Supreme Court No. 101529-1
Court of Appeals No. 56291-0-II

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

WASTE MANAGEMENT OF WASHINGTON, INC., WASTE MANAGEMENT DISPOSAL 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.

PETITION FOR REVIEW
FROM DIVISION II OF THE COURT OF APPEALS

Jessica L. Goldman, WSBA #21856
Jesse L. Taylor, WSBA #51603
SUMMIT LAW GROUP, PLLC
315 Fifth Avenue S., Suite 1000
Seattle, WA 98104
(206) 676-7000

Attorneys for Petitioners

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I. IDENTITY OF PETITIONERS

Petitioners are Waste Management of Washington, Inc., Waste Management Disposal Services of Oregon, Inc., Daniel Anderson Trucking & Excavating, LLC, and MJ Trucking & Contracting, Inc., appellants in the Court of Appeals.

II. COURT OF APPEALS DECISION

Petitioners seeks review of the published decision of Division Two of the Court of Appeals, filed November 8, 2022. A copy of the decision is in Appendix 1 ("Opinion").

III. ISSUE PRESENTED FOR REVIEW

Did the Court of Appeals err when it ruled that federal law *does not* preempt state economic regulation of trailer-on-flatcar and container-on-flatcar ("TOFC/COFC") service, a unique form of transporting cargo that requires both a rail and a truck leg and that is subject to exclusive federal jurisdiction?

IV. STATEMENT OF THE CASE

The federal Surface Transportation Board ("STB") and its predecessor, the Interstate Commerce Commission ("ICC"), have **exclusively** regulated TOFC/COFC service for 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 Ass'ns. v. ICC*, 656 F.2d 1115 (5th Cir. 1981).[1]

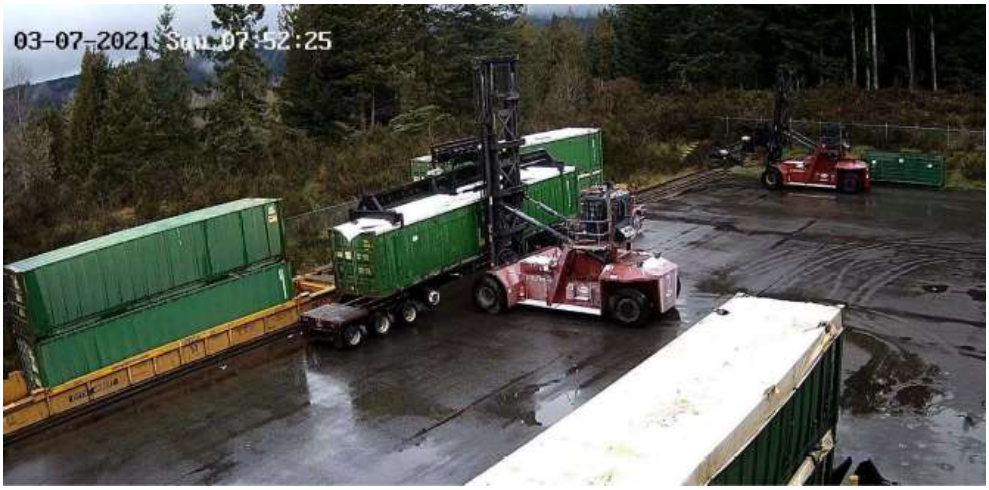
TOFC/COFC service is "a form of mixed train **and** truck transportation" that "enables a carrier to transport a trailer [or a container] and its contents over rail on a flatcar and then to haul the trailer [or container] on the highway. The goods need not be unloaded and reloaded when they move from the rail mode to the truck mode," or vice versa; "the shipment remains within the trailer or container during the entire journey." *ICC v. Texas*, 479 U.S. 450, 451-52 (1987) (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").[2] In contrast, the highway transportation

[1] A copy of Sub-No. 5 is in Appendix 2.
[2] A copy of Sub-No. 7 is in Appendix 3.

of an intermodal container, without the continuous rail leg, is **not** TOFC/COFC service nor at issue here.

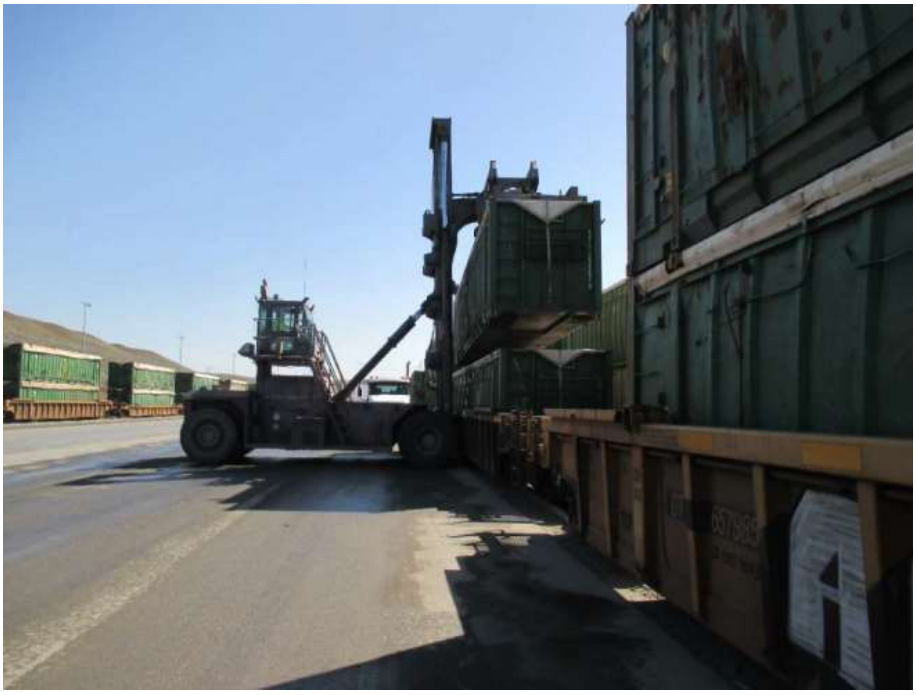
Petitioners provided COFC service from two paper mills in Washington to a landfill in Oregon. This involved the transportation in trucks of closed intermodal containers of old corrugated cardboard rejects ("OCC Rejects") from the mills and the transloading of the closed intermodal containers from trucks in Washington to rail cars owned by the Union Pacific Railroad for delivery to Oregon. Admin. Rec. at 496-97.

Below is a photograph of a closed intermodal container of OCC Rejects being transloaded in COFC service in Washington from a truck to the rail line.



Id. at 547-53.

Below is a photograph of a closed intermodal container of OCC Rejects being offloaded in Oregon at the end of the COFC service from Washington.



Id. at 539-46.

Although COFC service is exclusively regulated by the STB, Murrey's Disposal Co. ("Murrey's") petitioned the Washington Utilities and Transportation Commission ("UTC") to halt Petitioners' COFC service. Murrey's claimed that its

solid waste collection certificate from the UTC for the areas where the two paper mills are located barred Petitioners' COFC service. *Id.* at 6-13.[3]

The UTC granted the declaratory relief requested by Murrey's and ruled that the STB does not have exclusive jurisdiction over Petitioners' COFC service. *Id.* at 572-87. Petitioners appealed to the Thurston County Superior Court which transferred the appeal to the Court of Appeals. CP 1-117, 215-17.

The Court of Appeals affirmed the UTC's exercise of jurisdiction over COFC service. Contrary to federal law, it ruled that Congress and the STB *did not* preempt state economic regulation of COFC service and that the UTC also may regulate in this area.

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[3] Unlike in most states, the UTC grants "an unchallenged monopoly over a specific service area" to solid waste collection companies subject to tariffs dictated by the UTC, not the open market. *See* https://www.utc.wa.gov/about-us/about-commission/history-commission (last visited 12/4/22).

V. ARGUMENT

The decision of the Court of Appeals is in direct conflict with federal law and the Supremacy Clause of the United States Constitution. U.S. CONST. ART. VI. ¶ 2.

A. The STB Has Exclusive Authority Over All Railroad Transportation, Including Where the Cargo Is Solid Waste.

Congress granted the STB jurisdiction over railroad transportation in the Interstate Commerce Commission Termination Act ("ICCTA"). By definition, that jurisdiction is "exclusive"; there is no other, *non-exclusive* grant of jurisdiction.

> The jurisdiction of the Board over – [] transportation by rail carriers … 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). The STB has made clear that "the remedies provided under this part" refers to the provisions at "49 U.S.C. §§ 10101-11908[.]" *Ass'n of Am. RRs*

– *Pet'n for Decl. Order*, FD 36369 at 2 (STB Dec. 30, 2020).[4] Among those exclusive federal remedies is 49 U.S.C. § 10502 which authorized the ICC (now the STB) to exempt rail carrier transportation from economic regulation. As discussed below, that is the precise authority under which the STB exercised its exclusive jurisdiction over TOFC/COFC service. *See Bass v. City of Edmonds*, 199 Wn.2d 403, 411, 508 P.3d 172 (2022) ("We consider both the specific preemption statute and any related statutes that shed light on legislative intent.").

The STB "and courts have stated that the core purpose of" ICCTA preemption "is to ensure the free flow of interstate commerce, particularly by preventing a patchwork of differing regulations across states." *Ass'n of Am. RRs*, FD 36369 at 2. Congress made plain the breadth of the statute's preemptive effect in its definition of rail "transportation." *Del Grosso v.*

[4] The decision is available at https://www.stb.gov/proceedings-actions/search-stb-records/ and in Appendix 4.

STB, 898 F.3d 139, 149 (1st Cir. 2018) ("transportation" in "ICCTA-speak" is "expansive").

> 'Transportation' 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).

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); *accord Canadian Nat. Ry. Co. v. City of Rockwood*, No. COV-04-40323, 2005 WL 1349077, *3 (E.D. Mich. June 1, 2005) ("Congress enacted the ICCTA as a means of reducing the regulation of the railroad industry."). To

this end, Congress expressly preempted state regulation by granting exclusive jurisdiction over railroad operations to the STB. *Or. Coast Scenic RR*, 841 F.3d at 1072 (The statutory changes were "'made to reflect the direct and complete preemption of State economic regulation of railroads.'") (quoting H.R. Rep. No. 104-311 at 95 (1995)); *Ass'n of Am. RRs v. S. Coast Air Quality Mgmt. Dist.*, 622 F.3d 1094, 1097 (9th Cir. 2010) (The ICCTA "preempts all state laws that may reasonably be said to have the effect of managing or governing rail transportation[.]") (quotation marks & citation omitted); *City of Auburn v. U.S. Gov't*, 154 F.3d 1025, 1031 (9th Cir. 1998) (affirming the STB's preemption of local environmental laws).

The ICCTA preempts state economic regulation of all rail transportation, including where the cargo is solid waste. The STB held that intermodal containers of solid waste "which would be transferred directly from trucks to rail cars" were subject to its exclusive jurisdiction. *New England Transrail,*

LLC, D/B/A Wilmington & Woburn Terminal Railway – Construction, Acquisition and Operation Exemption – In Wilmington and Woburn, MA, FD 34797, 2007 WL 1989841 at *8-*9 (STB July 10, 2007) ("[W]hat our statute does not permit, in this or any case, is to have different legal standards for what is part of rail transportation based on the particular commodity involved."). The transfer of pre-baled solid waste from trucks to rail cars also was subject to exclusive STB jurisdiction. *Id.* All these "activities would be integrally related to transportation and therefore would be covered by the section 10501(b) preemption." *Id.* at *9.

Likewise, solid waste handling associated with rail carriage was "transportation" exclusively regulated by federal law. 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's] preemption clause.

N.Y. Susquehanna & W. Ry. Corp. v. Jackson, 500 F.3d 238, 247 (3rd Cir. 2007); *accord Canadian Nat. Ry.*, 2005 WL 1349077 at *4 ("activities which take place at [railroad] transload facilities are considered 'transportation' by the ICCTA"); *Waste Mgmt. of N.J., Inc. v. Union Cnty. Utils. 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 short, the STB and the courts hold that the STB's exclusive authority is based on the type of transportation, **not** "on the particular commodity involved." *New England*

Transrail, 2007 WL 1989841 at *8-*9. And the STB specifically has confirmed its jurisdiction over solid waste handling, answering in the affirmative the Court of Appeals' "question whether the federal statute preempts state regulation of solid waste collection" when the transportation at issue falls within the STB's grant of exclusive authority, as it does here. Opinion at 11.

B. The STB Exercises Exclusive Authority Over COFC Service.

Pursuant to its "exclusive" jurisdiction over the "transportation by rail carriers" and "the remedies provided" under the rail transportation statute, 49 U.S.C. § 10501(b), the STB and its predecessor, the ICC, have exercised authority over TOFC/COFC service for many decades. Initially, the ICC only exercised such authority when both the truck and rail legs of the TOFC/COFC service were provided by the railroad. In time, the STB expanded its authority over all TOFC/COFC service including where the truck leg was provided by an independent motor carrier as here. However, the Court of Appeals

disregarded that **all** federal economic jurisdiction over rail transportation is exclusive: if federal jurisdiction attaches, it is by definition exclusive. Opinion at 10 (ignoring § 10502(a)'s "jurisdiction of the Board under this part" in wrongly concluding that "[n]othing in 49 U.S.C. § 10502(a) or (b) expressly preempts or even mentions state law.").[5]

In 1980, Congress addressed the economic and competitive condition of the rail industry by enacting the Staggers Rail Act, explicitly stating: "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).

Congress broadly and clearly authorized the ICC to *exempt* regulation of rail transportation. "In a matter related to a rail carrier providing transportation **subject to the**

[5] Copies of 49 U.S.C. §§ 10501-10502 are in Appendix 6-7, respectively.

jurisdiction of the Board under this part, the Board, to the maximum extent consistent with this part, shall 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 section 10101 of this title[.]" *Id.* § 10502(a) (emphasis added). The "jurisdiction of the Board under this part" – that is, "Part A" which governs rail transportation – is set forth at 49 U.S.C. § 10501(b) which, as noted above, gave the Board "exclusive" jurisdiction over "transportation by rail carriers" and "the remedies provided" under the railroad transportation statute. *Id.* § 10501(b).[6]

[6] In its amicus brief to the Court of Appeals, the Association of American Railroads emphasized that "[t]he broad preemptive effect of the STB's jurisdiction reflects the importance of, and compelling need for uniformity in, operation of the interstate rail system. In preempting state laws, Congress has eliminated all obstacles to execution of federal law and the accomplishment of federal objectives." 3/11/22 Brief of *Amicus Curie* Association of American Railroads at 19-20.

In the case of deregulation by exemption, the STB retains jurisdiction over exempt transportation because the exemption can be revoked. *Id.* § 10502(d). Hence, the ICC could exempt – and revoke such exemption – pursuant to its exclusive authority over transportation by rail carriers. The D.C. Circuit emphasized this point: "Exercise of the ICC's section [10502] exemption authority neither lodges nor dislodges agency jurisdiction; instead, it *presupposes* ICC jurisdiction over the persons or services exempted." *Central States Motor Freight Bureau, Inc. v. ICC*, 924 F.2d 1099, 1102 (D.C. Cir. 1991). And that jurisdiction is exclusive. *Fayus Enters. v. BNSF Ry. Co.*, 602 F.3d 444, 451-52 (D.C. Cir. 2010) (In the Staggers Rail 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).

The STB, and before it, the ICC, are the governing authorities on the scope of their jurisdiction and the

concomitant ICCTA preemption. *Ass'n of Am. RRs*, 622 F.3d at 1097. In 1981, the ICC exercised its authority to exempt from regulation – *i.e.*, to deregulate – the highway portion of TOFC/COFC service 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 truck legs. *Id.* at *733.

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 … 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.

Several years later, 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").[7] 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. All such "'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 Assn's 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

[7] A copy of Sub-No. 6 is in Appendix 5.

> 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)) (emphasis added). "[W]hether 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 as 49 U.S.C. § 10502(a)]." *Id.* at *874 (emphasis added). The ICC **rejected** the argument of the motor carriers that "the exemption may be applied *only* to rail transportation[.]" *Id.* at *875 (emphasis original).

In Sub-No. 6, the ICC exercised its exclusive jurisdiction and adopted 49 C.F.R. § 1090.2, exempting TOFC/COFC service from regulation:

> 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. Tariffs heretofore applicable to any transportation service exempted by this section shall no longer apply to such service.

Id. at *866.

In 1989, the ICC took the final step to exempt from regulation TOFC/COFC service where, as here, such service is "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 **rejected**

the motor carriers' argument "that [the ICC] lack[s] jurisdiction to exempt any service in trucks" and 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 *209, *211 (quoting 49 U.S.C. § 10505(a), now codified as 49 U.S.C. § 10502(a)). The view rejected by the ICC is the view resuscitated by the Court of Appeals below. Opinion at 12 ("For an activity to come within the STB's exclusive jurisdiction and to be covered by preemption, the activity must satisfy both the 'transportation' and 'rail carrier' requirements.").

In its final expansion of the TOFC/COFC exemption, the ICC explained:

> The threshold issue in this case, as it has been in the other related piggyback exemption cases, is whether the service at issue involved 'a matter related to a rail carrier providing transportation subject to the jurisdiction of the … Commission[.]'

Sub-No. 7, 6 I.C.C.2d at *212 (quoting 49 U.S.C. § 10505(a), now codified at 49 U.S.C. § 10502(a)).[8] "The jurisdiction of the … Commission" is set forth in the preceding provision: "The jurisdiction of the Board over – (1) transportation by rail carriers … is exclusive" along with the "remedies" that follow. 49 U.S.C. § 10501(b). It is here that the Court of Appeals improperly grafted its finding that the STB only has authority where the transportation is "by rail carriers" which the Court of Appeals found cannot include the trucking component of TOFC/COFC service.

The ICC rejected this precise argument.

> Relying largely on what [the truckers] view as incompatible statutory directives in the Motor Carrier Act of 1980 (MCA), the opponents of the exemption claim that the service in issue is not rail-related, **because it is not provided by rail carriers**. 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

[8] TOFC/COFC service is also known as "piggyback."

> carriers providing transportation **subject to Commission jurisdiction**[.]

Sub-No. 7, 6 I.C.C.2d at *227 (emphasis added).

A dissenting Commissioner would have found that the ICC "lack[ed] jurisdictional authority" over "the independent motor pickup and delivery portion at issue here" which he believed "is by definition not provided by a railroad." *Id.* at *223-*24 (Lamboley, C., dissenting). Over this objection, the ICC found under its authority at 49 U.S.C. § 10505 (now codified as 49 U.S.C. § 10502(a)) – which "is subject to the" exclusive "jurisdiction of the Board under [the Rail] part" – 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. Sub-No. 7, 6 I.C.C.2d at *222, *226 (emphasis added).[9]

Exercising its "exclusive" statutory jurisdiction over railroads, the ICC concluded that it should exempt **all of** the TOFC/COFC service because:

> [I]t should have some clear benefits for the shipping public: more efficient coordinated service; more flexibility with respect to rates and services; better and more equal opportunities for shippers' associations to compete with parties able to take advantage of exempt joint rate or agency arrangements; more competition among truckers for ex-rail traffic; and greater freedom from unnecessary and unproductive economic regulator constraints. **The purpose of this and the prior piggyback exemptions is to free**

[9] Ignoring the ICC's TOFC/COFC decisions, the Court of Appeals instead claimed support from a New Jersey case that neither involved nor addressed TOFC/COFC service. Opinion at 13-15 (citing *Hi Tech Trans, LLC – Petition for Declaratory Order – Newark, NJ*, 2003 WL 21952136 (STB Aug. 14, 2003), and *Hi Tech Trans, LLC v. N.J.*, 382 F.3d 295 (3rd Cir. 2004)). Pointing to these unrelated decisions, the Court of Appeals remarked that "Waste Management's solid waste collection activities involved transportation *to* a rail carrier, not *by* a rail carrier," Opinion at 16, the very argument by the truckers the ICC rejected with respect to TOFC/COFC service. Sub-No. 7, 6 I.C.C.2d at *227.

> **carriers from unnecessary economic regulation so that they are better able to compete in the marketplace**.

Id. at *215-*16 (emphasis added). The ICC based its Sub-No. 7 decision on the *opposite* of the economic regulatory regime the UTC seeks to impose here over TOFC/COFC service.[10]

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

> 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 independently with the shipper or receiver (or its representative/agent) and performed immediately before or after a TOFC/COFC movement provided by a rail

[10] The UTC's desire to control tariffs is *not* an incidental impact on the STB's jurisdiction as the Court of Appeals found; it wholly undercuts the very purpose of the STB's TOFC/COFC regulation.

> 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.[11] Thus, not only did the ICC confirm that its jurisdiction – which is exclusive – includes regulation of the highway portion of the "continuous intermodal transportation," its jurisdiction includes trucking companies performing the

[11] The ICC's decision to **exclude** Plan I TOFC/COC service from the exemption confirms its jurisdiction over such service. In other words, Plan I TOFC/COFC service remains subject to (is not excluded from) exclusive federal regulation.

highway portion of TOFC/COFC service and operating "independently" of the rail carrier.[12] *Id.*

Included in the two "broad categories of state and local actions" that "have been found to be categorically preempted regardless of the context or rationale for the action" is "state or local regulation of matters that are directly regulated by the" STB. *Ass'n of Am. RRs*, FD 36369 at 3 (quotation marks & citation omitted). The STB directly regulates TOFC/COFC service and provides that "[t]ariffs heretofore applicable to any transportation service exempted by this section **shall no longer apply** to such service." 49 C.F.R. § 1090.2 (emphasis added).

C. There Is No Presumption Against Preemption Here.

The service the UTC seeks to regulate here is the highway portion of the continuous intermodal movement of

[12] "Federal regulations have no less pre-emptive effect than federal statutes." *Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 153 (1982); *accord Inlandboatmen's Union of the Pac. v. Dep't of Transp.*, 119 Wn.2d 697, 702, 836 P.2d 823 (1992) ("Federal regulations, within the scope of an agency's authority, have the same preemptive effect as federal statutes.").

freight that is a necessary component of TOFC/COFC service – an area controlled exclusively by federal laws and agencies for decades. Under these circumstances, no presumption against preemption applies. While the UTC did not assert the existence of any presumption against preemption, the Court of Appeals erred in employing such a presumption. Opinion at 11-12.

