, 322 I.C.C. at 352-54 (forbidding the publication of tariffs governing regulated service where the ICC had no jurisdiction over the motor carrier portion of the service).

Each of these examples demonstrates the ICC's consistent treatment of services like Waste Management's as motor carrier services.

Finally, the courts, like the ICC, treated motor carriers providing TOFC service as motor carriers, and thus as subject to the ICA's motor carrier provisions. For example, federal courts:

- Expressly stated that motor carriers performing TOFC service were "subject to Part II of the Interstate Commerce Act," the ICA's then-existing motor carrier provisions. *N.Y. Cent. R.R. Co. v. ICC*, 267 F. Supp. 619, 622 (S.D.N.Y. 1967);

[5] These motor carrier jurisdictional exclusions remain codified in the ICA. *E.g.*, 49 U.S.C. § 13506(a)(6), (7), (11)-(13).

- Routinely analyzed legal issues involving motor-carrier-TOFC service under the ICA's motor carrier provisions, not its rail carrier provisions. *E.g.*, *Am. Trucking Ass'n v. Atchison, Topeka, & S.F. Ry. Co.*, 387 U.S. 397, 402-16 & nn. 3, 8, 410-11, 87 S. Ct. 1608, 18 L. Ed. 2d 493 (1967) (citing §§ 216 and 316 of the ICA); *Lone Star Package Car Co. v. U.S.*, 379 Fed. Supp. 1215 (N.D. Tex. 1974) (citing § 216 of the ICA); *N.Y. Cent. R.R. Co.*, 267 F. Supp. at 624-31 (rejecting the argument that the ICA's rail carrier short haul provisions applied to motor carrier TOFC services in a lengthy opinion). This remained true even after the ICC's TOFC exemption rulemakings. *Cent. States Motor Freight Bureau v. ICC*, 924 F.2d 1099, 1103-04 (D.C. Cir. 1991) (analyzing why the ICC's order was consistent with the ICA's motor carrier provisions, including former 49 U.C.C. §§ 10322(b)(2), 10922(k), and 10923(b)); and

- Explicitly distinguished motor carrier TOFC service from "rail transportation." *Am. Trucking Ass'n v. Interstate Commerce Comm'n*, 656 F.2d 1115, 1120 (5th Cir. 1981) (*ATA*); *see Texas v. Interstate Commerce Comm'n*, 479 U.S. 450, 458 n.13, 107 S. Ct. 787, 93 L. Ed. 2d 809 (1987) (citing *ATA*'s reasoning with approval).

Against this overwhelming weight of on-point authority, Waste Management can only offer its interpretation of the ICC's TOFC exemption rules. But Waste Management simply misreads what the ICC did in the relevant rulemaking: the ICC did not exempt motor carrier TOFC as "rail transportation."

As relevant here, former 49 U.S.C. § 10505(a) authorized the ICC to exempt from regulation under the ICA persons, transactions, or services "related to a rail carrier providing transportation subject to" the ICC's jurisdiction. Staggers Rail Act of 1980, § 213(a), Pub. L. No. 96-448, 94 Stat. 1895, 1913. The ICC used that authority in its 1989 TOFC exemption rulemaking (*Pickup & Delivery*), the one relevant here, to

exempt from regulation under the ICA motor carriers who provided TOFC service and had no ownership or agency relationship with a rail carrier. *Improvement of TOFC/COFC regulations (Pickup & Delivery)*, 6 I.C.C. 2d 208 (1989).

In *Pickup & Delivery*, the ICC made clear that it was not treating the motor carriers providing the relevant service as rail carriers or as providers of "rail transportation." When addressing a challenge to its ability to exempt services that were not provided by rail carriers, the ICC adopted its analysis from an earlier TOFC exemption rulemaking addressing the issue. *Id*. at 212. In that rulemaking, the ICC determined that its exemption authority under former § 10505(a) was not limited "*only* to rail transportation," and that it could exempt non-rail carrier services "related to" jurisdictional rail carriage. *Improvement of TOFC/COFC regulations (R.R.-Affiliated Motor Carriers & Other Motor Carriers)*, 3 I.C.C. 2d 869, 875 (1987)).[6] Put

[6] The D.C. Circuit affirmed the ICC's third rulemaking on the basis that the service related to jurisdictional rail

otherwise, the ICC exempted motor carrier service as a motor carrier service that was something other than "rail transportation." *Pickup & Delivery*, 6 I.C.C. at 212-13.

Waste Management notes that the ICC's exemption authority did not alter its jurisdiction over a service, Pet. for Review at 15 (quoting *Cent. States*, 924 F.2d at 1102), meaning that the ICC had jurisdiction over the motor carrier services it exempted in *Pickup & Delivery*. That argument begs the question: what form of jurisdiction did the ICC have over motor carrier TOFC services? As explained above, all sources of federal law provide that the ICC regulated motor carriers providing TOFC service under the ICC's motor carrier provisions. So the fact that the ICC had jurisdiction over the services exempted does nothing to bolster Waste Management's argument here.

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transportation and therefore an exemption was permissible under former § 10505(a), not on the basis that those services were themselves rail transportation. *Cent. States*, 924 F.2d at 1103.

Waste Management's argument that it provides rail transportation finds no support in federal authority, all of which is directly contrary to that argument. This Court should deny review under RAP 13.4(b)(3).

V. CONCLUSION

The Commission respectfully asks this Court to deny Waste Management's petition for review for the reasons discussed.

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RESPECTFULLY SUBMITTED this 2nd day of February, 2023.

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