A presumption against preemption "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).[13] Undisputedly, the transportation of freight by railroad is a field that is traditionally occupied by the federal government. *City of Auburn*, 154 F.3d at 1027 (federal regulation of railroads is "among the most pervasive and comprehensive of federal regulatory schemes") (internal quotations omitted).

Under the ICCTA, as previously noted, STB jurisdiction over rail transportation always "is exclusive." 49 U.S.C. § 10501(b). Where Congress expressly preempts state law, the

[13] Ignoring U.S. Supreme Court law, the Court of Appeals stated that this Court "repeatedly has emphasized that 'there is a strong general presumption against finding that federal law has preempted state law.'" Opinion at 11-12 (quoting *Estate of Becker v. Avco Corp.*, 187 Wn.2d 615, 622, 387 P.3d 1066 (2017)). The Court of Appeals missed the context in which this broad statement previously was made. It comes from *Inlandboatmen's Union of the Pacific*, where this Court noted that "[t]here is a strong presumption against finding preemption **in an ambiguous case**." 119 Wn.2d at 702 (emphasis added) (cited in *State v. Kalakosky*, 121 Wn.2d 525, 546 n.28, 852 P.2d 1064 (1993)) (which, in turn, was cited in *Becker*, 187 Wn.2d at 622). There is no such ambiguity under the ICCTA or the ICC's regulation of TOFC/COFC service under its "exclusive" ICCTA jurisdiction.

plain text of the statute "begins and ends our analysis." *Puerto Rico v. Franklin Cal. Tax-Free Trust*, 579 U.S. 115, 125 (2016); *see also Kalakosky*, 121 Wn.2d at 546 ("a finding that Congress intended to preempt state law in a given field must be based on an unambiguous congressional mandate to that effect"). A statute with an express preemption "necessarily contains the best evidence of Congress' preemptive intent." *Puerto Rico*, 579 U.S. at 125 (quotation marks & citation omitted). Indeed, "[i]t 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 RR.*, 841 F.3d at 1976. **All** authority exercised by the STB over rail transportation arises from this sole, exclusive grant of jurisdiction. Pursuant to their "exclusive" statutory grant of jurisdiction, the STB and the ICC

have exercised authority over TOFC/COFC service for decades. Whether acting to regulate or exclude from regulation, the STB repeatedly reaffirmed that its "exclusive" jurisdiction includes the highway portion of the continuous intermodal movement of freight.

Of note, Division One of the Court of Appeals this year held that the ICCTA preempted the City of Seattle's franchise ordinance. *City of Seattle v. Ballard Terminal RR Co., LLC*, 22 Wn. App. 2d 61, 70-73, 509 P.3d 844, *review denied*, 200 Wn.2d 1008 (2022). The Court of Appeals correctly noted:

> [T]he Federal scheme of economic regulation and deregulation is intended to address and encompass all such regulation and to be completely exclusive. Any other construction would undermine the uniformity of Federal standards and risk the balkanization and subversion of the Federal scheme of minimal regulation for this intrinsically interstate form of transportation.

Id. at 72 (quoting H.R. Rep. No. 104-311, at 95-96, reprinted in 1995 U.S.C.C.A.N. 793, 808).

"Under the preemption doctrine, states are deemed powerless to apply their own law due to restraints deliberately imposed by federal legislation." *Alverado v. Wash. Pub. Power Supply Sys.*, 111 Wn.2d 424, 430-31, 759 P.2d 427 (1988). The Court of Appeals erred in holding to the contrary.

D. The STB Exercises Exclusive Authority Over Petitioners' COFC Service.

Petitioners are "[m]otor carrier[s]" providing "TOFC/COFC pickup and delivery services arranged independently with the shipper or receiver (or its representative/agent)" that "are performed immediately before … a TOFC/COFC movement provided by a rail carrier." 49 C.F.R. § 1090.2. The ICC exempted from regulation Petitioners' COFC service. Its authority to exempt demonstrates and is based on its exclusive jurisdiction over such service – jurisdiction that now rests with the STB. The STB's exclusive jurisdiction over all components of the bimodal COFC service preempts the jurisdiction the UTC seeks to assert.

But the Court of Appeals missed a basic fact in stating that "49 C.F.R. § 1090.2 contains no preemption provision." Opinion at 17. The preemption provision is in the statute that provided the ICC, and now the STB, with its sole grant of jurisdiction over the economic regulation of railroads, as the ICC ruled in adopting this regulation. Sub-No.7, 6 I.C.C.2d 208.[14] In other words, the jurisdiction the ICC exercised in regulating TOFC/COFC service is jurisdiction that is, by statutory definition, "exclusive." 49 U.S.C. § 10501(b).

VI. CONCLUSION

Petitioners respectfully request that the Court grant this Petition and reverse the Court of Appeals' improper assertion of state economic regulatory authority over this preempted component of rail transportation.

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[14] States retain police powers to protect public health and safety, such as fire, building, and electrical codes, as long as those police powers are nondiscriminatory in nature, do not interfere with interstate rail operations, or otherwise unreasonably burden interstate commerce. *See Franks Inv. Co. LLC v. Union Pac. RR. Co.*, 593 F.3d 404, 411-12 (5th Cir. 2010).

This document contains 4,996 words, excluding the parts of the document exempted from the word count by RAP 18.17.

DATED this 8th day of December, 2022.

Respectfully submitted,

SUMMIT LAW GROUP, PLLC
Attorneys for Petitioners

By: *s/ Jessica L. Goldman*
Jessica L. Goldman, WSBA #21856
Jesse L. Taylor, WSBA #51603
315 Fifth Avenue S., Suite 1000
Seattle, WA 98104
Tel: (206) 676-7000
jessicag@summitlaw.com
jesset@summitlaw.com

CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury according to the laws of the State of Washington that on this date she caused to be served a copy of the foregoing PETITION FOR REVIEW ***via electronic service*** on all counsel of record as follows:

Attorneys for Washington Utilities & Transp. Commission

Mark Johnson
Executive Director and Secretary
WASHINGTON UTILITIES & TRANSPORTATION COMMISSION
621 Woodland Square Loop S.E.
Lacey, WA 98503
records@utc.wa.gov

Leonard Jeff Roberson
Harry Fukano
OFFICE OF THE ATTORNEY GENERAL
1125 Washington Street SE
Olympia, WA 98504
serviceATG@atg.wa.gov
jeff.roberson@utc.wa.gov
harry.fukano@utc.wa.gov

Attorneys for Murrey's Disposal Company, Inc.

Blair I. Fassburg
David W. Wiley
Sean D. Leake
WILLIAMS KASTNER PLLC
601 Union Street, Suite 4100
Seattle, WA 98101-2380
dwiley@williamskastner.com
bfassburg@williamskastner.com
sleake@williamskastner.com

Attorneys for Washington Refuse and Recycling Assoc.

James K. Sells
4160 6th Ave., SE, Suite 205
Lacey, WA 98503
jamessells@comcast.net
jamessells47@gmail.com

Rod E. Whittaker
1318 Warner Street NE
Lacey, WA 98516-5430
rodwhittaker@yahoo.com
rod@wrra.org

DATED this 8th day of December, 2022.

s/ Sharon K. Hendricks
Sharon K. Hendricks, Legal Assistant
sharonh@summitlaw.com

APPENDIX 1

Filed
Washington State
Court of Appeals
Division Two

November 8, 2022

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

WASTE MANAGEMENT OF WASHINGTON, INC., WASTE MANAGEMENT DISPOSAL SERVICES OF OREGON, INC., MJ TRUCKING & CONTRACTING, and DANIEL ANDERSON TRUCKING AND EXCAVATION, LLC, Appellant, v. WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION, an agency of the State of Washington, Respondent.	No. 56291-0-II PUBLISHED OPINION

MAXA, J. – Murrey's Disposal Company, Inc. (Murrey's) filed two complaints with the Washington Utility and Transportation Commission (WUTC) against Waste Management of Washington, Inc. (WMW), Waste Management Disposal Services of Oregon, Inc. (WMDSO), MJ Trucking & Contracting (MJ Trucking), and Daniel J. Anderson Trucking and Excavation, LLC (DAT) (collectively, Waste Management). Murrey's asked the WUTC to issue an order directing these entities to cease and desist from engaging in the collection and transportation of solid waste from two paper mills in Clallam and Jefferson Counties. Waste Management appeals the WUTC's order granting Murrey's motion for summary determination and issuing the cease and desist order.

Two paper companies in Clallam and Jefferson Counties contracted with WMDSO to collect, transport, and dispose of their solid waste at WMDSO's Columbia Ridge Landfill. WMDSO subcontracted with MJ Trucking and DAT to transport waste-filled cargo containers by truck to transfer stations operated by WMW and others, where the containers were loaded onto rail cars for transportation via railroad to Columbia Ridge.

Under Washington law, an entity must obtain a certificate of authority from the WUTC to collect solid waste. Murrey's had authority from the WUTC to collect solid waste in Clallam and Jefferson Counties. WMW, WMDSO, MJ Trucking, and DAT did not have WUTC certificates of authority to operate as solid waste collection companies in Clallam or Jefferson Counties. Therefore, their solid waste collection activities violated Washington law.

However, Waste Management argues that federal law regarding rail transportation preempts Washington law because the various entities were providing train-on-flatcar/container-on-flatcar (TOFC/COFC) service that in part involved transportation of the solid waste on rail cars.[1] Waste Management identifies two sources of preemption. First, 49 U.S.C. § 10501(b)(1) states that the Surface Transportation Board (STB), formerly the Interstate Commerce Commission (ICC), has exclusive jurisdiction over "transportation by rail carriers" and that the regulation of rail transportation preempts state law remedies. Waste Management claims that "transportation by rail carrier" includes both the motor carrier leg and the rail leg of TOFC/COFC service.

[1] "Trailer-on-flatcar (TOFC or 'piggyback') service, a form of mixed train and truck transportation, enables a carrier to transport a trailer and its contents over rail on a flatcar and then haul the trailer on the highway. The goods need not be unloaded and reloaded when they move from rail mode to truck mode; the shipment remains within the trailer or container during the entire journey." *Interstate Com. Commc'n v. Texas*, 479 U.S. 450, 451, 107 S. Ct. 787, 93 L. Ed. 2d 809 (1987). Container-on-flatcar (COFC) involves a container that must be placed on a truck trailer for transportation. *Id.* at 452 & n.1.

Second, 49 U.S.C. § 10502 authorizes the STB to exempt certain services from federal regulation. An STB regulation, 49 C.F.R. § 1090.2, states that "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 federal regulation "regardless of the type, affiliation, or ownership of the carrier performing the highway portion of the service." Waste Management claims that this exemption from federal regulation of the motor carrier leg of TOFC/COFC service shows that the STB has exercised its exclusive jurisdiction over those services and therefore that preemption applies.

We hold that 49 U.S.C. § 10501(b) and 49 C.F.R. § 1090.2 do not preempt Washington law regarding Waste Management's solid waste collection activities. Accordingly, we affirm the WUTC's summary determination order.

FACTS

Background

McKinley Paper is a paper mill in Port Angeles, located in Clallam County. Port Townsend Paper is a paper mill in Port Townsend, located in Jefferson County. Both facilities generate solid waste in the form of old corrugated cardboard (OCC) rejects.

Murrey's has a certificate of authority from the WUTC to collect solid waste in Clallam and Jefferson Counties. Murrey's previously collected and disposed of OCC rejects from both McKinley Paper and Port Townsend Paper.

WMDSO owns and operates the Columbia Ridge Landfill in Arlington, Oregon. In 2020, McKinley Paper and Port Townsend Paper contracted with WMDSO to collect, transport, and dispose of their OCC rejects at Columbia Ridge.

WMDSO subcontracted with MJ Trucking to collect and transport waste-filled TOFC/COFC cargo containers by truck from McKinley Paper to the Olympic View Transfer Station in Kitsap County (which WMW operates), North Mason Fiber Company in Mason County, or Union Pacific Railroad's Argo Yard in Seattle. WMDSO subcontracted with DAT to collect and transport waste-filled TOFC/COFC cargo containers by truck from Port Townsend Paper to the Olympic View Transfer Station or to North Mason Fiber Company.

Once the containers arrived at the Olympic View Transfer Station, North Mason Fiber Company or the Argo Yard, the containers of solid waste were loaded onto rail cars and Union Pacific transported them via railroad to Columbia Ridge under a contract with WMDSO. The closed containers were not unloaded during this process.

WMDSO has no authority from the WUTC to collect solid waste. WMW has WUTC authority to collect solid waste, but not in Clallam or Jefferson Counties. MJ Trucking and DAT do not have WUTC authority to operate as solid waste collection companies.

Murrey's WUTC Complaint

In July 2020, Murrey's filed two different complaints with the WUTC asking for an order directing WMW, WMDSO, MJ Trucking, and DAT to cease and desist from engaging in the collection and transportation of solid waste from McKinley Paper and Port Townsend Paper. The WUTC consolidated these complaints.

Murrey's and Waste Management filed cross-motions seeking summary determination. The dispositive issue was whether federal law preempted WUTC regulation of Waste Management's solid waste collection activities. The WUTC concluded that federal preemption did not apply. As a result, the WUTC granted Murrey's motion for summary determination and denied Waste Management's motion. The WUTC then ordered Waste Management to cease and

desist from providing solid waste collection services to McKinley Paper and Port Townsend Paper.

Waste Management petitioned for judicial review, and the superior court transferred the matter to this court.

Waste Management subsequently filed a petition for a declaratory order with the STB, seeking a determination that federal law preempted the WUTC's order. The STB denied review because of this court's concurrent jurisdiction to answer the preemption question. *Waste Mgmt. of Wash., Inc.*, & *Waste Mgmt. Disposal Servs. of Or.*, Inc. – *Petition for Declaratory Order*, 2022 WL 331234 (U.S. Surface Transp. Bd. Feb. 2, 2022).

ANALYSIS

A. STANDARD OF REVIEW

The Administrative Procedure Act (APA), chapter 34.05 RCW, governs judicial review of agency decisions. RCW 34.05.510; *Puget Soundkeeper All. v. Dep't of Ecology*, 191 Wn.2d 631, 637, 424 P.3d 1173 (2018). Under the APA, we may grant relief from an agency's order based on one of nine reasons listed in RCW 34.05.570(3), including that the order is based on an erroneous interpretation or application of the law. RCW 34.05.570(3)(d). The party challenging the agency's decision has the burden of demonstrating the invalidity of that decision. RCW 34.05.570(1)(a).

If an administrative decision is based on summary judgment, we overlay the APA and summary judgment standards of review. *Haines-Marchel v. Wash. State Liquor & Cannabis Bd.*, 1 Wn. App. 2d 712, 728, 406 P.3d 1199 (2017). We review an agency's summary judgment ruling de novo, viewing the facts and all reasonable inferences in the light most favorable to the nonmoving party. *Hamilton v. Pollution Control Hr'gs Bd.*, 5 Wn. App. 2d 271, 281, 426 P.3d

281 (2018). Summary judgment on an issue is warranted only if there are no genuine issues of material fact. *Id.*

We review an agency's legal conclusions de novo. *Pac. Coast Shredding, LLC v. Port of Vancouver, USA*, 14 Wn. App. 2d 484, 502, 471 P.3d 934 (2020). We give "substantial weight to its interpretations of the law when subjects fall within its area of expertise." *Id.* However, "[w]hile we give agencies great deference to their interpretation of rules within their area of expertise, we may substitute our interpretation of the law for that of an agency." *Quinault Indian Nation v. Imperium Terminal Servs., LLC*, 187 Wn.2d 460, 474, 387 P.3d 670 (2017).

B. WASHINGTON LAW REGARDING SOLID WASTE COLLECTION

RCW 81.77.020 states, "No person . . . shall engage in the business of operating as a solid waste collection company in this state, except in accordance with the provisions of this chapter." "Solid waste collection company" is defined as "every person . . . owning, controlling, operating, or managing vehicles used in the business of transporting solid waste for collection or disposal, or both, for compensation, . . . over any public highway in this state." RCW 81.77.010(9).

The WUTC regulates solid waste collection companies in Washington. RCW 81.77.030. RCW 81.77.040 states,

> A solid waste collection company shall not operate for the hauling of solid waste for compensation without first having obtained from the [WUTC] a certificate declaring that public convenience and necessity require such operation. Operating for the hauling of solid waste for compensation includes advertising, soliciting, offering, or entering into an agreement to provide that service.

Here, it is undisputed that WMDSO, WMW, MJ Trucking, and DAT had no authority from the WUTC to collect solid waste in Clallam or Jefferson Counties. Therefore, these entities violated

RCW 81.77.040 by collecting solid waste from McKinley Paper and Port Townsend Paper and transporting that waste on public highways.

C. FEDERAL LAW REGARDING RAILROAD TRANSPORTATION

1. ICC and STB

In 1887, Congress enacted the Interstate Commerce Act, which created and authorized the ICC to establish rates that railroads could charge. Pub. L. No. 49-104, 24 Stat. 379 (1887). In 1935, Congress in the Motor Carrier Act gave the ICC jurisdiction over the economic regulation of interstate motor carriages. Pub. L. No. 74-255, 49 Stat. 543 (1935).

In 1995, Congress enacted the Interstate Commerce Commission Termination Act (ICCTA), which replaced the ICC with the STB. Pub. L. 104-88, 109 Stat. 803 (1995). Although the ICC was dissolved, the ICC's "orders, determinations, rules, [and] regulations" remained valid and in force until "modified, terminated, superseded, set aside, or revoked" by the STB. ICCTA § 204(a), 109 Stat. at 941.

2. Applicable Statutes and Regulations

49 U.S.C § 10101(1) states several federal policies regarding regulation in the railroad industry, including

> (1) to allow, to the maximum extent possible, competition and the demand for services to establish reasonable rates for transportation by rail;
> (2) to minimize the need for Federal regulatory control over the rail transportation system and to require fair and expeditious regulatory decisions when regulation is required.

This provision was enacted in the Staggers Rail Act of 1980, Pub. L. No. 96-448, 94 Stat. 1895, which had the purpose of revitalizing the railroad industry by reducing regulatory burdens. *Coal Exporters Ass'n of U.S., Inc. v. United States*, 745 F.2d 76, 80-81 (D.C. Cir. 1984).

a. Exclusive STB Jurisdiction and Preemption

Under 49 U.S.C. § 10501(a)(1)(A), the STB "has jurisdiction over transportation by rail carrier that is . . . only by railroad." 49 U.S.C. § 10501(b) further provides:

> 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;
>
> . . . .
>
> 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*.

(Emphasis added.)

b. Exemption from Federal Regulation

49 U.S.C. § 10502(a) authorizes the STB to exempt from federal regulation certain rail transportation:

> In a matter *related to a rail carrier providing transportation* subject to the jurisdiction of the [STB] under this part, the [STB], to the maximum extent consistent with this part, shall exempt a person, class of persons, or a transaction or service whenever the [STB] finds that the application in whole or in part of a provision of this part—
>
> (1) is not necessary to carry out the transportation policy of section 10101 of this title; and
>
> (2) either --
> (A) the transaction or service is of limited scope; or
> (B) the application in whole or in part of the provision is not needed to protect shippers from the abuse of market power.

(Emphasis added.) 49 U.S.C. § 10502(f) states, "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."

Pursuant to this authority, the ICC in the 1980s adopted through rulemaking a number of exemptions regarding the motor carrier portions of TOFC/COFC service. First, the ICC provided an exemption when a railroad owned the trucks. *Improvement of TOFC/COFC Regulation*, 364 I.C.C. 731 (1981) (Sub-No. 5). Next, the ICC expanded the exemption to include motor carriers acting as an agent or joint partner of a railroad. *Improvement of TOFC/COFC Regulation (R.R. - Affiliated Motor Carriers & Other Motor Carriers)*, 3 I.C.C.2d 869 (1987) (Sub-No. 6). Finally, the ICC exempted TOFC/COFC service arranged independently by the shipper and performed immediately before or after TOFC/COFC movement by a rail carrier. *Improvement of TOFC/COFC Regulation (Pickup & Delivery)*, 6 I.C.C.2d 208 (1989).

The current regulation is 49 C.F.R. § 1090.2, in which the STB has exempted TOFC/COFC service from certain federal requirements:

> Except as provided in 49 U.S.C. 10502(e) and (g) and 13902, *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 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.

(Emphasis added.) However, § 1090.2 expressly states, "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)."

49 CFR § 1090.1(b) defines highway TOFC/COFC service:

> (b) *Highway TOFC/COFC service* means the highway transportation, in interstate or foreign commerce, of any of the types of equipment listed in paragraph (a) of this section *as part of a continuous intermodal movement that includes rail TOFC/COFC service, and during which the trailer or container is not unloaded*.

(Emphasis added.)

Nothing in 49 U.S.C. § 10502(a) or (b) expressly preempts or even mentions state law. The regulation establishes exemptions from certain federal laws.

c. Motor Carrier Jurisdiction and Preemption

The STB also has jurisdiction under 49 U.S.C. § 13501 "over transportation by motor carrier and the procurement of that transportation, to the extent that passengers, property, or both are transported by motor carrier" in interstate commerce. "Motor carrier" is defined as "a person providing motor vehicle transportation for compensation." 49 U.S.C. § 13102(14).

In the Federal Aviation Administration Authorization Act of 1994, Congress enacted a preemption provision regarding certain intrastate transportation of property by motor carriers:

> Except as provided in paragraphs (2) and (3), a State, political subdivision of a State, or political authority of 2 or more States may not 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 . . . or any motor private carrier, broker, or freight forwarder *with respect to the transportation of property*.

49 U.S.C. § 14501(c)(1) (emphasis added).

D. PREEMPTION OF WASHINGTON LAW

Waste Management argues that 49 U.S.C. § 10501(b) and 49 C.F.R. § 1090.2 operate to preempt Washington law regarding their solid waste collection activities because the waste was collected in cargo containers that were transported in part on rail cars. We disagree.

1. Preemption Principles

The Supremacy Clause provides that "the Laws of the United States . . . shall be the supreme Law of the Land . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. CONST. art. VI, cl. 2. Congress can expressly or implicitly preempt state law through federal legislation. *Oneok, Inc. v. Learjet, Inc.*, 575 U.S. 373, 376, 135 S. Ct. 1591,

191 L. Ed. 2d. 511 (2015). In addressing the preemptive effect of a statute, the guiding principle is that the purpose of Congress controls. *Altria Group, Inc. v. Good*, 555 U.S. 70, 76, 129 S. Ct. 538, 172 L. Ed. 2d 398 (2008). Where Congress expressly preempts state law, the plain text of the statute "begins and ends [the] analysis." *Puerto Rico v. Franklin Cal. Tax-Free Trust*, 579 U.S. 115, 125, 136 S. Ct. 1938, 195 L. Ed. 2d 298 (2016). However, even for an express preemption clause the court must determine "the substance and scope of Congress' displacement of state law." *Altria Group*, 555 U.S. at 76.

Our preemption analysis starts " 'with the assumption that the historic police powers of the States [are] not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.' " *Id.* at 77 (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230, 67 S. Ct. 1146, 91 L. Ed. 1447 (1947)); *see also NW Wholesale, Inc. v. Pac Organic Fruit, LLC*, 184 Wn.2d 176, 184, 357 P.3d 650 (2015) (quoting similar passage). The assumption especially applies "when Congress has legislated in a field traditionally occupied by the States." *Altria Group*, 555 U.S. at 77. Therefore, courts generally apply a reading of a preemption statute that disfavors preemption when the text of the statute is susceptible to more than one plausible reading. *Id.*

Waste Management argues that there is no presumption against preemption here because the federal government traditionally has regulated rail transportation. However, the question is whether the federal statute preempts state regulation of solid waste collection. Congress has recognized that "the collection and disposal of solid wastes should continue to be primarily the function of State, regional, and local agencies." 42 U.S.C. § 6901 (a)(4).

In addition, our Supreme Court repeatedly has emphasized that "there is a strong general presumption against finding that federal law has preempted state law." *Estate of Becker v. Avco*

Corp., 187 Wn.2d 615, 622, 387 P.3d 1066 (2017). Division One of this court has applied this presumption against preemption in the context of 49 U.S.C § 10501(b). *City of Seattle v. Ballard Terminal R.R. Co.*, 22 Wn. App. 2d 61, 71, 509 P.3d 844, *review denied*, 200 Wn.2d 1008 (2022).

2. Express Preemption – 49 U.S.C. § 10501(b)

Waste Management argues that 49 U.S.C. § 10501(b) expressly preempts state law regarding the collection of solid waste in closed containers as part of TOFC/COFC service. We disagree.

49 U.S.C. § 10501(b) states that the STB has exclusive jurisdiction over "transportation by rail carriers" and that the remedies provided regarding the regulation of "rail transportation" preempt state law. There is no question that this statute expressly provides for preemption of state law under certain circumstances. *See City of Seattle v. Burlington N. R.R. Co.*, 145 Wn.2d 661, 668, 41 P.3d 1169 (2002); *see also City of Auburn v. United States Gov't*, 154 F.3d 1025, 1030-31 (9th Cir. 1998).

However, the plain language of 49 U.S.C. § 10501(b) limits the scope of preemption to matters involving "transportation by rail carriers." For an activity to come within the STB's exclusive jurisdiction and to be covered by preemption, the activity must satisfy both the "transportation" and "rail carrier" requirements. *E.g., Del Grosso v. Surface Transp. Bd.*, 804 F.3d 110, 114 (1st Cir. 2015); *N.Y. & Atl. Ry. Co. v. Surface Transp. Bd.*, 635 F.3d 66, 72 (2d Cir. 2011); *N.Y. Susquehanna & W. Ry. Corp. v. Jackson*, 500 F.3d 238, 247-51 (3d Cir. 2007).

We need not decide whether Waste Management's solid waste collection services qualify as "transportation" under 49 U.S.C. § 10501(b) because we conclude that Waste Management cannot satisfy the "by rail carrier" requirement.

49 U.S.C. § 10102(5) defines "rail carrier" to mean "a person providing common carrier railroad transportation for compensation." It is undisputed that none of the Waste Management entities are rail carriers. On the other hand, Union Pacific – which transports the solid waste to the Columbia Ridge landfill on the last leg of the TOFC/COFC service – is a rail carrier. The question here is whether the Waste Management entities can satisfy the rail carrier requirement because they ultimately deliver the solid waste they collect to a rail carrier.

In *Hi Tech Trans, LLC– Petition for Declaratory Order – Newark, NJ*, 2003 WL 21952136 (U.S. Surface Transp. Bd. Aug. 14, 2003) (*Hi Tech Trans* I), the STB addressed whether operations by a company that is not a rail carrier can satisfy the rail carrier requirement in 49 U.S.C. § 10501(b). Hi Tech contracted for trucks to transport construction and demolition (C&D) debris to a transloading facility at a Canadian Pacific Railway (CP) rail yard, where the debris was loaded onto rail cars. *Id.* at *1. Hi Tech then directed CP where to transport the debris. *Id.* CP had no responsibility or liability for Hi Tech's operations, and was responsible only for transporting the loaded rail cars. *Id.* at *1-2.

The STB summarized Hi Tech's position as follows:

> Hi Tech does not argue that it is a rail carrier. Instead, it contends that the test to determine whether its facility is considered transportation by rail carrier is whether it is integrally related to interstate rail service. Hi Tech argues that its facility is integrally related to CP's interstate rail service because its transloading activities benefit CP and because C&D debris cannot be transported by rail without first being loaded into rail cars. Essentially, Hi Tech maintains that there is no legal distinction between a transloading facility operated by a noncarrier licensee and one operated by a rail carrier.

Id. at *4.

The STB rejected this argument:

> By Hi Tech's reasoning, any third party or noncarrier that even remotely supports or uses rail carriers would come within the statutory meaning of transportation by rail carrier. The [STB] and its predecessor, the Interstate Commerce Commission,

> have indicated that the jurisdiction of this agency may extend to certain activities and facets of rail transloading facilities, but that any such activities or facilities must be closely related to providing direct rail service. In every case, jurisdiction was found and local regulations relating to transportation facilities preempted only when those facilities have been operated or controlled by a rail carrier. Here, Hi Tech's activities are not performed by a rail carrier.
>
> *The facts of this case establish that Hi Tech's relationship with CP is that of a shipper with a carrier.* Hi Tech brings cargo and loads it onto rail cars, and CP, under the Transportation Agreement, hauls it to a destination designated by Hi Tech. . . . Moreover, CP disclaims any agency or employment relationship with Hi Tech and, under the License Agreement, the parties all but eliminate CP's involvement in the operation of the transloading facility and its responsibility for it. There is no evidence that CP quotes rates or charges compensation for use of Hi Tech's transloading facility. Thus, CP's level of involvement with Hi Tech's transloading operation at its Oak Island Yard is minimal and insufficient to make Hi Tech's activities an integral part of CP's provision of transportation by rail carrier.

Id. The STB concluded that "Hi Tech's activities at its transloading facility at CP's Oak Island Yard and related activities are not part of 'transportation by rail carrier' as defined under 49 U.S.C. 10501(a). Hi Tech is merely using CP's property to transload cargo." *Id.* at *5.

The Third Circuit addressed the same issue in *Hi Tech Trans, LLC v. New Jersey*, 382 F.3d 295, 299 (3d Cir. 2004) (*Hi Tech Trans* II). The court provided more detail regarding Hi Tech's operations: trucks hauled waste to the facility and discharged the waste into a hopper, and the waste then was loaded from the hopper onto rail cars. *Id.* at 299. Hi Tech argued that 49 U.S.C. § 10501(b) preempted state permit and license requirements for solid waste disposal facilities. *Id.* at 308.

The court held that even assuming that Hi Tech's facility involved "transportation," the facility did not involve transportation by a "rail carrier." *Id.* The court emphasized that CP, not Hi Tech, transported the waste by rail. The court stated that "[t]he most [Hi Tech's facility] involves is transportation '*to* rail carrier.' " *Id.* The court found it significant that CP had no

involvement in or responsibility for Hi Tech's operations, and that there was no agency relationship between Hi Tech and CP. *Id.*

The court concluded:

> [I]t is clear that Hi Tech simply uses [CP']s property to load C & D debris into/onto [CP's] railcars. *The mere fact that the [CP] ultimately uses rail cars to transport the C & D debris Hi Tech loads does not morph Hi Tech's activities into "transportation by rail carrier."* Indeed, if Hi Tech's reasoning is 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 railcarrier. 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.

Id. at 309 (emphasis added).

Waste Management attempts to distinguish *Hi Tech Trans* I and II because those cases did not involve TOFC/COFC service in which closed containers were transferred from truck to rail car. Instead, Hi Tech processed waste outside of the original cargo containers. Waste Management essentially argues that transportation by rail carrier includes motor carriers performing any portion of TOFC/COFC service that culminates in transport by rail. However, Waste Management cites no STB or case authority for this proposition, and the only cases Waste Management cites involved operations conducted by actual rail carriers. *See N.Y. Susquehanna*, 500 F.3d at 249-50; *New England Transrail, LLC, d/b/a Wilmington & Woburn Terminal Ry. -- Construction, Acquisition & Operation Exemption -- in Wilmington & Woburn, MA*, Fed. Carr. Cas. (CCH) ¶ 37,241, 2007 WL 1989841 (U.S. Surface Transp. Bd. July 10, 2007).

Hi Tech Trans I and II indicate that Waste Management's activities do not constitute transportation by a rail carrier. As in those cases, the only relationship between Waste Management and Union Pacific was shipper to carrier. There is no evidence that Union Pacific had any involvement in or responsibility for Waste Management's solid waste collection

activities, and Union Pacific merely transported the solid waste to the location that Waste Management designated. As the court noted in *Hi Tech Trans* II, Waste Management's solid waste collection activities involved transportation *to* a rail carrier, not *by* a rail carrier. *See* 382 F.3d at 308.

We conclude that Waste Management's solid waste collection activities did not constitute transportation "by rail carrier" under 49 U.S.C. § 10501(b). Therefore, we hold that 49 U.S.C. § 10501(b) does not preempt chapter 81.77 RCW with regard to those activities.[2]

3. STB Exemptions – 49 C.F.R. § 1090.2

Waste Management argues that the STB's exemption of the motor carrier leg of TOFC/COFC service from federal regulation in 49 C.F.R. § 1090.2, as authorized in 49 U.S.C. § 10502(a), demonstrates that the STB has exercised jurisdiction over those services and therefore that preemption applies. We disagree.

As noted above, 49 C.F.R. § 1090.2 exempts from federal regulation (1) "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 . . . regardless of the type, affiliation, or ownership of the carrier performing the highway portion of the service," and (2) "pickup and delivery services arranged independently with the shipper or receiver (or its representative/agent) and performed immediately before or after a TOFC/COFC movement." Waste Management emphasizes that the exercise of this exemption authority presupposes STB jurisdiction over the services exempted. *See Cent. States Motor Freight Bureau, Inc. v. Interstate Com. Comm'n*, 924 F.2d 1099, 1102 (D.C. Cir. 1991).

[2] The WUTC argues that 49 U.S.C. § 10501(b) does not apply at all to motor carriers, even when providing TOFC/COFC service. Because we hold that 49 U.S.C. § 10501(b) preemption does not apply here, we do not address this argument.

However, 49 C.F.R. § 1090.2 contains no preemption provision. That provision only exempts certain TOFC/COFC service from *federal* regulation. Waste Management argues that the STB's exercise of jurisdiction over TOFC/COFC service implicates the exclusive jurisdiction and preemption provisions of 49 U.S.C. § 10501(b). But we concluded above that Waste Management's activities do not constitute transportation by rail carrier, and therefore the 49 U.S.C. § 10501(b) preemption provision does not apply to state regulation of those activities. So even if the STB exercises jurisdiction over the motor vehicle portion of TOFC/COFC service, that jurisdiction is not exclusive under 49 U.S.C. § 10501(b). And if 49 U.S.C. § 10501(b) does not apply, there is no basis for applying preemption under 49 C.F.R. § 1090.2.

Further, Waste Management cites to no STB or case authority specifically holding that the exercise of jurisdiction over the motor vehicle portion of TOFC/COFC service under 49 C.F.R. § 1090.2 operates to preempt state regulation of that service.

We conclude that 49 C.F.R. § 1090.2 does not preempt state regulation of Waste Management's solid waste collection activities.[3]

4. Incidental Impact on Rail Transportation

In further support of our conclusion that neither 49 U.S.C. § 10501(b) nor 49 C.F.R. § 1090.2 preempt Washington law regarding the regulation of solid waste collection, we conclude that Congress did not intend to preempt state laws like those in chapter 81.77 RCW that only incidentally affect rail transportation.

[3] The WUTC argues that the provision in 49 C.F.R. § 1090.2 that exempts the motor carrier portion of TOFC/COFC service was based on the STB's authority to regulate motor carrier transportation, not its authority to regulate rail transportation. Because we hold that 49 C.F.R. § 1090.2 does not preempt state regulation here, we do not address this argument.

49 U.S.C. § 10501(b) preempts state law remedies "with respect to *regulation* of rail transportation." (Emphasis added.) Inclusion of the word "regulation" necessarily conveys a different meaning than would the broader phrase "with respect to rail transportation." *Fla. E. Coast Ry. Co. v. City of W. Palm Beach*, 266 F.3d 1324, 1331 (11th Cir. 2001). Therefore, 49 U.S.C. § 10501(b) can be interpreted as preempting "state laws that may reasonably be said to have the effect of 'manag[ing]' or 'govern[ing]' rail transportation, *while permitting the continued application of laws having a more remote or incidental effect on rail transportation*." *Id.* (emphasis added) (alterations in original) (quoting BLACK'S LAW DICTIONARY 1286 (6th ed. 1990)). Division One quoted this language in *Ballard Terminal Railroad*, 22 Wn. App. 2d at 71. "What matters is the degree to which the challenged regulation burdens rails transportation." *N.Y. Susquehanna*, 500 F.3d at 252.

Multiple federal circuit courts have held that the ICCTA is narrowly tailored to only preempt state law that has a managing or governing effect on rail transportation, not an incidental or remote one. *Ass'n. of Am. R.R. v. S. Coast Air Quality Mgmt. Dist.*, 622 F.3d 1094, 1097-98 (9th Cir. 2010); *Franks Inv. Co. v. Union Pac. R.R. Co*., 593 F.3d 404, 410 (5th Cir. 2010); *PCS Phosphate Co. v. Norfolk S. Corp*., 559 F.3d 212, 218 (4th Cir. 2009); *Adrian & Blissfield R.R. Co. v. Blissfield*, 550 F.3d 533, 539 (6th Cir. 2008); *N.Y. Susquehanna*, 500 F.3d at 252; *see also Girard v. Youngstown Belt Ry. Co.*, 979 N.E. 2d. 1273, 1281 (Ohio 2012). "Generally speaking, ICCTA does not preempt state or local laws if they are laws of general applicability that do not unreasonably interfere with interstate commerce." *Ass'n of Am. R.R.*, 622 F.3d at 1097.

The legislative history of the ICCTA noted that although federal regulation was intended to be exclusive, "States retain the police powers reserved by the Constitution." H.R. REP. NO. 104-311, at 96 (1995). Similarly, the Conference Report for 49 U.S.C. § 10501(b) stated that the

exclusivity of federal remedies stated in that section was "limited to remedies with respect to rail regulation – not State and Federal law generally." H.R. REP. NO. 104-422, at 167 (1995) (Conf. Rep.).

Here, chapter 81.77 RCW does not have a managing effect on rail transportation. The applicable statutes address only solid waste collection companies, which are persons who use vehicles to transport solid waste for collection or disposal over any public highway. RCW 81.77.010(9). The WUTC's authorization is required regardless of whether the solid waste eventually is delivered to a rail carrier. RCW 81.77.040 does not attempt to regulate rail transportation or to limit rail carriers' handling of solid waste. Instead, that statute regulates only the motor carriers who can collect and transport solid waste and who may bring solid waste to rail carriers. As a result, any effect on rail transportation is indirect, remote, and incidental.

In addition, the regulation of solid waste collection involves public health and safety that constitutes a valid exercise of police power. *See Weyerhaeuser v. Pierce County*, 124 Wn.2d 26, 40, 873 P.2d 478 (1994). As our Supreme Court has 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.' " *Ventenbergs v. City of Seattle*, 163 Wn.2d 92, 109, 178 P.3d 960 (2008) (quoting *AGG Enter. v. Wash. County*, 281 F.3d 1324, 1328 (9th Cir. 2002)). There is no indication in the statutory language or in the case law that Congress intended to preempt these traditionally local, police power regulations.

We conclude that Congress did not intend to preempt state government regulation of the collection of solid waste, which has only a remote and incidental effect on rail transportation.

5. Summary

We conclude that neither 49 U.S.C. § 10501(b) nor 49 C.F.R. § 1090.2 operate to preempt Washington law regarding solid waste collection activities, and that Congress did not intend to preempt state government regulation of the collection of solid waste. Therefore, Waste Management cannot show that the UTC's summary determination order was based on an erroneous interpretation or application of the law under RCW 34.05.570(3)(d).

CONCLUSION

We affirm the WUTC's summary determination order.

Maxa, J.

MAXA, J.

We concur:

Worswick J

WORSWICK, J.

Glasgow, CJ

GLASGOW, C.J.

APPENDIX 2

364 I.C.C. 731, 1981 WL 22778

SURFACE TRANSPORTATION BOARD (S.T.B.)

IMPROVEMENT OF TOFC/COFC REGULATION

Decided February 19, 1981
EX PARTE NO. 230 (SUB-NO. 5)

NOTICE

TITLE 49—TRANSPORTATION

CHAPTER X—INTERSTATE COMMERCE COMMISSION

SUBCHAPTER B—GENERAL RULES AND REGULATIONS

PART 1039—RAIL INTERMODAL TRANSPORTATION EXEMPTION

PART 1090—PRACTICES OF CARRIERS INVOLVED IN THE INTERMODAL MOVEMENT OF CONTAINERIZED FREIGHT

PART 1300—FREIGHT TARIFFS: RAILROADS, WATER CARRIERS, AND PIPELINE COMPANIES SUBJECT TO SECTION 6 OF THE INTERSTATE COMMERCE ACT AND CARRIERS JOINTLY THEREWITH

****1** By the Commission, Acting Chairman Alexis, Commissioners Gresham, Clapp, Trantum, and Gilliam. Commissioners Clapp and Gilliam concurring with separate expressions.

***731** AGENCY: Interstate Commerce Commission.

ACTION: Notice of final rule [exemption].

SUMMARY: The Commission is exempting rail and truck service provided by rail carriers in connection with trailer-on-flatcar (TOFC) and container-on-flatcar (COFC) service from Title 49, Subchapter IV of the U.S. Code. The exemption is based on findings that regulation is not necessary to carry out the transportation policy of 49 U.S.C. 10101a or to protect shippers from the abuse of market power by railroads. This notice clarifies certain aspects of the exemption highlighted in the public comments.

DATES: The exemption is effective March 23, 1981.

FOR FURTHER INFORMATION CONTACT:

Richard B. Felder or Jane F. Mackall

(202) 275-7656

***732** SUPPLEMENTARY INFORMATION:

The Commission proposed to exempt rail and truck service provided by railroads in connection with TOFC/COFC service in a decision served November 21, 1980, 45 F.R. 79123 (November 28, 1980). The exemption was scheduled to go into effect on February 10, 1981. The public was given 45 days to comment on the exemption. The reasons for proposing the exemption were given in the prior decision and will not be repeated in detail here. In general, however, we concluded that this traffic was highly competitive with motor carrier service, that intramodal rail competition was active, that service problems were an

impediment to successful marketing of TOFC/COFC service, that regulatory restraints had impeded the development of intermodal service, and that exemption from regulation would likely stimulate improvements in service without threatening any harm to individual shippers.

Our review of the comments has reinforced our earlier judgment that exemption of TOFC/COFC operations will promote the public interest. We believe that our proposed exemption is consistent with the congressional intent that we vigorously pursue exemptions from economic regulation in the railroad area where regulatory control appears unnecessary to protect against abuses of market power. See generally H. Rept. 96-1430, 96th Cong. 2d sess., pp. 104-05.

The comments contain numerous questions about the economic effects likely to flow from the exemption. Numerous comments support the exemption. Others, including comments by some shippers, reflect uncertainty and concern over the mechanics of the exemptions and the effect of the exemption on them. We can appreciate their concern. This is truly an area where predictive judgment is difficult and definitive answers to troublesome questions concerning the implementation of the exemption cannot be given based on a paper record. We are confident, however, that rail managements will respond enthusiastically when relieved from existing regulatory constraints. Indeed, as we suggested in our notice of rulemaking, existing regulatory barriers have impeded the development of intermodal service so that exemption should stimulate service improvements. We are also confident, that continued regulation is not needed to protect shippers from abuses of market power.

****2** We can also appreciate the concern expressed by the motor carrier sector that exemption of rail service could offer rail carriers a regulatory advantage in competing for TOFC/COFC traffic. We believe that the proper regulatory response is to seek means of freeing motor carriers from regulatory restraints so that they may compete on equal terms rather than continue to constrain the railroads.

***733** We recognize the limitations on our predictive powers. Our favorable experience with exemption of fresh fruits and vegetables—although not identical to the issues presented here—encourages our continued employment of the exemption power. We believe that exemption of TOFC/COFC service will benefit the shipping public. We nonetheless stand ready to monitor the effects of the exemption to assure that continued regulation is not needed. We believe that such after-the-fact evaluation is what Congress intended. See H. Rept. 96-1430, *supra*.

1. *Jurisdiction and scope*.—The exemption cover TOFC/COFC service provided by railroads. It includes the railroad transportation of trailers and containers on flatcars and truck service provided by railroads of containers and trailers.[1] In other words, railroad operations involving TOFC and COFC are exempt, whether they are conducted on railroad flatcars or in trucks that are owned and operated by the railroad itself (rather than by a separately incorporated railroad affiliate).

A number of parties have suggested that the full scope of our proposed exemption, i.e., whether or not it is intended to cover rail-affiliated motor carriers and independent motor carriers providing service on behalf of railroads is unclear. Upon further reflection, we agree. As a consequence, we shall today issue a supplemental notice directed to these questions and call for comments within 30 days.

2. *Ex-water traffic*.—A number of comments have been filed questioning the inclusion of ex-water traffic in the exemption. A number of ocean carriers and the Federal Maritime Commission (FMC) believe that the proposed exemption is the type of action which must be reviewed by the FMC or the President before it can be placed in effect. We do not agree that this is the sort of rule or regulation affecting shipping in the foreign trade contemplated by section 19 of the Merchant Marine Act of 1920, 46 U.S.C. 876. The FMC and the ocean carriers cite no case law to support their expansive reading of section 19. The proposed exemption may change the form of some business arrangements between railroads and ocean carriers. Nevertheless, it is clear that ocean carriers may still file and adhere to the port-to-port tariffs they file with the FMC. Joint intermodal arrangements involving railroads and ocean carriers may still continue.

The ocean carriers and others have questioned the form that intermodal pricing will assume after the exemption takes effect. We do not know the answers to these questions. We leave to the exempt railroads and their business partners the decision of how to price and advertise their ***734** services. We are confident that a clear and simple way to price and publicize this service will be developed.

**3 In addition to tariff format, there is considerable speculation in the comments about which carriers would participate in joint intermodal rail/water traffic in the future. Bound up in these comments is the concern that the exemption would defeat ocean conference participation in joint rates with railroads. In our view, there is no reason why railroads and ocean carriers would not continue to do business after the effective date of the exemption in any way they see fit. Ocean carriers set their rates either independently or through rate conferences. Each ocean carrier can present its rate to the railroad to be used as a component of a joint through rate or combination rate. Rail carrier rates will be set independently and will not be published in tariffs. These circumstances should not inhibit the setting of a joint rate. The railroad and the ocean carrier will be involved in a joint venture in a highly competitive market. These carriers will have every incentive to join their services and market them effectively. We see no legal impediment or antitrust problem in an ocean carrier establishing joint through rates with one or more railroads. Again, ocean carrier rates can be set independently or collectively.

We realize that the exemption may potentially lessen the control of ocean conference ratemaking over joint intermodal rates. Railroads which must set their prices independently may seek out ocean carriers which are willing to price independently. Such an outcome was possible under the law before the exemption. Therefore, we are not inclined to change the exemption to prevent such activity.

We recognize that the exemption will bring with it a new unregulated operating environment for railroads and water carriers. Our failure to treat the comments of the FMC and water carrier interests in greater detail should not be mistaken for an insensitivity to the issues and problems they have raised. Rather, our brief responses are intended to dispel the legal and practical fears of these interests and leave to the marketplace the resolution of any problems. Again, we stand ready to respond to any continuing problems after the exemption becomes effective.

3. *Competitive considerations*.—Considerable comment was directed to our findings that the service we are exempting is highly competitive and that the exemption was unlikely to result in abuses of market power. We see no reason to retreat from these findings.

No one has seriously questioned the existence of vigorous competition between TOFC/COFC and motor carrier service. Motor carriers have expressed the fear that they may not be able to participate in this service *735 as easily as they could in the past. This is true. The railroads are only likely to open their tracks to do business with trucking companies which promise to offer the most competitive and efficient services. Such an outcome is consistent with the national transportation policy of 49 U.S.C. 10101 and 10101(a).

**4 We cannot accept the suggestion of ocean carriers and some shippers that railroads have unchecked market power for ex-water intermodal traffic. Their position is premised on the apparent lack of competition between railroads and motor carriers for these large volume movements. In our judgment, without immunity to collectively establish their rates, there will be vigorous competition among railroads for this traffic.

First, it should be noted that recent studies, such as those performed by Reebie Associates for the Federal Railroad Administration, question whether there are any significant line-haul economies of scale between single-car and multiple-car movements. As a consequence, we are not prepared to conclude that ex-water shipments will not be subject to transport by motor carrier. Second, and perhaps more important, we believe that there is a substantial intramodal competition for such movements and that this competition will be enhanced rather than diminished by the exemption of TOFC/COFC.

The various port ranges discussed in *Rail Rate Equalization To and From Ports* (Rail Services Planning Office, Interstate Commerce Commission, January 1979) are in vigorous competition with each other, as are the individual ports within those port ranges. The Ports of Boston, New York, Philadelphia, Baltimore, and Hampton Roads, to use one example, are all in competition with one another. All of these ports are served by more than one rail carrier that has some presence in the TOFC/COFC market. In the case of Hampton Roads and Baltimore, the competition between the carriers is vigorous and in the case of New York and Philadelphia, could become more so if the strongest competitor, ConRail, seeks to abuse its competitive position.

We appreciate that exemption may mean that some ports will not be in as strong a competitive position as they previously were and some steamship companies also will see their individual positions weakened. This does not mean, however, that transportation capability will not be available or that shippers will not have sufficient alternatives available to prevent abuse.

What will occur is competition among ports and the rail carriers and steamships serving those ports. The competitive relationships we have described for the North Atlantic port range exist in the other port ranges as well and, in the absence of collective ratemaking, are sufficient to prevent abuse and unlawful discrimination, and to permit ***736** competition and the demand for services to establish reasonable rates for transportation by rail.[2]

Finally, the port of Oakland complains of current abuses of market power. We believe they are likely to disappear after the effective date of the exemption. As discussed above, the two railroads which serve Oakland will have to compete and set their rates independently. We are convinced that geographic and intramodal competition will tend to minimize railroad market power under the exemption.

****5** 4. *Antitrust immunity*.—For the reasons cited in the November 21, 1980 decision, we are unwilling to consider exempting this service and continuing antitrust immunity for the setting of rates. Our decision today simply highlights the role of independent pricing in achieving the intended benefits of the exemption. Most importantly, independent pricing is needed to protect shippers and connecting carriers from potential abuses of market power. The exemption will disperse this power and deliver the benefits of intermodal and intramodal competition to the public.

5. *Other matters*.—A number of other matters deserve mention here. On page 8 of the November 21, 1980 decision we mentioned the issue of 'appropriate treatment of railroad affiliated motor carriers.' This statement has confused some of the commenters. It was intended to describe the possibility of reconsidering our policy on applications by railroads to acquire motor carriers under 49 U.S.C. 11344. This issue will be addressed in a separate proceeding.

One comment focused on whether it was wise to exempt service provided by the Alaska Railroad. There is some fear that this government owned entity will abuse its market power. This is the type of situation which may require some attention in the future but offers no real cause for concern at this time. In this area, as in others, we will follow the advice of the legislative history of section 213 and 'adopt a policy of reviewing carrier actions after the fact to correct abuses of market power,' H. Rept. 96-1430, 96th Cong. 2d. sess. 105 (1980).

The last subject which merits attention is the timing of the decision. Some parties including the American Trucking Association, are arguing that our November 21, 1980 decision was issued in violation of the notice provisions of the Administrative Procedure Act (APA), U.S.C. 553. As we noted in our decision at footnote 1, the Staggers Rail Act of 1980 removed the requirement that a proceeding be held to consider an exemption. The notice and comment requirements of the APA do not ***737** apply here at all. We nonetheless appreciate our obligation to devise alternative procedures sufficient to comply with basic principles of due process by allowing interested persons an opportunity to put forward their views with respect to the proposed exemption. This we have done, of course, and we see no prejudice to any party as a result of the procedural vehicle that we have chosen.

There is general concern that 180 days which have elapsed since the effective date of the exemption was announced is not sufficient time to prepare for the exemption. We seriously question if this is the case. Carriers have the option of continuing their present rates and practices until they are replaced by new arrangements negotiated under the exemption. The transition should not be that difficult.

Proctor and Gamble Company filed a supplement to its comments urging us to proceed with the exemption as scheduled. In its words 'if competition and the marketplace cannot replace regulation as an economic control of COFC/TOFC service and prices, then competition and the marketplace cannot replace regulation in any area of transportation activity.' The comments have not demonstrated that further delay would change the prospects for implementing the exemption. Rule changes, business adjustments, and any further agency actions can be done after the exemption as easily as before.

****6** Nevertheless, to remove any doubt about APA procedural claims and to give some commenters including the FMC additional time to adjust to the exemption we are postponing the effective date of the rules until March 23, 1981. The new effective date is more than 30 days from the date of this decision, which adopts in large measure the rules proposed in our decision of November 19, 1980.

The rules implementing the exemption are in the appendix.[3]

This decision does not significantly affect either the quality of the human environment or conservation of energy resources.

COMMISSIONER CLAPP, concurring:

The mechanics of this exemption promise to be more complicated than those of Ex Parte No. 346 (Sub-No. 1)—due, in no small part, to the heavy emphasis on intermodalism. The many issues and questions raised by the numerous commentators reflect this concern. The railroads, shippers, motor carriers, and ports have asked us for assistance, and I believe we owe them and others a full analysis and response. This decision all but ignores those requests. I agree that problems may arise which will require further consideration by us but do not understand why, when presented ***738** with definite questions from the involved parties, we fail to respond. Not only do I believe that these issues *should* have been addressed, they *could* have been addressed without delaying implementation. The exemption is intended to encourage the development of TOFC/COFC traffic yet the uncertainty which will exist as a result of our failure to address the issues may delay realization of that goal.

COMMISSIONER GILLIAM, concurring:

I fully support the rail exemption of TOFC/COFC service. I reached this decision only after much deliberation and careful analysis of the record in this proceeding. It was a difficult decision which was the primary reason that I advocated an extension of the scheduled effective date of the exemption beyond February 10, 1981. In addition to the complex issues raised by the numerous parties who filed comments, there was the question of adequate notice to those who were only included in the proceeding by our Federal Register Notice of November 28, 1980.

The concerns raised by the parties are all questions that I have raised myself with the Commission during the deliberative process. I have attempted within my power to make certain this decision clarifies the scope of the exemption and is otherwise responsive to as many of the concerns of the parties as is possible. While I am not satisfied that this decision accomplishes that goal, I give it my unqualified support because of the fact that Congress intended that we pursue partial and complete exemptions from remaining regulations consistent with the policies of the Staggers Act. The revocation procedures contained in the first exemption provision are retained in the Staggers Act and in my view are strengthened by congressional intent that we adopt a policy of reviewing carrier actions after the fact.

****7** I believe the decision to exempt TOFC/COFC services offers the potential for tremendous growth in intermodalism which is in my opinion an answer to our transportation needs of the future. I urge all concerned to use this exemption and make this second major experiment in deregulation a successful prototype for the future.

***739** APPENDIX

Chapter X Title 49 of the Code of Federal Regulations is amended as follows:

1. A new section 1039.11 reading as follows is added:

1039.11 RAIL INTERMODAL TRANSPORTATION EXEMPTION

Railroad and truck transportation provided by a rail carrier as part of a continuous intermodal movement is exempt from the provisions of Subtitle IV of Title 49 with certain exceptions. Carriers must continue to comply with Commission accounting and reporting requirements. All railroad tariffs pertaining to the transportation of intermodal freight will no longer apply except to the extent adopted by carrier quotations. Nothing in this exemption shall be construed to affect our jurisdiction under section 10505 or our ability to enforce this decision or any subsequent decision made under authority of this exemption section. This exemption shall remain in effect, unless modified or revoked by a subsequent order of this Commission.

(Authority 49 U.S.C. 10321(a) and 10505)

Part 1090 is revised to read as follows:

Part 1090—PRACTICES OF CARRIERS INVOLVED IN THE INTERMODAL MOVEMENT OF CONTAINERIZED FREIGHT

§ 1090.1	Definition of TOFC/COFC Service
§ 1090.2	Use of TOFC/COFC service by Motor and Water Carriers (49 U.S.C. 10321(a) and 10762).

§ 1090.1 *Definition of TOFC/COFC Service*.

Trailer-on-flatcar (TOFC/COFC) service means the transportation on a rail car, in interstate or foreign commerce, of (a) any freight-laden highway truck, trailer, or semitrailer (or container portion of any highway truck, trailer, semitrailer having a demountable chasis) or (b) any empty highway truck, trailer, or semitrailer (or the container portion of any highway truck, trailer, or semitrailer having a demountable chasis) when such empty equipment is being transported incidental to its prior or subsequent use in TOFC/COFC service.

§ 1090.2 *Use of TOFC/COFC service by motor and water carriers*.

(a) Except as otherwise may be prohibited by these rules, motor common and contract carriers, water common and contract carriers, and freight forwarders may utilize TOFC/COFC service in the performance of all or any portion of their authorized service.

(b) Motor and water common carriers shall utilize TOFC/COFC service only if their tariff publications give notice that such service only may be utilized at their option, but that the right is reserved to the user of their services to direct that in any particular instances TOFC/COFC service not be utilized.

(c) Motor and water contract carriers may utilize TOFC/COFC service only if their transportation contracts and schedules make appropriate provisions therefor.

****8** (d) Tariffs of motor and water common carriers and contracts and schedules of motor and water contract carriers providing for the use of TOFC/COFC service shall set forth the points between which TOFC/COFC service may utilized.

***740** (Authority: 49 U.S.C. 10321(a), and 10762)

§§ 1300.0 and 1300.67 are amended as follows:

§ 1300.0(a)(1) is amended by amending the second sentence to read as follows:

The regulations in this part shall also govern the construction and filing of tariffs naming through routes and joint rates over the lines of common carriers by water or pipeline, subject to the Interstate Commerce Act, on the one hand, and vessel-operating common carriers by water engaged in the foreign commerce of the United States, as defined in the Shipping Act, 1916, on the other hand, for the transportation of property between any place in the United States and any place in a foreign country. See section 1300.67

§ 1300.67(b)(1) is amended by deleting from the first sentence (1) the word ‘railroad’, including the comma, (2) the comma following the word ‘pipeline’, and (3) the phrase ‘or a common carrier by railroad, jointly with a common carrier by motor vehicle’, including the comma.

§ 1300.67(b)(2) is amended by deleting the sentence reading as follows: ‘If a tariff provides less-than-carload, less-than-container-load, or less-than-trailerload service, such service must be define.’

§ 1300.67(b)(5) is amended by deleting from the next to last sentence the parenthetical phrase reading as follows: '(such as tariffs containing joint rail-ocean rates, joint rail-motor-ocean rates, et cetera)'.

(Authority: 49 CFR 10762)

I.C.C.

Footnotes

[1] In response to numerous comments, we intended the exemption to extend to 'Roadrailer' equipment and any other equipment developed to be used in intermodal service.

[2] The finding of market dominance for this type of service in No. 37417, *Shipments of Marine Containers on Railroad Flatcars*, (served April 17, 1980) was premised on the existence of antitrust immunity to set rates collectively and should not continue in a wholly exempt environment where carriers have no antitrust immunity.

[3] 49 CFR 1039.11 has been amended by deleting the requirement that railroads send a letter of notification before using the exemption.

364 I.C.C. 731, 1981 WL 22778

APPENDIX 3

6 I.C.C.2d 208, 1989 WL 246988

SURFACE TRANSPORTATION BOARD (S.T.B.)

IMPROVEMENT OF TOFC/COFC REGULATIONS (PICKUP AND DELIVERY)

EX PARTE NO. 230 (SUB-NO. 7)
Decided November 27, 1989
Effective on January 17, 1990

****1 *208** Regulations adopted exempting the motor carrier pickup and delivery portion of TOFC/COFC service.

BY THE COMMISSION:

We are exempting from economic regulation the motor carrier pickup and delivery portion of trailer-on-flatcar (TOFC) and container-on-flatcar (COFC) services (sometimes called piggyback service). Under 49 U.S.C. § 10505, we find that the motor carrier portion of such coordinated TOFC/COFC service, which by definition involves a prior or subsequent movement by rail carrier, is a matter related to rail carrier transportation, and that application of the Interstate Commerce Act is not necessary to carry out the rail transportation policy of 49 U.S.C. § 10101a or to protect shippers from the abuse of market power. "Plan I" service (in which rail service is substituted for a portion of a motor carrier's authorized service) is not being exempted as a class at this time. We will assess applications for individual Plan I exemptions on a case-by-case basis.

BACKGROUND

The TOFC/COFC exemption proceedings were initiated when we exempted, pursuant to 49 U.S.C. § 10505,[1] TOFC/COFC services provided ***209** by railroads on flatcars or in rail-owned trucks. Improvement of TOFC/COFC Regulation, 364 I.C.C. 731 (1981), aff'd, American Trucking Assn's v. ICC, 656 F.2d 1115 (5th Cir.1981) (ATA). Contemporaneously with the issuance of our Ex Parte No. 230 (Sub-No. 5) decision, we sought comment on whether we could and should "round out" the exemption to its logical scope by extending its coverage to over-the-road TOFC/COFC services performed in equipment not owned and operated by a railroad. Ex Parte No. 230 (Sub-No. 6), Improvement of TOFC/COFC Regulations, 46 Fed.Reg. 14,365 (1981).

The public response to the Ex Parte No. 230 (Sub-No. 6) proposal was consistent with past expressions. A majority of the participating motor common carrier interests opposed a broadened exemption. They argued, as they had in the Ex Parte No. 230 (Sub-No. 5) proceeding, that we lack jurisdiction to exempt any service in trucks, and that absent regulation the railroads would likely abuse their market power. The railroads and various shipper groups generally supported the proposal. They argued, as they had in the Ex Parte No. 230 (Sub-No. 5) proceeding, that we have statutory authority to exempt truck service that is related to rail, and that the competitiveness of the TOFC/COFC market would protect the shipping public from any potential abuse of market power.

During the course of the Ex Parte No. 230 (Sub-No. 6) proceeding it became apparent that, although there were different legal and, perhaps, practical considerations associated with exempting different types of piggyback operations, most of the parties had addressed the issues only generally, and had not specifically focused on precisely which types of piggyback services could and should be exempted.[2] Given the generality our notice and of the comments received, we were concerned that we lacked sufficient information to make an informed determination as to the proper scope of the exemption. Accordingly, we decided to limit the ***210** Ex Parte No. 230 (Sub-No. 6) exemption to TOFC/COFC operations performed by a motor carrier either as the agent or the joint rate partner of a rail carrier. Improvement of TOFC/COFC Regulations, 3 I.C.C.2d 869 (1987) (Agency-Joint Rates). We concluded that this modest expansion of the prior exemption was warranted,[3] even in light of the minimal record developed, under either the generally applicable "related to rail" criterion of § 10505(a) or the more specific "provided by rail" provision of § 10505(f).[4]

****2** We instituted the instant proceeding to elicit more detailed comments, once the parties had acquired substantial

experience under the Ex Parte No. 230 (Sub-No. 5) exemption, on whether the exemption should be expanded to cover motor carrier TOFC/COFC pickup and delivery operations. Noting the direct connection of these services to rail carriers and the apparently intense competitive environment, we expressed our preliminary view in our notice of proposed rulemaking that the logical scope of the class exemption should extend to all motor/rail TOFC/COFC services (save perhaps Plan I). We also requested responses to various, specific questions designed to enhance our understanding of the industry's evolution since 1980 and whether a further exemption would be consistent with the provisions and policies of the Interstate Commerce Act, as amended in 1980 with respect to both rail and motor carriers.

***211** THE COMMENTS

Certain motor carrier interests[5] again opposed the exemption largely on jurisdictional grounds. Some individual motor carriers, by contrast, supported the exemption as a means to increase their participation in TOFC/COFC traffic. Rail carriers, looking to facilitate coordination with motor carriers (and thereby increase their own intermodal traffic base), supported the exemption. Shipper interests, viewing the exemption as enhancing their ability to obtain a low-priced intermodal transportation package, supported the proposal.

The comments have assisted us in understanding how the industry has responded to the deregulation of rail TOFC/COFC in the early 1980's. Most significantly, the sharp increase in the railroads' piggyback traffic base, the inability of motor carriers to document any of the market power abuses that they had predicted, and the strong shipper support for further deregulation confirm the success of the TOFC/COFC exemption program to date.

Yet the comments indicate that Ex Parte No. 230 (Sub-No. 6) did not take the piggyback exemption to its logical scope. Our expansion of the exemption in that case was modest, and it presupposed that the participating carriers would be willing to assume the legal responsibilities associated with the required agency or joint rate partnership arrangements. But the railroad testimony indicates that many motor carriers are reluctant to operate as railroad "subordinates," because they would prefer to maintain their separate identities as motor carriers. The Shippers' Agents, which indicate that they are responsible for coordinating the substantial bulk of the nation's TOFC/COFC traffic, report that in their experience most railroads prefer to "wholesale" their business[6] rather than tie themselves legally to individual motor carriers through joint rate or agency arrangements.[7] See similar observations in the comments of Pennsylvania Truck Lines. Thus, while our Ex Parte No. 230 (Sub-No. 6) exemption undoubtedly did ease some unnecessary regulatory burdens, we think we ***212** can and should do more. See 49 U.S.C. § 10505(a) ("the Commission shall exempt ***.") (emphasis added). The focus of our inquiry will be on whether the removal of additional regulatory burdens is consistent with the provisions and goals of § 10505.

DISCUSSION AND CONCLUSIONS

****3** At the outset, we note that the issues here are similar to those that we considered in Ex Parte No. 230 (Sub-No. 6). The difference here is primarily one of degree. Because the arguments raised here concerning our statutory authority to exempt any motor carriage and the likelihood of market power abuse in light of the existing competitive climate are identical to those raised and addressed there, we incorporate by reference here our decision found at Agency-Joint Rates, supra.

A. Related to Rail. The threshold issue in this case, as it has been in the other related piggyback exemption cases, is whether the service at issue involves "a matter related to a rail carrier providing transportation subject to the jurisdiction of the *** Commission ***." 49 U.S.C. § 10505(a). Proponents of this exemption rely largely on the apparently plain meaning of the "related to" language. They argue that the motor carrier pickup and delivery portion of piggyback service is a matter related to a "rail carrier providing transportation ***," because of the operational relationship of the two separate rail and motor legs that make up the coordinated TOFC/COFC movement. Relying largely on what they view as incompatible statutory directives in the Motor Carrier Act of 1980 (MCA), the opponents of the exemption claim that the service at issue is not rail-related, because it is not provided by rail carriers. 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, for the reasons noted below. We note that the Supreme Court rejected arguments similar to those made by the motor carriers in holding that the State of Texas's authority to regulate the intrastate motor portion of piggyback movements is preempted by the ICC's Ex Parte No. 230 (Sub-No. 5) exemption. ICC v. Texas, 479 U.S. 450 (1987).

The first step in ascertaining legislative intent is to examine the language of the statute itself. Here, the language of § 10505(a) applies to matters "related to a rail carrier providing transportation subject to [Commission] jurisdiction." It does not limit our exemption authority to services "provided by" rail carriers. Moreover, the statutory framework indicates that Congress intended to set up a broad "related to" standard in ***213** § 10505(a) that would embrace all services that might be appropriate for exemption, and also to identify in § 10505(f) a narrower category of services "provided by" rail carriers as examples of matters that should be candidates for exemption. See ATA, 656 F.2d at 1120-21. Had Congress intended to equate the broad, somewhat discretionary public interest standard associated with the "related to" language with the more exhortative "provided by" provision, there would have been no reason to have enacted the two provisions separately. Thus, the fact that pickup and delivery operations not provided by railroad do not qualify for exemption under § 10505(f) is immaterial to whether they qualify under the "related to rail" language of § 10505(a).

****4** As the proponents of this exemption note, an equipment interchange agreement establishes an operational relationship between the trucker and the railroad, and it ensures continuity in the movement of the goods. In short, as we noted in our prior decision, motor service that is part of a continuous intermodal movement is, by definition, related to rail:

> 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. As the Supreme Court recognized in [American Trucking v. A.T. & S.F.R. Co., 387 U.S. 397, 420 (1987), and ICC v. Texas, 107 S.Ct. 787, 788-89 (1987)], and the reviewing court noted in ATA, TOFC/COFC service is, by its very nature, bimodal, and the participants that exchange the lading are natural business partners.

Agency-Joint Rates, supra, at 873-74. The courts and the Commission[8] have found since the earliest days of intermodalism that the motor and rail legs of a continuous TOFC/COFC movement are related. As discussed below, the MCA, in our view, recognized and confirmed that finding.

The opposing motor carrier interests disagree with this view. They note that the MCA explicitly addressed various motor carrier issues in general and TOFC/COFC issues in particular. They argue that this attention precludes the Commission from taking further inconsistent administrative action in the field. We do not believe that our action here is inconsistent with any directives of the MCA. As we held earlier in addressing this argument (Agency-Joint Rates, supra, at 873-77), the fact that Congress relaxed but did not exempt motor carrier piggyback regulation in the MCA does not preclude the Commission from exempting this traffic, particularly when such action is consistent with the policies of the subsequently enacted ***214** Staggers Act.[9] To the contrary, the legislative history of the MCA indicates to us that Congress recognized the intimate relationship between the motor and rail legs of a through movement, and that it expected that motor carrier piggyback service might be exempted after further study.[10]

Accordingly, we find that the motor portion of a TOFC/COFC shipment that is covered by an interchange agreement between a motor carrier and a railroad is a matter related to a rail carrier for purposes of § 10505(a).

B. Rail Transportation Policy and Abuse of Market Power. Section 10505(a) requires an exemption if we find that continued regulation is not necessary to further the rail transportation policy (RTP) of § 10101a or to protect shippers from potential abuses of market power. Given our favorable experience to date with the TOFC exemptions and the fact that much motor carrier TOFC/COFC service (commercial zone traffic, traffic moving under agency arrangements or joint rates, and traffic handled in rail-owned trucks) is already exempt,[11] we conclude that further regulation of this service is neither necessary nor desirable.

****5** The RTP expresses several Congressional goals to guide the Commission in its regulation of rail carriers. In general, the RTP contemplates that market discipline in competitive markets, rather than government regulation, is the best way to ensure a healthy transportation ***215** system that will most efficiently meet the needs of the shipping public. See generally, supra, at 878-881. We have found in our prior piggyback exemption decisions that the TOFC/COFC market is highly competitive. Those findings are confirmed by articles in the trade press nearly every day, and by the studies referred to in RCCC's

comments.[12] One basis for the motor carrier opposition to our prior exemptions has been the claim that railroads and motor carriers whose piggyback operations are exempt would abuse market power. To date, portions of piggyback traffic have been exempt for several years, yet no party has presented any information demonstrating such abuses. In short, we see no evidence from which we could conclude that continued regulation is necessary to further the RTP or to protect shippers. To the contrary, the strong support of the shippers for a broadened exemption confirms the success of the intermodal exemption program thus far.

The only remaining question, then, is whether there is any other reason not to take this logical and modest (see n. 7, supra) next step and extend the exemption as proposed here. We can see none. Indeed, in light of the observations during the Congressional MCA debate about the anomaly of having "freight movements [that] are half-regulated, half-unregulated" (126 Cong.Rec. at 7825; see also id. at 7826: "the fact is the railroads are not deregulated"), we think that, if the MCA had been enacted after some experience with the TOFC/COFC exemption established in our Ex Parte No. 230 (Sub-No. 5) proceeding, Congress might well have been more direct in supporting this type of exemption.

We agree with the suggestion in RCCC's comments[13] that the action proposed here will not revolutionize the transportation environment (as did Ex Parte No. 230 (Sub-No. 5)). But it should have some clear benefits for the shipping public: more efficient coordinated service; more flexibility with respect to rates and services; better and more equal opportunities for ***216** shippers' associations to compete with parties able to take advantage of exempt joint rate or agency arrangements; more competition among truckers for ex-rail traffic; and greater freedom from unnecessary and unproductive economic regulatory constraints. The purpose of this and the prior piggyback exemptions is to free carriers from unnecessary economic regulation so that they are better able to compete in the marketplace.[14] We read our mandate as requiring that we issue an exemption once we find that a service meets the criteria of § 10505(a). Accordingly, we will grant the exemption as proposed.[15]

C. Plan I Services. In the Sub-No. 6 decision we declined to issue a classwide exemption for all Plan I TOFC/COFC service because of the lack of an adequate record. Plan I involves operations in which rail service is substituted for a portion of a motor carrier's authorized service. We found "that Plan I motor service is indeed 'related to' rail carrier service," and we expressed skepticism over the claim "that the so-called 'practical' problems that the motor carriers raise—particularly with respect to collective ratemaking—could not be resolved if the parties were truly intent on providing high quality exempt service." Agency-Joint Rates, supra, at 882. For these reasons, although declining to grant a class exemption, we indicated that we would be receptive to new requests for relief as to Plan I.

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****6** In this proceeding some shippers have provided vague support for a ***217** Plan I exemption, and one motor carrier (Overnite Transportation Co.) has argued that we should exempt Plan I service. Overnite is not concerned about antitrust liability because, in its view, few motor carriers actually use collectively set rates for most of their operations even in connection with regulated traffic. Overnite states that its customers know in advance that substituted rail service may be used, and it argues that in today's competitive market the shipper does not need to know at the outset whether a shipment will move by rail or motor.

The opposing motor carriers, consistent with their past views, again oppose a Plan I exemption. The rate bureaus appear to argue that, even if motor carriers set their Plan I rates independently, the collectively set tariff rules would still apply. RCCC also argues that it would be operationally impossible for carriers to negotiate rates separately with thousands of individual shippers. Finally, in their reply comments the rate bureaus argue that Plan I is not suitable for an exemption because "it is impossible to sort out traffic in TOFC/COFC service which will move under collectively set rates from that which will move under independently set rates."

Given the minimal support, we again decline to exempt Plan I services generically. We still find the motor carriers' arguments—particularly those concerning alleged antitrust implications and operational and mechanical difficulties associated with an exemption—to be unpersuasive. For example, carriers should not be subject to antitrust exposure for charging collectively set rates for exempt movements, as long as the carriers electing to quote such rates for their exempt traffic do so independently and without collusion. Similarly, RCCC's argument that it is operationally impossible to negotiate rates separately for thousands of individual shipments overlooks the fact that it is up to each individual carrier to determine the extent to which it wants to negotiate its exempt rates individually (as is done by contract motor carriers) or, instead, to set up some general rate structure that would apply to all of its shippers.[17] Nevertheless, absent greater support, or an indication

that relief is necessary for other reasons, we will entertain petitions from carriers seeking exemption of individual Plan I operations, but we will not exempt all such operations now.

D. Environmental Matters. On December 8, 1988, we issued an environmental assessment (EA) in this proceeding concluding that the ***218** proposed exemption would not likely have a significant effect on the environment or energy consumption. The EA recognized that the exemption could result in some traffic shifts from motor to rail service, but it concluded that any such shifts would likely be minor, and that therefore the beneficial environmental effects generally associated with diverting traffic from motor to rail service would not be significant.

****7** The rate bureaus filed comments disputing the conclusions reached in the EA. First, the rate bureaus challenge what they characterize as "the EA's unsupported assumptions." Second, they contend that the exemption will adversely affect motor carrier safety and may increase terminal area congestion. To resolve these issues, they claim, we should have undertaken a comprehensive environmental impact statement (EIS) rather than simply an EA. We disagree. Under the National Environmental Policy Act (NEPA), an EIS is required only when a major federal action has the potential to result in significant environmental effects. Upon reviewing the unsubstantiated comments of the rate bureaus, we continue to believe, as set forth in more detail below, that the environmental impacts associated with this action are not significant and, therefore, do not warrant an EIS under NEPA.

1. Validity of EA's Assumptions.

At the outset, the rate bureaus argue in passing that there are no empirical data proving the EA's assumptions that the exemption will enhance competitive opportunities, that it may result in a slight shift in traffic patterns, or that rail service is generally thought of as being environmentally superior to motor. These arguments do not require extensive comment. One of the basic premises underlying the piggyback exemptions that we have undertaken since 1981 is that the removal of regulatory restrictions could expand competitive opportunities. The growth in the piggyback business since 1981, which has been widely reported in the trade press, tends to confirm that the exemptions have expanded competitive opportunities, and that an expansion of competitive opportunities may shift traffic patterns and "increase the amount of traffic moving on flat cars." See also 126 Cong.Rec. 7825-26 (1980) (remarks of Senator Stevenson). But as RCCC points out, large-scale shifts from highway to intermodal service will depend on several factors other than deregulation. Thus, we agree with the EA that "[a]lthough it is difficult to assess the changes in traffic movement," any "shift in traffic to flatcars" may indeed be "only *** slight."

The rate bureaus also challenge the statement that a shift in traffic from motor to rail might reduce energy consumption, air pollution, and highway congestion. But the overall environmental benefits of rail service ***219** vis-a-vis motor service have been recognized for years. See, e.g., Senator Stevenson's remarks during the MCA deliberations, 126 Cong.Rec. 7825-26 (1980) (referring to various studies by DOT, GAO, Booz Allen, the Council of Economic Advisors, and the National Transportation Policy Study Commission demonstrating that piggyback service "is between two and four times as fuel-efficient as all-truck service. *** Increasing the freight moving by piggyback would also reduce highway maintenance costs."). Absent some persuasive indication that the conventional wisdom is incorrect, we see no need to conduct an EIS based an unsupported assumptions by a group of motor carriers, which presents no data of its own.

2. Terminal Area Congestion.

****8** Although they challenge the EA's assumption that an exemption could result in diversion of some traffic to rail, the rate bureaus also argue that if TOFC/COFC traffic does indeed increase, then "it is also clear that there will be an increase in motor carrier congestion in and around rail terminal areas." They urge that a more detailed environmental analysis be undertaken to test whether the amount of diversion to rail that could result from this exemption would in fact be slight.

As we have just indicated, we think that diversion to rail resulting solely from this exemption will be modest. Given the many economic and operational factors that potentially affect the modal market shares of piggyback traffic and contribute to diversion, any effort to quantify how much of the potentially divertible traffic would in fact be diverted would necessarily be somewhat speculative. However, based on our experience and analysis of this type of traffic we believe that our assessment of the environmental effects is reasonable. Under NEPA, the Commission is only required to evaluate the reasonably foreseeable effects of its action (see 40 C.F.R. § 1052.22; Robertson v. Methow Valley Citizens Council, 109 S.Ct. 1835

(1989)). We have done so in this case.

In other recent cases we have studied in more detail the environmental impacts of potentially increased terminal area congestion, and found them insignificant. For example, in No. MC-F-17934 (Sub-No. 1), Norfolk Southern Corp. and North America Van Lines, Inc.—Control—Tran-Star, Inc. (NS), EA (not printed), served March 28, 1988, we conducted a "worst case" analysis of the effects of increased terminal area congestion on safety, noise levels, and air quality in the vicinity of intermodal terminal areas. We found that even a substantial increase in terminal area truck traffic would not result in significant noise impacts in light of the brief period of exposure of each particular location on the way to the rail yards. We found that additional noise would not significantly change the already high noise ***220** levels at the intermodal rail yards. We found that any safety problems resulting from local congestion could be addressed by local authorities. And we found, relying on our environmental work in No. AB-19 (Sub-No. 112), Baltimore and Ohio R. Co., Metropolitan Southern R. Co., and Washington and Western Maryland Railway Co.—Abandonment—of the Georgetown Subdivision Located in Montgomery County, MD, and the District of Columbia, (Draft EIS served March 6, 1987, Final EIS served October 2, 1987), that increased terminal area truck traffic would not significantly affect air quality.

In light of those findings, we see no benefit to be gained by further delaying this action to prepare an EIS which is not warranted under NEPA. We think that, on balance, the environmental impacts that will result if some truck traffic is diverted to truck/rail service will be favorable. We see no reason to prepare an unnecessary EIS.

3. Safety.

****9** The rate bureaus also argue that allowing unregulated for-hire carriers to operate (both within and beyond the terminal areas)[18] will adversely affect safety. Their argument is twofold: (1) that the Commission's licensing program is the most effective tool to ensure that carriers operate safely and maintain adequate insurance; and (2) that expanding the scope of permissible exempt operations might "invite into operation a whole class of unfit motor carriers." We disagree with both arguments.

We do not believe that this exemption will encourage unfit carriers to enter the market. For over eight years we have authorized unregulated TOFC/COFC operations in rail-owned trucks, and since mid-1987 independent motor carriers operating under joint rate or agency arrangements with railroads have been similarly exempt from economic regulation. During that time we have received no indication that unlicensed piggyback operators operate any less safely, or are any less likely to carry appropriate insurance, than regulated carriers. The rate bureaus' claims are simply without foundation. Similar claims were raised by various carrier interests in connection with 1980 legislation relaxing motor carrier regulation, and they too have not been borne out by experience.[19] ***221** Moreover, the claim that full economic regulation is necessary to ensure safety is particularly weak here given the nature of the TOFC/COFC shipper: a sophisticated shipper tendering large volumes of high valued freight on a regular basis.[20] In the case of piggyback, the market place, rather than regulation, will keep the business out of the hands of unsafe or uninsured operators.

The rate bureaus' other claim is that economic regulation is needed to enhance safety compliance. We disagree. It is quite true that we consider safety and insurance coverage to be paramount factors in our licensing procedures; indeed, unsafe or uninsured operators cannot obtain licenses, and established carriers that become unsafe or uninsured risk losing their licenses. But the fact that we perform these safety-related functions in connection with our economically oriented licensing activities is not a reason for regulating when there is no economic basis for doing so. This determination does not leave the public unprotected, because from an enforcement perspective, DOT, the Federal agency with primary responsibility for motor carrier safety, has the authority and the commitment to ensure that economically unregulated carriers will maintain insurance at appropriate levels as required by law and will operate safely.

Under the Motor Carrier Safety Act of 1984 ("Safety Act"), Pub.L. No. 98-554, codified at 49 U.S.C. 2501-2520. DOT has issued motor carrier safety regulations[21] that apply to virtually all motor carriers operating in ***222** interstate commerce,[22] including motor carriers whose operations are exempt from ICC economic regulation.[23] DOT's authority over safety was strengthened in the Commercial Motor Vehicle Safety Act of 1986, which is designed to require states, the motor carrier industry, and individual drivers to work with DOT to ensure that only safe drivers are permitted on the road and that unsafe drivers are removed. See generally Commercial Driver Licensing Standards' Requirements and Penalties, 52 Fed.Reg. 20,574 (1987). In short, we are confident that our determination not to regulate this traffic will not impair highway safety.

FINDINGS

**10 We find, under our authority at 49 U.S.C. § 10505, that: (1) TOFC/COFC pickup and delivery services performed by motor carriers as part of continuous intermodal movement are related to rail carrier transportation; and (2) application of the Interstate Commerce Act is not necessary to carry out the transportation policy of 49 U.S.C. § 10101a or to protect shippers from the abuse of market power. Appropriate Code of Federal Regulation revisions are attached.

This action will not significantly affect the quality of the human environment or energy conservation. The exemption should have beneficial energy consumption and environmental impacts. To the extent that the exemption encourages the increased use of intermodal TOFC/COFC service in place of all-highway service, the net effect on the environment and on energy consumption should be favorable, because it is generally recognized that transportation by rail has a smaller environmental impact and uses less fuel than transportation by highway. Increased use of intermodal service should also reduce highway congestion and road damage. It is not possible accurately to predict the magnitude of these effects since they will depend entirely on the actions and choices of individual carriers and shippers in an economic environment free from regulation under the Interstate Commerce Act. There is, however, no reason to expect the effect to be of major significance.

This action will have a significant economic impact on a substantial number of small entities. It imposes no new regulatory burden or requirements on any person, but instead relieves a potentially large number of persons, including small businesses, of such burdens and requirements. *223 In this decision, we have considered the purposes and anticipated effects of the exemption, as well as the alternatives (no exemption, partial exemption) open to us. We have chosen the feasible alternative that imposes the fewest, and removes the most, regulatory burdens on small businesses and other entities.

AUTHORITY: 49 U.S.C. §§ 10505 and 10321(a); 5 U.S.C. § 553.

COMMISSIONER LAMBOLEY, dissenting:

**11 In my judgment, we lack jurisdictional authority under provisions of § 10505 to exempt the motor carrier pickup and delivery portion of TOFC/COFC services at issue here. The majority's decision is based on its belief that this motor service is sufficiently "related-to-rail" to permit exemption under 49 U.S.C. § 10505(a). In my view, the motor-provided pickup and delivery service is beyond the scope of this provision.

To date, we have exempted those motor aspects of intermodal movements that are provided by a railroad. In Ex Parte No. 230 (Sub-No. 5),[24] the Commission exempted what was historically known as "Plan II" service—railroad-provided door-to-door intermodal service that included, in addition to the rail line-haul movement, railroad-performed motor pickup and delivery service. In Ex Parte No. 230 (Sub-No. 6)[25] we expanded the exemption to include motor portions of TOFC/COFC operations performed by a motor carrier acting as an agent or a joint rate partner of a railroad.[26]

In each instance, authority for exemption was premised jointly on §§ 10505(a) and (f)—the motor services were considered both "a matter related to a rail carrier providing transportation" (Section 10505(a)), as well as "transportation that is provided by a rail carrier as a part of a continuous intermodal movement." (Section 10505(f)). See ATA, 656 F.2d at 1120-21 and Agency—Joint Rate, 3 I.C.C.2d at 874-75. From a practical viewpoint, any "related-to-rail" decisional reasoning was largely superfluous for these *224 exemptions: the railroad provides the involved motor services and assumes full legal responsibility for the shipment as part of an integrated door-to-door transportation service.

In contrast, the independent motor pickup and delivery portion at issue here is by definition not provided by a railroad. As opposed to Plan II-type service, the rail carrier here offers only ramp-to-ramp rail service. Motor pickup and delivery is arranged by the shipper independently. Instead of a contractual relationship with one carrier as part of an integrated transportation service, the shipper has potentially several, with each carrier having independent and unrelated legal obligations toward the underlying shipment when it is in its respective possession. Thus, in contrast to Ex Parte No. 230 (Sub-Nos. 5 and 6), jurisdiction for exemption consideration here cannot be found in the "provided-try-rail" language of § 10505(f), but must lie solely within the "related-to-rail" language of § 10505(a).

The majority offers two rationales to support that jurisdictional premise: (1) the "related-to-rail" statutory language of § 10505(a), complemented both by the statutory exemption framework of § 10505 in its entirety, and statements in the

legislative history of the Motor Carrier Act of 1980 (MCA) which indicated a desire and/or anticipation of the eventual exemption of the independent motor carrier portion of TOFC/COFC service; and (2) Supreme Court precedent in ICC v. Texas, 479 U.S. 450 (1987) (Texas). In my view, neither is persuasive.

12 As for statutory construction of § 10505, neither the plain language of the statute nor relevant legislative history supports the majority's position. When read comprehensively, the language of § 10505 evidences a congressional intent to establish a broad exemption framework for rail-provided services only. In my view, the important "plain" language in the long introductory prepositional phrase of § 10505(a) is *"a rail carrier providing transportation subject to [Commission] jurisdiction." The controversial language—"[i]n a matter related to" such rail-provided transportation—simply modifies the above-noted portion of the longer phrase. The "matters related to" necessarily concern, in my judgment, normally regulated activities of the rail carrier—such as tariff filing, rates and charges, abandonments, acquisitions, and securities issuances—which the Commission can exempt from its oversight if the elements in the body of § 10505(a) are satisfied. Thus, the focus in § 10505(a) is on "rail-provided" service and the underlying regulated "matters" regarding that service that can be exempted. To conclude that the prepositional language at issue extends to independent, non-rail provided motor service such as that in issue here is simply, in my judgment, an overreach. The entire statement of § 10505(a) when combined with § 10505(f) and taken as a whole establishes the statutory predicate for exemption for rail provided *225 intermodal service only.[27]

Further, nothing in the relevant legislative history supports the majority's contrary "related-to-rail" position. In fact, the most salient aspect of that history was the full Senate's rejection of a Commerce Committee amendment to the MCA which would have exempted independently provided truck service incidental to rail TOFC transport. Any reference to Congressional statements in support of the motor exemption or expressions of expectations that it would occur at some future date simply suffer by comparison. Moreover, nothing in the Staggers Act or its legislative history offers any comfort or basis to the majority's position.[28]

The majority suggests that this type of analysis improperly equates the assertedly broad, "related-to-rail" language of § 10505(a) with the more narrowly focused "provided-by-rail" language of § 10505(f). Had Congress intended a more narrow "provided-by-rail" equivalence, the argument goes, there would have been no need for the separate "related-to-rail" language in subsection (a).

To wade into this analytical framework, the majority must necessarily consider the converse: If § 10505(a) is as broad as suggested, there would have been no separate need for § 10505(f). In my judgment, § 10505(f) was enacted because § 10505(a) was confined to exemptions for rail-provided services only. Through § 10505(f), Congress expressed both its interest in having the Commission consider exemption of the rail-provided motor portion of continuous TOFC/COFC service, but also its reservation that § 10505(a) was not sufficient in its jurisdictional reach to allow it. Arguments which claim that the plain language of § 10505(a) takes it beyond rail-provided service illogically negate a need or meaningful effect for the specific provisions of § 10505(f).[29]

**13 *226 Lastly, the Texas case is not particularly apposite here. Aside from the interstate/intrastate concerns raised there, that proceeding involved motor TOFC/COFC service that was railroad-provided, with the focus on the Commission's jurisdiction under § 10505(f). It clearly differs from the situation here, which involves independently provided motor pickup and delivery service and our jurisdiction to consider exemption of the service solely under § 10505(a). Even without these significant distinctions, under closer examination the case itself does little to support, if not serve to contradict, the majority view.

It is ordered:

1. The over-the-road portion of TOFC/COFC pickup and delivery services provided by motor carriers as part of a continuous intermodal movement is exempted from regulation to the extent noted above.

2. The Code of Federal Regulations is amended accordingly.

3. This decision is effective January 17, 1990.

By the Commission, Chairman Gradison, Vice Chairman Simmons, Commissioners Andr , Lamboley, and Phillips. Commissioner Lamboley dissented with a separate expression.

***227 APPENDIX**

****14** Title 49, Chapter X of the Code of Federal Regulations is amended as follows:

1. The authority citation for 49 C.F.R. Part 1090 continues to read: 49 U.S.C. §§ 10321, 10505 and 5 U.S.C. § 553.

2. Part 1090 is amended by revising Section 1090.2 to read as follows:

§ 1090.2. Exemption of rail and highway TOFC/COFC service.

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 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.

Footnotes

[1] The provisions of 49 U.S.C. § 10505(a) and (f) provide:
(a) In a matter related to a rail carrier providing transportation subject to the jurisdiction of the Interstate Commerce Commission under this subchapter, the Commission shall exempt a person, class of persons, or a transaction or service when the Commission finds that the application of a provision of this subtitle-
(1) is not necessary to carry out the transportation policy of § 10101a of this title; and
(2) either (A) the transaction or service is of limited scope, or (B) the application of a provision of this subtitle is not needed to protect shippers from the abuse of market power.
*****
(f) The Commission may exercise its authority under this section to exempt transportation that is provided by a rail carrier as part of a continuous intermodal movement.

[2] Several motor carrier organizations did discuss, in supplemental comments, what they viewed as the practical ramifications of exempting Plan I TOFC/COFC. In response to their comments, we concluded that different types of operations might best be assessed separately, and we expressly declined to exempt Plan I in our Ex Parte No. 230 (Sub-No. 6) decision. We will continue to address Plan I services separately in this decision.

[3] Among other things, we found that a joint rate exemption would promote intermodalism because it would "eliminat[e] any doubts about the propriety or format of a joint rate between a regulated and an unregulated entity ***.", Agency-Joint Rates, supra, at 880 n. 15. As the comments here were filed shortly after the Ex Parte No. 230 (Sub-No. 6) decision was issued, it is difficult to determine the extent to which that action may have encouraged initiation of new joint rate arrangements. In any event, it appears to us that the additional exemption proposed here is appropriate.

[4] One set of commentors that did not participate in the Ex Parte No. 230 (Sub-No. 6) proceeding, American Institute for Shippers' Associations, Inc., and Intermodal Marketing Association (collectively referred to as "Shippers' Agents"),

criticizes the Ex Parte No. 230 (Sub-No. 6) decision. They claim that the decision should not have relied on assertedly "extraneous" considerations such as the existence of joint rate or agency arrangements, characterizing them (comments at 9) as "sloppy parameters for the exemption." The courts, however, have for years relied on such factors in determining whether and how a particular movement is to be regulated. See, e.g., IML Sea Transit, Ltd. v. United States, 343 F.Supp. 32 (N.D.Cal.), aff'd per curiam, 409 U.S. 1002 (1972).

[5] A group of rate bureaus and the Regular Common Carrier Conference (RCCC), hereafter termed the "opposing motor carrier interests."

[6] In "wholesaling" piggyback services the railroads specialize in the sale of ramp-to-ramp transportation to large shippers or to shippers' agents, brokers, or other third party intermediaries. The shippers' agents and other third party intermediaries buy large blocks of rail capacity and in turn market or "retail" the rail service directly to the shipping public.

[7] One railroad witness's testimony indicates that in the past approximately 6% of his company's TOFC/COFC traffic has moved under joint rate or agency arrangements. Approximately 80% of the remaining traffic was commercial zone traffic that is already exempt from Commission regulation.

[8] See Substituted Service—Piggyback, 322 I.C.C. 301 (1964), aff'd, American Trucking v. A.T. & S.F.R. Co., 387 U.S. 397 (1967).

[9] A stronger version of the same argument was rejected in ICC v. Texas, supra, where the Court found that the express reservation of state jurisdiction to regulate intrastate motor carriage did not override the exemption of intrastate motor carrier operations related to intrastate piggyback rail service.

[10] See the discussion among Senators Stevenson, Cannon, and Hollings, 126 Cong.Rec. S 7825-26 (Apr. 15, 1980). Senator Stevenson supported an outright exemption of incidental-to-rail trucking services, on the ground that it would "encourage piggyback." Senator Cannon and Senator Hollings opposed the exemption, essentially for two reasons. First, they were concerned that the matter had not been adequately explored ("[W]e simply need more time and more testimony before we drive into this matter."). Second, they believed that it would be anomalous to exempt the motor portion of a movement when the rail portion was still regulated (unless rail piggyback were deregulated, it would be inappropriate to "creat[e] a situation of half-regulated, half-unregulated transportation where that situation did not exist before."). The matter has by now been explored in considerable detail, and the rail portion of the transportation, of course, is now exempt.

[11] As an alternative to a finding that regulation is not necessary to protect shippers from abuse of market power, § 10505(a) authorizes us to exempt services that are limited in scope. Because much motor carrier piggyback service is already exempt, the services at issue here are rather limited in scope. Nevertheless, in light of our concern that shippers not be subjected to potential abuses of market power, we will not rely on the limited in scope provisions here.

[12] See also Railroad TOFC/COFC Monitoring Study, Office of Transportation Analysis, Interstate Commerce Commission, December 1985; Intermodalism: The Rail/Truck Battle Rages On, Journal of Commerce Special Report, June 13, 1989; Transportation Services: Railroads, 1988 U.S. Industrial Outlook, U.S. Department of Commerce, January 1988.

[13] RCCC seems to argue that the exemption should be denied because non-regulatory railroad improvements (rather than deregulation) will be necessary before railroads will be able to divert traffic from long haul truckers. Although there is always room for non-regulatory industry improvements, the strong support for the exemption expressed by the Shippers' Agents, which use both all-motor and coordinated intermodal services, suggests that regulatory improvements will also improve service. But in any event, RCCC argues only that an exemption may not help the railroads much. It does not argue, as it must if it is to prevail under the statute, that regulation is necessary to carry out the RTP or protect shippers from abuse of market power.

[14] During the MCA debates Senator Stevenson clearly expressed his view that deregulation of TOFC/COFC would increase competition, encourage intermodalism, improve fuel efficiency, reduce transportation costs, facilitate highway maintenance programs, and, "[i]n short, *** help integrate the transportation system ***." 126 Cong.Rec. at 7825-26 (1980).

[15] Shippers' Agents have asked that we clarify the nature of the motor carriers' obligations to provide contractual terms for liability and claims. Consistent with the language of § 10505(e), our exemption of these pickup and delivery services will not relieve any carrier of any obligation (or opportunity) it would otherwise have under the liability provisions of §§ 11707 and 10730 were the services still regulated. Similarly, as we noted in the Ex Parte No. 230 (Sub-No. 6) decision, Agency-Joint Rates, supra, at 883 n. 20, this exemption does not relieve carriers of their responsibilities to comply with the Department of Transportation's safety and insurance regulations.

[16] In particular, the opposing motor carrier interests had argued that, because less-than-truckload (LTL) carriers do not know until they have aggregated several LTL shipments into a trailer whether they will perform the movement entirely by truck, or in substituted rail service: (a) the shipper would not know whether its service would be a regulated service governed by the tariff rate or an unregulated service subject to some other rate; and (b) the carrier would face antitrust exposure if it assessed collectively set class rates for what turned out to be an exempt service.

[17] Of somewhat more concern to us is the argument that the shippers could be at a disadvantage if they do not know in advance how or at what rates a particular shipment will move. However, there is no logical reason to believe that shippers will tender freight without knowing the applicable rate. Any motor carrier seeking an individual exemption in the future should indicate how it plans to ensure shipper concurrence in the type of shipping arrangement made and the rate to be applied.

[18] Of course, our action here will have no effect on economic regulation of motor services within commercial zones or rail terminal areas, as such operations are already statutorily exempt under other provisions of the Act.

[19] We note that the participants in a 1987 conference on the relationship between deregulation and motor carrier safety as experienced since the 1980 motor carrier legislation concluded that "*** no objective evidence had been found to support a position that economic deregulation had caused a degradation of highway safety ***." See "Transportation Deregulation and Public Safety. Summary Report On a Conferences" by Leon Moses and Ian Savage, in Conference Proceedings on Transportation and Public Safety, the Transportation Center, Northwestern University, June 1987, at 921. In fact, one of the most accurate measures of motor carrier safety, the Fatal Accident Reporting System data as compiled by the National Highway Traffic Safety Administration, shows that the number of fatalities from heavy truck accidents, both absolutely and in relation to the increased number of vehicle miles, has declined since motor carrier deregulation in 1980. See "The Myth of Economic Deregulation and Safety In the U.S. Motor Carrier Industry" by Richard Schweitzer, at 703, in Conference Proceedings, etc.

[20] Under current motor carrier regulation, the Department of Transportation (DOT) safety ratings of commercial motor carriers are available to the public upon request. Thus, any shipper can now readily screen out unsafe carriers. Given the competitive nature of this market and the ample supply of quality carriers, even if unsafe operators sought to invade the TOFC/COFC market, it seems unlikely that TOFC/COFC shippers would use them.

[21] See 49 C.F.R. Part 390.

[22] Unlike the previous DOT safety procedures, the new regulations now apply even to exempt commercial zone operations, except in areas in which a state maintains and enforces comparable regulations. See 49 C.F.R. § 390.5, reproduced at 53 Fed.Reg. 18,053 (1988).

[23] See 49 C.F.R. § 390.5, reproduced at 53 Fed.Reg. 18,053 (1988).

[24] Improvement of TOFC/COFC Regulation, 364 I.C.C. 731 (1981), aff'd, American Trucking Assns. v. I.C.C., 656 F.2d 1115 (5th Cir.1981) (ATA).

[25] Improvement of TOFC/COFC Regulations, 3 I.C.C.2d 869 (1987) (Agency—Joint Rate).

[26] For outline of TOFC/COFC service Plans I through V, see generally, Substituted Service—Piggyback, 322 I.C.C. 301, 304-305 (1964) and American Trucking v. A.T. & S.F.R. Co., 387 U.S. 397, 403 (1967) (ATA v. ATSF); Plan II 1/2, Iron & Steel Articles Between Atlanta, and St. Louis, 318 I.C.C. 80, 81 (1962). In exemptions such as here, the class of persons and transactional activities are relevant factors in evaluating the potential for market abuse. 49 U.S.C. § 10505(a)(2)(B). In the absence of identification of such factors, the scope of this exemption is not defined; ostensibly it includes Plans II 1/2, III and IV.

[27] Cf. ATA v. I.C.C., supra, at 1120-1121, Texas, supra, at 460.

[28] In lieu of broad TOFC/COFC exemption, Congress in the MCA enacted § 10322(b)(2), as well as such other rail-motor provisions as § 10922(j) and 10923(e). In the Staggers Act, Congress added additional rail-motor provision in § 11344(e). See ATA, supra at 1121-1122.

[29] In statutory construction, the more specific provision prevails over the more general. See I.C.C. v. Texas at 456, 461, and ATA v. ATSF at 410. The exemption relationship between § 10505(a) and § 10505(f) is that of general and specific. The specific authorization of § 10505(f) is not merely illustrative; were it so, it would be redundant. Rather, it forms the definitional nexus between rail and motor activity for exemption purposes. In ATA v. I.C.C., the Court found that transportation of TOFC/COFC traffic by rail owned trucks is specifically a "matter related to a rail carrier providing transportation" for which exemption may be authorized, concluding in part that:
"We base this finding on the literal language of §§ 10505(a) and (f), ***" (Emphasis added).
ATA at 1121.

6 I.C.C.2d 208, 1989 WL 246988

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APPENDIX 4

50359 SERVICE DATE – DECEMBER 30, 2020
EB

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 36369

ASSOCIATION OF AMERICAN RAILROADS—PETITION FOR DECLARATORY ORDER

Digest:[1] In response to a request for a declaratory order regarding preemption of the Clean Water Act's National Pollutant Discharge Elimination System (NPDES) permitting program and discharge prohibition, the Board declines to issue a declaratory order but provides guidance and explains that the NPDES permitting program and discharge prohibition would likely be preempted by 49 U.S.C. § 10501(b) if applied to discharges incidental to the operation of rail cars in transit.

Decided: December 29, 2020

On November 27, 2019, the Association of American Railroads (AAR) filed a petition for a declaratory order asking the Board to find that the preemption provision of the Interstate Commerce Act, 49 U.S.C. § 10501(b), as amended by the ICC Termination Act of 1995 (ICCTA), preempts two provisions of the Clean Water Act (CWA)—the National Pollutant Discharge Elimination System (NPDES) permitting program, 33 U.S.C. § 1342 and the discharge prohibition, 33 U.S.C. § 1311—as applied to discharges incidental to the operation of rail cars in transit. (AAR Pet. 1.) For the reasons explained below, the Board concludes that issuing such an order would be premature, and, accordingly, declines to issue a declaratory order at this time. See U.S. Envtl. Protection Agency—Pet. for Declaratory Order (EPA Declaratory Order), FD 35803, slip op. at 6 (STB served Dec. 30, 2014) (declining to issue a declaratory order regarding preemption because it was premature). However, the Board will provide guidance on the issue and explain that, based on the structure of the CWA and the manner in which it is currently administered, the NPDES permitting program and discharge prohibition would likely be preempted by § 10501(b) if applied to discharges incidental to the operation of rail cars in transit.[2]

[1] The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. See Pol'y Statement on Plain Language Digests in Decisions, EP 696 (STB served Sept. 2, 2010).

[2] For purposes of providing guidance regarding the preemption issues raised by AAR's petition, the Board assumes, without deciding, that coal particles or particles of other commodities coming from a rail car in transit constitutes the "discharge of a pollutant" and that a rail car in transit meets the definition of "point source" under the CWA.

BACKGROUND

On February 19, 2020, the Board instituted a proceeding to consider AAR's petition. Ass'n of Am. R.Rs.—Pet. for Declaratory Order, FD 36369 (STB served Feb. 19, 2020). The Board has received numerous comments[3] and letters[4] on the issues raised in the petition.[5]

ICCTA Preemption. Section 10501(b) provides that the jurisdiction of the Board over "transportation by rail carriers" is "exclusive." "Transportation" is defined broadly to encompass "a locomotive, car, . . . yard, property, facility, instrumentality, or equipment of any kind related to the movement of . . . property . . . by rail" as well as "services related to that movement." 49 U.S.C. § 10102(9). In addition, § 10501(b) expressly provides that "the remedies provided under [49 U.S.C. §§ 10101-11908] with respect to regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law." The Board and courts have stated that the core purpose of this provision is to ensure the free flow of interstate commerce, particularly by preventing a patchwork of differing regulations across states. See, e.g., Elam v. Kan. City S. Ry., 635 F.3d 796, 804 (5th Cir. 2011) (a purpose of ICCTA was to create a "[f]ederal scheme of minimal regulation for this intrinsically interstate form of transportation") (quoting H.R. Rep. No. 104–311, at 93 (1995), reprinted in 1995 U.S.C.C.A.N. 793, 805); Fla. E. Coast Ry. v. City of W. Palm Beach, 266 F.3d 1324, 1338-39 (11th Cir. 2001) (stating that a desire to prevent a "patchwork of regulation . . . motivated the passage of the ICCTA" and that "[i]n reducing the regulation to which railroads are subject at state and federal levels, the ICCTA concerns itself with the efficiency of the industry as a whole

[3] Comments on the petition were submitted by: AAR; the American Coal Council (Coal Council); the American Farm Bureau Federation (Farm Bureau); the American Short Line and Regional Railroad Association (ASLRRA); BNSF Railway Company (BNSF); the Confederated Tribes of the Warm Springs Reservation of Oregon (Tribes of Warm Springs); the Confederated Tribes and Bands of the Yakama Nation (Yakama Nation); EPA; the Freight Rail Customer Alliance (FRCA); the National Mining Association (NMA); the National Coal Transportation Association (NCTA); the National Grain and Feed Association (NGFA); the North American Freight Car Association (NAFCA); and the Railway Supply Institute (RSI). The Board also received a joint comment by the American Soybean Association, the National Association of Wheat Growers, and the National Corn Growers Association (collectively, Crop Associations), as well as joint comments by Sierra Club, Natural Resources Defense Council, Columbia Riverkeeper, Friends of the Columbia Gorge, Spokane Riverkeeper, RESources for Sustainable Communities, and Puget Soundkeeper (collectively, Environmental Organizations).

[4] Letters were filed by: U.S. Representative Rick Crawford; U.S. Senators Kevin Cramer, Steve Daines, and John Hoeven and U.S. Representatives Kelly Armstrong and Greg Gianforte; U.S. Senators Michael B. Enzi and John Barrasso and U.S. Representative Liz Cheney; U.S. Representative Dusty Johnson; U.S. Representatives Sam Graves and Rick Crawford; U.S. Senators John Barrasso, Kevin Cramer, Shelley Moore Capito, James M. Inhofe, M. Michael Rounds, Dan Sullivan, John Boozman, and Joni K. Ernst; and U.S. Senators Roger F. Wicker, Deb Fischer, John Thune, Roy Blunt, Ted Cruz, Jerry Moran, Dan Sullivan, Marsha Blackburn, Shelley Moore Capito, Ron Johnson, and Todd Young.

[5] In the interest of a complete record, all late filings will be accepted into the record.

across the nation."); Pet. of Norfolk S. Ry. for Expedited Declaratory Order, FD 35949, slip op. at 3 (STB served Feb. 25, 2016) ("The purpose of § 10501(b) is to prevent a patchwork of local regulation from interfering with interstate commerce.").[6]

Section 10501(b) preempts all *state* laws that may reasonably be said to have the effect of managing or governing rail transportation, while permitting the continued application of laws having a more remote effect on rail transportation. N.Y. Susquehanna & W. Ry. v. Jackson, 500 F.3d 238, 252 (3d Cir. 2007) (quoting Fla. E. Coast Ry., 266 F.3d at 1331). State or local laws affecting rail transportation can be categorically preempted or preempted "as applied." EPA Declaratory Order, FD 35803, slip op. at 7. Two broad categories of state and local actions have been found to be categorically preempted "regardless of the context or rationale for the action": (1) state or local permitting or preclearance requirements that could be used to deny a railroad the ability to conduct some part of its operations or proceed with activities that the Board has authorized; and (2) state or local regulation of matters that are directly regulated by the Board. CSX Transp., Inc.—Pet. for Declaratory Order (CSX Transp. May 2005), FD 34662, slip op. at 3 (STB served May 3, 2005); Pet. of Norfolk S. Ry., FD 35949, slip op. at 3. State or local laws that are not categorically preempted still may be preempted "as applied" if they would have "the effect of unreasonably burdening or interfering with rail transportation." EPA Declaratory Order, FD 35803, slip op. at 8.

In contrast, when another *federal* law (such as the CWA) potentially conflicts with the purposes of § 10501(b), the Board or a court "must strive to harmonize the two laws, giving effect to both laws if possible." Ass'n of Am. R.Rs. v. S. Coast Air Quality Mgmt. Dist., 622 F.3d 1094, 1097-98 (9th Cir. 2010). See also Joint Pet. for Declaratory Order—Bos. & Me. Corp., 5 S.T.B. 500, 509 n.28 (explaining that two federal statutes should be harmonized unless there is a "positive repugnancy" or "irreconcilable conflict" between them), recons. denied 5 S.T.B. 1041 (2001).

The CWA. The CWA prohibits the discharge of any amount of a "pollutant"[7] from a "point source" (defined to include "rolling stock," 33 U.S.C. § 1362(14)) into navigable waters without a permit. 33 U.S.C. § 1311(a); 33 U.S.C. § 1362(12). Remedies for unpermitted discharges include injunctive relief as well as administrative, civil, and criminal penalties. 33 U.S.C. § 1319. Permits for discharges of pollutants are issued under the NPDES permitting program pursuant to 33 U.S.C. § 1342. Under § 1342 and EPA's regulations, EPA may authorize qualified states to administer all or part of the NPDES program. 33 U.S.C. § 1342(b); 40 C.F.R. part 123. Permits issued by authorized states must meet EPA permitting requirements but may contain more stringent terms and conditions. See 33 U.S.C. § 1370; see also id.

[6] See also DesertXpress Enters., LLC—Pet. for Declaratory Order, FD 34914, slip op. at 1 (STB served May 7, 2010) ("[F]ederal regulation of rail transportation in interstate commerce is intended to avoid a patchwork of conflicting and parochial regulatory actions that impede the flow of people and goods throughout the nation.")

[7] "Pollutant" is broadly defined as "dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water." 33 U.S.C. § 1362(6).

§ 1311(b)(1)(C); 40 C.F.R. § 123.25(a). Individual permits can be issued to authorize discharges from a single facility, see 40 CFR § 122.21, or general permits can be issued to authorize discharges from a category of facilities, see 40 C.F.R. § 122.28. Once a state is authorized to issue its own NPDES permits, EPA's authority to issue such permits in that state ceases. 33 U.S.C. § 1342(c)(1). According to AAR, 47 states have been authorized by EPA to administer the NPDES permitting program.[8] (AAR Pet. 5.)

Under the CWA, states must prescribe water quality standards applicable to their surface waters. 33 U.S.C. § 1313(c)(2)(A); 40 C.F.R. § 131.4. Water quality standards consist of designated uses for a body of water (e.g., fishing, swimming, public water supply), 40 C.F.R. § 131.10, and criteria to protect those designated uses, id. § 131.11. Water quality criteria may be numeric (e.g., specifying the maximum levels of pollutant permitted in a body of water) or narrative (e.g. describing the conditions of the body of water as free from toxic pollutants in toxic amounts). Id. § 131.11. NPDES permits may contain two types of effluent limitations to ensure compliance with water quality standards: technology-based effluent limitations (TBELs) and water quality-based effluent limitations (WQBELs). See 40 C.F.R. § 122.44(a), (d). TBELs and WQBELs can be stated as numeric standards or as required best management practices. See id. § 122.44(k).

TBELs are required for all discharges and are based on the best practicable control technology currently available for reducing discharges. See 33 U.S.C. § 1311(b). EPA may set nationally applicable effluent limitations guidelines that prescribe the basis for setting TBELs for certain categories and classes of point sources. Id. § 1314(b). "Once EPA establishes effluent limitations guidelines, [an individual] permit writer is responsible for translating the limitations and other requirements of the effluent limitations into TBELs and other conditions appropriate for inclusion in an NPDES permit." EPA, NPDES Permit Writers' Manual at 5-22 (Sept. 2010), https://www.epa.gov/sites/production/files/2015-09/documents/pwm_2010.pdf. However, states can also establish technology-based requirements more stringent than any EPA nationally applicable guidelines. See 33 U.S.C. §§ 1342(a)(1), 1370; 40 C.F.R. § 123.25(a). EPA has not set guidelines for discharges from rail cars. (AAR Pet. 6.) In the absence of national guidelines, TBELs are set on a case-by-case basis by employing a permit writer's "best professional judgment." 40 C.F.R. § 125.3(a)(2)(i)(B), (c)(2). If TBELs are not sufficient to ensure compliance with water quality standards for a particular body of water, the applicable NPDES permit must prescribe more stringent WQBELs that ensure compliance with water quality standards. 33 U.S.C. § 1311(b)(1)(C), (d); 40 C.F.R. § 122.44(d)(1). As a result, WQBELs may vary not just from state to state but from one body of water to another within a state.

NPDES permits must also include monitoring conditions. 40 C.F.R. § 122.48. Monitoring requirements are set on a case-by-case basis and involve consideration of a multitude

[8] Massachusetts, New Hampshire, New Mexico, and the District of Columbia are not authorized to administer the NPDES program and therefore EPA continues to administer the NPDES program in those jurisdictions. See EPA, NPDES Program Authorizations (July 2019), https://www.epa.gov/sites/production/files/2020-04/documents/npdes_authorized_states_2020_map.pdf.

of factors that vary according to the permittee, the pollutant(s) involved, and the body of water at issue. See generally, EPA, NPDES Permit Writers' Manual, Chapter 8 (Sept. 2010).

Even where EPA administers the NPDES permitting program, a state may nonetheless add additional requirements to an EPA-issued permit through the permit certification process as necessary to ensure that a permit applicant will comply with any effluent limitations or other limitations under the CWA and any other appropriate requirement of State law. 33 U.S.C. § 1341(d).

Neither EPA nor any state has ever applied the NPDES permitting program to rail cars in transit. (Envtl. Orgs. Comments 8; AAR Pet. 2.) In Sierra Club v. BNSF Railway, No. 2:13-cv-00967, slip op. at 17-18 (W.D. Wash. Oct. 25, 2016), however, the court held that the rail cars in transit in that case, which were allegedly emitting coal particles directly over and next to navigable waters, were a "point source" subject to the CWA's discharge prohibition and that BNSF could be liable for those discharges if the plaintiffs could establish that the discharges actually occurred. Although BNSF raised the issue of preemption of CWA remedies by ICCTA, the case settled before the court addressed whether ICCTA preempted the plaintiff's requested relief.

The Parties' Arguments. AAR argues that, even though the case was settled, the court's decision in Sierra Club has created uncertainty regarding the application of the CWA to incidental discharges from rail cars in transit and that the Board should resolve that uncertainty through a declaratory order. (AAR Pet. 2.)

AAR argues that unless a rail car owner or operator can ensure that no particle of any commodity, no matter how small, will leave a rail car in transit and enter a body of water, that owner or operator will face liability under the CWA—including potential administrative, civil or criminal penalties and injunctive relief directed at rail operations—unless it can obtain a permit under the NPDES program. (Id. at 1, 12, 15.) However, AAR claims that application of the NPDES permitting program to rail cars in transit is not permissible under the prevailing legal standard. (Id.) AAR argues that, under the harmonization standard of the Board and the courts, any direct regulation of core rail operations under another federal law, including an environmental law, is preempted. (Id. at 15-16.) AAR claims that application of the CWA to rail cars in transit would constitute such direct regulation because NPDES permitting requirements could prevent a railroad from providing service, and complying with its statutory common carrier obligation, by withholding permits or imposing onerous permit requirements and because permit requirements would directly impact how rail carriers move various commodities. (Id. at 17.)

AAR further argues that application of the CWA to discharges from rail cars in transit, which frequently travel through numerous states and by numerous bodies of water, is preempted because it will inevitably create a patchwork of different state regulations, which is impermissible under the harmonization standard. (AAR Pet. 15-16, 19-20.) According to AAR, this is because the CWA delegates enormous discretion to states in setting permit conditions and because permits are often granted with respect to a particular body of water and include specific technology-based restrictions as well as effluent limits based on the water quality standards

applicable to that body of water. (Id. at 18.) AAR also argues that EPA likely could not issue a nationwide permit applicable to incidental discharges from rail cars in transit because it did not exempt rail cars from its delegation of authority to the 47 states that are authorized to administer the NPDES program within their borders. (Id. at 18-19.) In addition, AAR suggests that a patchwork of regulation is still likely to result from any nationwide permit because, in the only instance in which EPA attempted to issue a nationwide permit, which was for marine vessels, the states nonetheless added numerous differing permit conditions beyond those required by EPA. (Id. at 7, 9.) In support of its position, AAR also cites to EPA Declaratory Order, FD 35803, where the Board found that regulations issued by an air quality management district in California under the Clean Air Act, which would be given the force and effect of federal law if approved by EPA, would likely be preempted. (Id. at 14-15.)

AAR also claims that NPDES permitting would directly interfere with the Board's exclusive authority over the economic relationship between railroads and their customers. (Id. at 21-23.) According to AAR, in Arkansas Electric Cooperative Corp.—Petition for Declaratory Order, FD 35305 (STB served Mar. 3, 2011), and Reasonableness of BNSF Railway Coal Dust Mitigation Tariff Provisions, FD 35557, slip op. at 19 (STB served Dec. 13, 2013) (collectively, the Coal Dust decisions), the Board addressed the requirements railroads could impose on shippers to reduce or prevent the loss of coal dust during transit. (AAR Pet. 21-22.) AAR argues that allowing states to impose NPDES requirements to limit the loss of coal in transit would usurp the Board's exclusive authority to govern the economic relationship between railroads and shippers and almost certainly conflict with the standards set by the Board in the Coal Dust decisions, based on the rail transportation policy at 49 U.S.C. § 10101, which Congress intended to be the basis for railroad regulation. (Id. at 22-23; see also BNSF Comments 17-18.)

AAR also asserts that there are compelling policy reasons for the Board to find that application of the CWA to incidental discharges from rail cars in transit is preempted. AAR projects that application of the CWA to such discharges would create enormous disruptions to the interstate rail network, including potentially causing the rerouting of trains to avoid waterways, changes to equipment and operating practices, and discontinuation of transportation of certain commodities, in particular geographic areas, or altogether. (AAR Pet. 24.) AAR claims that it is also not clear which party or parties would be responsible for ensuring compliance with NPDES permit requirements and that defining these relative responsibilities could require substantial changes in commercial relationships. (Id. at 24-25.) Finally, AAR asserts that it is not clear whether permits would be issued for individual rail cars, train sets or broader sets of rail activities, such as transportation of coal from a particular point of origin. AAR argues that permitting of individual rail cars or particular train sets would be extremely challenging given the dynamic nature of rail operations and given that rail cars typically are transported to a wide variety of locations under the control of different entities and frequently move in and out of a single train set. (Id. at 25-26.)

Coal Council, ASLRRA, BNSF, Crop Associations, Farm Bureau, NAFCA, NCTA, NGFA, NMA, and RSI support AAR's petition, arguing that application of the NPDES permitting program to incidental discharges from rail cars in transit would likely result in differing regulations across states that would be highly disruptive and burdensome to their

respective industries and to rail transportation generally. FRCA does not take a position on AAR's petition but states that application of the CWA to rail cars in transit could increase the difficulty and expense of transporting coal and other goods by rail. EPA filed comments providing a summary of certain aspects of the NPDES program but takes no position on the merits of AAR's petition.

The Environmental Organizations argue that, under Board precedent, a preemption analysis requires the Board to examine the specific requirements imposed on the railroads and determine whether those requirements unreasonably burden interstate commerce. (Envtl. Orgs. Comments 7-8.) The Environmental Organizations claim that AAR's petition is premature because, absent any current attempts to impose any permit conditions on rail cars in transit, AAR's claims that application of the CWA will create a patchwork of regulations are speculative. (Id.) The Environmental Organizations assert that the Board lacks the "concrete instances of regulation of discharges from rail cars in transit" that are necessary for the Board to determine whether the regulations would unreasonably interfere with rail transportation. (Id. at 7-10.) According to the Environmental Organizations, even if the Board finds that state administration of the NPDES permitting program is preempted because it would result in a patchwork of regulation, the relief requested in AAR's petition would still be inappropriate because EPA could issue a nationally uniform general permit for discharges from rail cars in transit. (Id. at 13 n.28.) In addition, the Environmental Organizations assert that a federal statute cannot be held to have repealed an earlier enacted federal statute by implication absent "clear and manifest" Congressional intent to preempt the earlier law and a finding that the two statutes are completely irreconcilable. (Id. at 15-16; Envtl. Orgs. Reply 5-7.) The Environmental Organizations argue that § 10501(b) does not demonstrate a clear intent to repeal the NPDES permitting program under the CWA, which specifically defined "point source" to include "rolling stock."[9] (Envtl. Orgs. Comments 19; Envtl. Orgs. Reply 6-7; see also Tribes of Warm Springs Comments 3; Yakama Nation Comments 5-6.) The Environmental Organizations also argue that the text and legislative history of 49 U.S.C. § 10501(b) indicate that it is primarily concerned with preemption of economic, rather than environmental, regulation. (Envtl. Orgs. Comments 20.) According to the Environmental Organizations, the Board's regulations contemplate that railroads are required to comply with NPDES permitting requirements. (Id. at 21 (citing 49 C.F.R. § 1105.7).) Moreover, the Environmental Organizations assert that the Board and courts have consistently found that § 10501(b) does not preempt federal environmental laws, including the CWA. (Id. at 15-17.) The Environmental Organizations also claim that regulation of rail operations under the CWA is similar to public health and safety measures imposed by the Pipeline and Hazardous Materials Safety Administration and the Federal Railroad Administration, which no party argues should be preempted by ICCTA. (Id. at 10-11.)

The Tribes of Warm Springs and the Yakama Nation additionally argue that the CWA protects their treaty-reserved rights to harvest fish and that the Board should decline to issue an order finding that the CWA's NPDES permitting program and discharge prohibition are

[9] The Environmental Organizations suggest that AAR's petition effectively asks the Board to write the term "rolling stock" out of the CWA's definition of "point source." (Envtl. Orgs. Comments 3.)

preempted to ensure that their treaty-reserved rights are not violated. (Tribes of Warm Springs Comments 2-3; Yakama Nation Comments 3-4.)

AAR and BNSF dispute the Environmental Organizations' argument that AAR's petition is premature. AAR argues that there is no need to wait for the development of more facts because no party disputes their fundamental premise: that the delegation of NPDES permitting authority to the states guarantees a patchwork of regulation, which therefore, in their view, would per se unreasonably burden interstate commerce if applied to incidental discharges from railcars in transit. (AAR Reply 7-9.) Moreover, AAR notes that the Environmental Organizations' suggestion that the patchwork problem could be avoided if EPA were to issue a nationally uniform permit ignores the reality that states could still add their own state-specific requirements to any national permit. (Id. at 8; see also BNSF Reply 11-12.)[10] AAR also asserts that issuance of a declaratory order at this point is appropriate because of the uncertainty created by the district court's decision in Sierra Club finding, without addressing § 10501(b) preemption, that the rail cars in transit that were at issue in that case were "point sources" subject to the CWA's NPDES permitting program and discharge prohibition. (AAR Reply 10-12; see also BNSF Reply 6, 10 (arguing that Sierra Club shows that CWA compliance would significantly burden rail transportation).)

AAR and BNSF further argue that the Environmental Organizations' claim that the Board and courts have consistently found that ICCTA does not preempt the CWA misinterprets precedent. (AAR Reply 17-19; BNSF Reply 14-16.) According to BNSF, the language cited by the Environmental Organizations is dicta because EPA Declaratory Order is the only Board case that actually involved the application of federal environmental law. (BNSF Reply 14.) In addition, BNSF argues that the Board precedent cited by the Environmental Organizations merely recognizes, as the Board did in EPA Declaratory Order, that federal environmental law is generally not preempted by ICCTA because it does not generally regulate rail operations directly. (Id.) BNSF claims that court cases cited by the Environmental Organizations are also consistent with the conclusion that state enforcement of federal environmental law is preempted where it seeks to directly regulate rail operations (Id. at 15; see also AAR Pet. 17-19 (distinguishing cases cited by the Environmental Organizations).) In addition, BNSF asserts that courts have repeatedly rejected the Environmental Organizations' argument that ICCTA only preempts economic regulation, and that, in any event, application of the NPDES permitting program to rail cars in transit would amount to economic regulation because it would be enormously disruptive to the economic relationships within the rail industry. (BNSF Reply 15-16.)

With respect to the Tribes of Warm Springs' and the Yakama Nation's claims that a finding of preemption in this case would interfere with treaty-reserved rights, AAR argues that treaty rights arise from the treaties themselves, and not the CWA, and therefore a finding of preemption does not preclude the tribes from seeking other remedies available to them to enforce their rights under the treaty. (AAR Reply 19; see also BNSF Reply 13.)

[10] In addition, BNSF claims that even if the states could be excluded from administering the CWA, regulation of rail transportation by EPA under the CWA would be preempted because it would conflict with the Board's exclusive jurisdiction. (BNSF Reply 12.)

AAR argues that even under the implied repeal framework, the Board should find that ICCTA repeals the application of the CWA to incidental discharges from rail cars in transit. According to AAR, ICCTA grants authority with respect to interstate rail transportation specifically while the CWA is a statute of more general applicability—and a more specific statute enacted later in time should prevail over an earlier, more general statute. (AAR Reply 20-21.) AAR and BNSF further argue that the fact that the Board's environmental reporting regulations at 49 C.F.R. § 1105.7 require applicants, in railroad licensing cases involving specific rail lines, to submit information regarding the CWA during the Board's environmental review process for those projects is not relevant to the preemption analysis in this case, which is narrowly focused on NPDES permits for incidental discharges from rail cars in transit. (Id. at 21; BNSF Reply 18.) Finally, with respect to the term "rolling stock," BNSF argues that even if preemption is found here with respect to incidental discharges from rail cars in transit, the term "rolling stock" would not be read out of the statute because it would apply with respect to rail cars in other contexts and to other forms of rolling stock. (BNSF Reply 17-18.)

DISCUSSION AND CONCLUSIONS

The Board has discretionary authority under 5 U.S.C. § 554(e) and 49 U.S.C. § 1321 to issue a declaratory order to eliminate controversy or remove uncertainty. See Bos. & Me. Corp. v. Town of Ayer, 330 F.3d 12, 14 n.2 (1st Cir. 2003); Delegation of Auth.—Declaratory Order Proceedings, 5 I.C.C.2d 675 (1989). For the reasons explained below, the Board finds that a declaratory order here is premature.

The Board has authority to issue a decision in this case. The Tribes of Warm Springs, the Yakama Nation, and the Environmental Organizations argue that under Epic Systems Corp. v. Lewis, 138 S. Ct. 1612 (2018), harmonization of different statutory regimes is a matter for the courts, not agencies, and that the Board therefore should refrain from engaging in a harmonization analysis with respect to § 10501(b) and the CWA. (Tribes of Warm Springs Comments 4; Yakama Nation Comments 4-5; Envtl. Orgs. Comments 5-7; Envtl. Orgs. Reply 3-5.) However, Epic Systems addresses the level of deference to be accorded to an agency harmonization analysis but does not prohibit agencies from providing guidance with respect to the statutes they administer, which is what the Board is doing in this case. In addition, the present case is distinguishable from Epic Systems because § 10501(b), unlike the statute at issue in Epic Systems, expressly preempts the application of other federal statutes. Section 10501(b) explicitly provides that "remedies . . . with respect to the regulation of rail transportation" under other federal laws are preempted. The statute requires, in certain circumstances, the preemption of other federal laws and does not prohibit the Board from opining on its interpretation of the other federal laws to determine where ICCTA preemption applies.[11]

[11] Epic Systems involved a determination by the National Labor Relations Board (NLRB) that a provision of a statute it administered, the National Labor Relations Act (NLRA), displaced a provision of a statute administered by another agency, the Federal Arbitration Act. Unlike § 10501(b), the NLRA provision at issue was silent on whether it preempted the

Issuance of a declaratory order here is premature. As explained above, the Board has authority to issue a declaratory order to eliminate controversy or remove uncertainty. Here, AAR asks the Board for a declaratory order to remove uncertainty. The Sierra Club decision holding that rail cars in transit are "point sources" subject to the CWA's NPDES permitting program and discharge prohibition, while declining to address ICCTA preemption, has created some uncertainty for railroads and other stakeholders. However, the Sierra Club litigation, which was initiated in 2013 and ended in settlement, appears to be the only attempt in the nearly 50-year history of the CWA to enforce either the discharge prohibition or the NPDES permitting program with respect to rail cars in transit. Moreover, no party to the current proceeding has suggested that future enforcement efforts are planned or likely to occur. Nor has any state proposed any regulation regarding discharges from rail cars in transit. Therefore, any future enforcement is speculative at present. Given the lack of any current dispute or any indication that a future dispute is imminent, the issuance of a declaratory order at this point would be premature. See EPA Declaratory Order, FD 35803, slip op. at 6 (declining to issue a declaratory order regarding preemption of proposed rules because it was premature); Commuter Rail Div. of the Reg'l Transp. Auth.—Pet. for Declaratory Order—Status of Chi. Union Station, FD 36171, slip op. at 1, 4 (STB served Aug. 22, 2018) (declining to issue a declaratory order regarding the applicability of statutory remedies because it was premature).[12]

Nonetheless, as explained further below, the Board will provide guidance explaining that if individual states (and the EPA in those jurisdictions in which it administers the NPDES program) were to apply the NPDES permitting program to discharges from the incidental operation of rail cars in transit, it would likely result in a patchwork of differing regulations that cannot be harmonized with § 10501(b) and therefore would likely be preempted. If there is any attempt in the future to establish NPDES permit requirements or enforce the discharge prohibition on discharges incidental to the operation of rail cars in transit, the preemption issue would then be ripe for review and any party may petition the Board for a declaratory order seeking a formal preemption determination.[13]

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application of other federal laws. The fact that the NLRA contained no language indicating that it was intended to displace other federal law or that Congress intended to delegate authority to the NLRB to interpret statutes administered by other agencies weighed heavily in the Supreme Court's determination that deference to the NLRB's determination was not due. Epic Systems, 138 S. Ct. at 1625, 1629.

[12] See also Chelsea Prop. Owners—Pet. for Declaratory Order—Highline, FD 34259, slip op. at 3 (STB served Nov. 27, 2002) ("There is no reason to institute a declaratory order proceeding to resolve issues that may never arise."); Am. Bus Assoc.—Pet. for Declaratory Order—Connecting Services, MC-C-30224, slip op. at 1-2 (ICC served Feb. 27, 1995) (declining to issue a declaratory order to resolve uncertainty regarding whether a motor carrier's statutory duties would conflict with certain self-help measures against connecting carriers where it was not clear that the carrier would engage in such measures).

[13] Because no state has proposed any regulation regarding discharges from rail cars in transit at this time, it cannot be determined whether there will ever exist varying regulations between the states that would create the kind of patchwork of conflicting state regulations that

Application of the NPDES permitting program in its current form would likely create a patchwork of differing permit requirements. Due to the structure of the NPDES permitting program as currently administered, which is based on state-specific permitting requirements, application of the permitting program to discharges incidental to the operation of rail cars in transit appears likely to result in a patchwork of differing regulations. As explained above, individual permit writers are responsible for translating EPA's TBEL guidelines into state-specific permit requirements and have discretion to impose TBELs more stringent than EPA guidelines and, in the absence of EPA guidelines, set TBELs on a case-by-case basis based on their "best professional judgment."

WQBELs and monitoring requirements are also likely to vary from state to state. Where TBELs are not sufficient to ensure compliance with a state's water quality standards, which are set with respect to individual bodies of water based on designated uses assigned by the state, the state must prescribe WQBELs that ensure compliance with water quality standards. States also set monitoring requirements on a case-by-case basis, taking into consideration a multitude of factors that vary according to the permittee, the pollutant(s) involved, and the body of water at issue. In short, variability of permit conditions is an essential feature built into the structure of the NPDES permitting system to allow states to tailor their regulations to their policy goals, the specific characteristics of their waters, and the discharges at issue. For these reasons, application of the NPDES permitting program, as currently administered, to discharges incidental to the operation of rail cars in transit would likely result in a patchwork of differing regulations.

The NPDES permitting program requirements, as currently administered, cannot likely be harmonized with § 10501(b) and therefore would likely be preempted. The preemption provision of the Interstate Commerce Act, as broadened by the ICCTA, expressly provides that the jurisdiction of the Board over "transportation by rail carriers" is "exclusive." 49 U.S.C. § 10501(b). To that end, § 10501(b) provides that "the remedies provided under [49 U.S.C. §§ 10101-11908] with respect to regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law." The purpose of § 10501(b) is to provide uniform regulation of rail transportation and to ensure the free flow of interstate commerce, particularly by preventing a patchwork of differing regulations across states.[14]

That does not mean that § 10501(b) always has a preemptive effect. "[I]f two Federal statutes are 'capable of coexistence,' the statutes should be harmonized and each should be

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would interrupt the free flow of interstate commerce. However, if regulations did vary from state to state, it is difficult to imagine that such varying regulations would not impose such impermissible interruptions.

[14] See Fayus Enters. v. BNSF Ry., 602 F.3d 444, 452 (D.C. Cir. 2010); Fla. E. Coast Ry., 266 F.3d at 1339; Pet. of Norfolk S. Ry., FD 35949, slip op. at 3; EPA Declaratory Order, FD 35803, slip op. at 7; H. Rep. No. 104-311, at 95-96 (1995), reprinted in 1995 U.S.C.C.A.N. 793, 808 ("[T]he Federal scheme of economic regulation and deregulation is intended to address and encompass all such regulation and to be exclusive. Any other construction would undermine the uniformity of Federal standards and risk the balkanization and subversion of the Federal scheme of minimal regulation for this intrinsically interstate form of transportation.").

regarded as effective unless there is a 'positive repugnancy' or an 'irreconcilable conflict' between the laws." Joint Pet. for Declaratory Order—Bos. & Me. Corp., 5 S.T.B. at 509 n.28 (quoting Matsushita Elec. Indus. Co. v. Epstein, 516 U.S. 367, 381 (1996)). The courts and the Board have stated that this harmonization standard is applicable to apparent conflicts between § 10501(b) and other federal statutes, including environmental statutes. See, e.g., Ass'n of Am. R.Rs., 622 F.3d at 1097; CSX Transp., Inc. May 2005, FD 34662, slip op. at 6 ("[W]hile a literal reading of section 10501(b) would suggest that it preempts all other federal law, neither the Board nor the courts have interpreted the statute in that manner.").

The Environmental Organizations argue that any preemption determination by the Board requires an analysis of specific permit requirements to determine if they impose an unreasonable burden on rail transportation. (Envtl. Orgs. Comments 8-10.) But that is not correct. While issuance of a declaratory order here is premature, for the reasons discussed above, the Board finds that no such analysis would be required if a patchwork of differing regulations that interrupted the free flow of interstate commerce, as discussed above, were imposed on rail cars, which are essential for moving freight from state to state. Such a patchwork would, by its nature, be incompatible with § 10501(b)'s purpose of ensuring uniform regulation of rail transportation. See EPA Declaratory Order, FD 35803, slip op. at 8; see also Pet. of Norfolk S. Ry., FD 35949, slip op. at 5.

In EPA Declaratory Order, EPA sought a declaratory order determining whether state-specific locomotive idling regulations promulgated by California would be preempted if approved by EPA and thereby given the force of federal law pursuant to the Clean Air Act. EPA Declaratory Order, FD 35803, slip op. at 1. The Board declined to issue a declaratory order due to substantial questions as to whether EPA could lawfully approve the regulations. Id. at 5-6. However, the Board explained that the regulations would likely be preempted because allowing states to implement a patchwork of regulations "governing how an instrument of interstate commerce is operated, equipped, or kept track of" would conflict with the purpose of § 10501(b), which is to ensure uniform regulation of interstate rail transportation. (Id. at 10.) The application of the current NPDES permitting program to incidental discharges from the operation of rail cars in transit similarly would regulate an instrument of interstate commerce by governing how rail cars are equipped and/or operated. Such regulation under the current state-specific NPDES permitting program, as noted, is likely to vary from state to state. As a result, application of the current NPDES program to incidental discharges from rail cars in transit under those circumstances would likely be irreconcilable with § 10501(b)'s goal of providing uniform regulation of rail transportation and ensuring the free flow of interstate commerce,[15] and

[15] The Environmental Organizations suggest that Congress intended § 10501(b) to ensure uniform *economic* regulation of rail transportation and that there is therefore no conflict between § 10501(b) and environmental regulations. (Envtl. Orgs. Comments 20.) However, the Board and courts have rejected the notion that § 10501(b) applies only to economic regulation. See, e.g., N.Y. Susquehanna & W. Ry., 500 F.3d at 252; City of Auburn v. United States, 154 F.3d 1025, 1030 (9th Cir. 1998); CSX Transp., Inc.—Pet. for Declaratory Order, FD 34662, slip op. at 8 (STB served March 14, 2005).

therefore would likely be preempted.[16]

It is unlikely that the Board would come to a different conclusion regarding the likelihood of preemption based on the Environmental Organizations' argument that, because there are two federal statutes at issue here, (1) the analysis should focus not on preemption but rather on repeal by implication, and (2) § 10501(b) does not demonstrate a "clear and manifest" Congressional intent to repeal the NPDES permitting program. (Envtl. Orgs. Comments 14-15; Envtl. Orgs. Reply 5-6.) As explained above, the Board would likely find that the NPDES permitting program as currently administered is incompatible with the purpose of § 10501(b). In that context, under the repeal by implication analysis, the later-enacted statute, § 10501(b), would be given effect. See Radzanower v. Touche Ross & Co., 426 U.S. 148, 154 (1976) ("[W]here provisions in the two acts are in irreconcilable conflict, the later act to the extent of the conflict constitutes an implied repeal of the earlier one . . . .") (quoting Posadas v. Nat'l City Bank, 296 U.S. 497, 503 (1936)); Henry v. Educ. Fin. Serv. (In re Henry), 944 F.3d 587, 591-92 (5th Cir. 2019). (stating that Congressional intent for the federal Bankruptcy Code to displace the requirements of the Federal Arbitration Act was demonstrated by the inherent conflict between the two statutory schemes).[17]

The Environmental Organizations further argue that the general preemptive language of § 10501(b) cannot preempt the CWA's specific prohibition on discharges from rolling stock without a permit because, absent clear Congressional intent to the contrary, "a specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment." (Envtl. Orgs. Reply 5-6 (quoting Crawford Fitting Co. v. J.T. Gibbons, Inc., 482 U.S. 437, 445 (1987).) However, the fact that the CWA refers to rolling stock as an example of a point source does not appear to make the CWA's NPDES permitting program and discharge prohibition more specific than § 10501(b). The CWA's NPDES permitting program and discharge prohibition apply across all industries to any type of "discernible, confined and discrete conveyance," and provides "rolling stock" as merely one of many examples of such conveyances. 33 U.S.C. § 1362(14). In contrast, § 10501(b) is limited to the regulation of rail transportation. Thus,

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[16] If state-specific permitting under the NPDES program were to be preempted in the future and not replaced by a nationwide uniform general permit, rail carriers could arguably be accused of operating in violation of the CWA's discharge prohibition. If the CWA's discharge prohibition were to be applied in a manner that interferes with the free flow of interstate commerce, such as—in the clearest examples—by requiring carriers to cease service (even temporarily) or requiring the transportation of certain commodities to meet an impracticable or unreasonable standard, it would likely be preempted. See Green Mountain R.R.—Pet. for Declaratory Order, FD 34052, slip op. at 6 (STB served May 28, 2002).

[17] See also Tug Allie-B, Inc. v. United States, 273 F.3d 936, 948 (11th Cir. 2001) (finding that application of a statute that limits a vessel owner's liability for damages would "completely frustrate" the purpose of the later-enacted Park System Resources Protection Act and that the later-enacted statute therefore controls); EPA Declaratory Order, FD 35803, slip op. at 8, 10 (stating that state-specific regulations under the Clean Air Act likely could not be harmonized with § 10501(b) because allowing states to enact a variety of differing regulations would be contrary to the purpose of § 10501(b).)

§ 10501(b) is arguably the more specific statutory provision.[18] In addition, the rule governing specific versus general statutes does not apply in the face of clear Congressional intent to the contrary. Crawford Fitting Co., 482 U.S. at 445 ("[W]here there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one. . .") (quoting Radzanower, 426 U.S. at 153). As explained above, Congress clearly intended that § 10501(b) preempt laws that create an irreconcilable conflict with the free flow of interstate commerce by imposing a patchwork of regulation on interstate rail transportation. Although the Board is not issuing a declaratory order in this decision, such a patchwork appears likely if the current NPDES permitting program, structured to grant states broad discretion in setting state-specific permit conditions, is applied to incidental discharges from rail cars in transit.

The Board also would unlikely be persuaded by the Environmental Organizations' claim that court and Board precedent demonstrate that ICCTA cannot preempt federal environmental laws, including the application of the CWA. (Envtl. Orgs. Comments 15-18.) The Board has stated that "[f]ederal statutes, including environmental statutes and statutes regulating hazardous materials by rail, are also given effect *unless* they irreconcilably conflict and cannot be harmonized with the Interstate Commerce Act." San Pedro Peninsula Homeowner's United, Inc.—Pet. for Declaratory Order, FD 36065, slip op. at 4-5 (STB served Mar. 6, 2017) (emphasis added); see also EPA Declaratory Order, FD 35803, slip op. at 8, 10 (federal environmental law is preempted under § 10501(b) if it is likely to result in a patchwork of regulation of interstate rail transportation). Additionally, the court cases cited by the Environmental Organizations do not support their argument because those cases did not involve federal regulation of rail transportation that would vary from state to state in a manner that would conflict with § 10501(b)'s purpose of ensuring the free flow of interstate commerce.[19] (Envtl. Orgs. Comments 16-18.)

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[18] See Ozark Air Lines, Inc. v. Nat'l Mediation Bd., 797 F.2d 557, 563 (8th Cir. 1986) ("[T]he [Railway Labor Act] is tailored to the rail and air carrier industries, in contrast to the generality of the Norris-LaGuardia Act."); CSX Transp., Inc. v. Pub. Util. Comm'n of Ohio, 701 F. Supp 608, 614 (S.D. Ohio 1998) (holding that a provision of the Federal Rail Safety Act was more specific than a provision of the Hazardous Materials Transportation Act because the former applied only to rail transportation while the latter applied to all modes of transportation); see also PDS Consultants, Inc. v. United States, 907 F.3d 1345, 1358 (Fed. Cir. 2018) (holding a statute applicable to procurements of a single agency was more specific than a statute imposing contracting requirements on government agencies generally).

[19] See Swinomish Indian Tribal Cmty., 951 F.3d 1142, 1158 (9th Cir. 2020) (enforcement of an easement railroad voluntarily entered into did not constitute "regulation" of rail operations subject to ICCTA preemption); Ass'n of Am. R.Rs., 622 F.3d at 1098 (finding state environmental law at issue preempted and stating that ICCTA "generally does not preempt" federal environmental laws implemented by states but requires that when two federal statutes are involved courts (and the Board) must attempt to harmonize them); United States v. St. Mary's Ry. W., 989 F. Supp. 2d 1357, 1362 (S.D. Ga. 2013) (court held that regulation under CWA requiring railroad to obtain a permit for discharges into wetlands made during construction of a spur track did not constitute regulation of rail transportation and therefore did not conflict with ICCTA's goal of preventing the balkanization of regulation of rail transportation); Humboldt

The Board does not suggest that every requirement under the CWA that may differ from state to state would be preempted as applied to railroads.[20] However, rail cars in transit are inherently instrumentalities of interstate commerce; as such, subjecting them to differing regulatory requirements as they pass from one state to the next is likely to be incompatible with the free flow of interstate commerce that Congress envisioned when enacting § 10501(b). In contrast, other applications of the CWA, such as non-discriminatory application to discharges from certain types of stationary facilities owned or operated by railroads, including application to stormwater discharges from fueling facilities, maintenance facilities, or rail construction sites,[21] are generally not preempted because, although they may differ from state to state, they do not typically conflict with § 10501(b)'s goal of preventing differing regulations from interfering with the free flow of interstate commerce.[22]

A nationwide uniform general NPDES permit for incidental discharges from rail cars in transit might not be preempted. As explained above, application of the NPDES permitting program, which allows for disparate and varying state-specific regulatory requirements, is likely to result in a patchwork of regulations irreconcilable with § 10501's goal of ensuring the free flow of interstate commerce. A nationwide uniform general permit for

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Baykeeper v. Union Pac. R.R., No. 06-cv-02560, slip op. at 4 (N.D. Cal. May 27, 2010) (court held that the cost of litigating a CWA suit regarding discharges from maintenance and fueling facilities does not constitute an unreasonable burden warranting preemption).

[20] See Emerson v. Kan. City S. Ry., 503 F.3d 1126, 1131 (10th Cir. 2007) (explaining that that "Congress did not intend to pre-empt all state and federal law that might touch on a railroad's property or actions" but rather intended to limit preemption to regulation that conflicts with the federal scheme of rail regulation); H.R. Conf. Rep. No. 104-422 at 167 (1995), reprinted in 1995 U.S.C.C.A.N. 850, 853 (1995) (explaining that the exclusivity of remedies under § 10501(b) "is limited to remedies with respect to rail regulation—not State and Federal law generally.")

[21] AAR notes that NPDES permits are frequently issued for discharges from certain types of stationary rail facilities, such as stormwater discharges associated with fueling and maintenance. (AAR Pet. at 17-18.) As AAR notes, the regulation of discharges from stationary facilities is not at issue in its petition. (Id. at 17.)

[22] The fact that the Board's environmental regulations at 49 C.F.R. § 1105.7 require railroads to provide certain information regarding compliance with permitting requirements under the CWA during the environmental review process for proposed rail constructions and abandonments is a recognition that the application of the CWA to these types of licensing proceedings is generally not preempted. But it does not indicate, as the Environmental Organizations contend, that the Board, when drafting the regulations, believed that the CWA's NPDES permitting program in its current form would apply to incidental discharges from rail cars in transit, particularly given that the Board's environmental regulations predate the Sierra Club court decision suggesting for the first time that the CWA program could be applied to such discharges.

incidental discharges from rail cars in transit, however—if adhered to by each of the states—would avoid this patchwork problem.[23]

BNSF and AAR note that even if EPA were to issue a nationwide uniform general permit for incidental discharges from rail cars in transit, EPA could not prevent states from imposing varying permit requirements through the certification process pursuant to 33 U.S.C. § 1341, just as they did with respect to EPA's general permit for marine vessels. (AAR Reply 8; BNSF Reply 12.) The Board agrees that if states were to impose varying state-specific requirements on a rail car general permit issued by EPA via the certification process, any such requirements would likely also create a patchwork of differing regulations in irreconcilable conflict with the core purpose of § 10501(b). Therefore, any such additional state requirements would likely be preempted, even though a nationwide uniform general NPDES permit might not be. BNSF argues that the Board must find that a nationwide general permit issued by EPA would also be preempted because preempting the states' role in the NPDES permitting system while allowing EPA to potentially issue a general permit would be inconsistent with the structure of the CWA, which is designed to ensure a role for the states in the permitting process. (BNSF Reply 12.) That argument goes to how the CWA can and should be administered and is better left for EPA to decide in the first instance. To the extent that EPA could issue a nationwide general permit for incidental discharges from rail cars in transit that includes uniform requirements for the states, such a nationwide general permit would not create a patchwork of differing regulations and could therefore potentially be harmonized with § 10501(b).

BNSF suggests that even if states could not alter the requirements of a nationwide uniform permit, such a permit necessarily would be preempted because it would constitute regulation of rail transportation by a federal agency other than the Board and would therefore conflict with the Board's exclusive jurisdiction to regulate rail transportation under § 10501(b). (BNSF Reply 12.) However, section 10501(b) has never been applied to prohibit all regulation of rail transportation by other federal agencies. Rather, as previously noted, where there is an apparent conflict between § 10501(b)'s grant of exclusive jurisdiction and another federal statute, the Board must attempt to harmonize the two statutes to the extent possible. For example, the Board and courts have indicated there generally is not an irreconcilable conflict between the Federal Railroad Safety Act (FRSA) and § 10501(b) because Congress intended the Federal Railroad Administration (FRA) under FRSA to exercise primary authority over matters of rail safety and intended the Board under ICCTA to exercise primary authority over other areas of rail transportation. See Tyrrell v. Norfolk S. Ry., 248 F.3d 517, 523 (6th Cir. 2001); CSX Transp. May 2005, FD 34662, slip op. at 6-7.

Here, harmonization might be possible with respect to a nationwide uniform general permit for incidental discharges from rail cars in transit. A nationwide permit, with only uniform

[23] The Board does not address here whether EPA has the authority to issue a nationwide uniform general permit. AAR claims that it is not clear that EPA has the authority to issue a general permit for incidental discharges from rail cars because EPA did not reserve its authority under the CWA to regulate rail cars when it delegated authority to the 47 states now authorized to administer the NPDES permitting program. (AAR Comments 10 n.4.) That question is not before the Board in this proceeding and, in any event, is not for the Board to decide.

requirements, would not create a patchwork of regulation of rail transportation that interferes with the free flow of interstate commerce. Because a uniform nationwide permit would not result in such a patchwork applied to rail cars in transit, a preemption determination would require an analysis of the specific permit requirements to determine if they are otherwise irreconcilable with § 10501(b)'s purpose of ensuring the free flow of interstate commerce. Because no national permit has been issued, the Board will not opine on the issue further.[24]

Preemption of the CWA's NPDES permitting program and discharge prohibition does not abrogate treaty-reserved rights. According to the Tribes of Warm Springs and the Yakama Nation, the CWA protects their treaty-reserved rights to harvest fish, and the Board has a duty to ensure that these treaty-reserved rights are given full effect. (Tribes of Warm Springs Comments 3; Yakama Nation Comments 2-4.) They argue that the Board should decline to issue an order finding that the CWA's NPDES permitting program and discharge prohibition are preempted to ensure that their treaty-reserved rights are not violated. (Tribes of Warm Springs Comments 3-4; Yakama Nation Comments 4.) The Board is not issuing an order finding preemption but rather is providing guidance. Moreover, any treaty-reserved rights are based not in the CWA, but in the treaties themselves. To the extent that any treaty prohibits discharges from rail cars, the Tribes can seek to enforce the terms of the treaty independent of the CWA.

For the reasons discussed above, the petition for declaratory order will be denied.

It is ordered:

1. All late filings are accepted into the record.

2. The petition for declaratory order is denied, as explained above.

3. This decision is effective on its service date.

By the Board, Board Members Begeman, Fuchs, and Oberman.

[24] AAR and BNSF point to the Board's Coal Dust decisions, which addressed ways for railroads to limit the loss of coal in transit and the reasonableness of certain BNSF tariff requirements, and raise concerns that any NPDES permit for incidental discharges from rail cars in transit would conflict with the outcome of those cases. (AAR Pet. 21-23; BNSF Comments 17-18.) However, the Coal Dust decisions involved the question of what requirements were reasonable to impose on shippers in particular coal tariffs based on the record before the Board in those cases. The inquiry regarding any nationwide uniform general permit for incidental discharges from rail cars in transit would be a different inquiry into whether the terms in any such permit would irreconcilably conflict with the free flow of commerce by railroads, not shippers.

APPENDIX 5

3 I.C.C.2d 869, 1987 WL 101284

SURFACE TRANSPORTATION BOARD (S.T.B.)

IMPROVEMENT OF TOFC/COFC REGULATIONS (RAILROAD-AFFILIATED MOTOR CARRIERS AND OTHER MOTOR CARRIERS)

Decided June 11, 1987
Effective on July 23, 1987

****1** Regulations adopted exempting the highway portion of joint rail-motor TOFC/COFC service, and motor TOFC/COFC service performed as agent of a railroad, regardless of the type, affiliation, or ownership of the motor carrier.

Ex Parte No. 230 (Sub-No. 6)[1]

DECISION

BY THE COMMISSION:

SUMMARY

We are exempting from regulation most railroad-affiliated and other motor carriers performing the over-the-road portion of trailer-on-flatcar (TOFC) and container-on-flatcar (COFC) services (sometimes called piggyback service). Under 49 U.S.C. §10505, we find that the over-the-road portion of rail/motor TOFC/COFC service that is held out by railroads using motor carriers as agents, or jointly by rail and truck, is a matter related to rail carrier transportation, and that application of the Interstate Commerce Act is not necessary to carry out the transportation policy of 49 U.S.C. §10101a or to protect shippers from the abuse of market power. Plan I TOFC, which is primarily transportation held out by motor carriers, albeit in cooperation with the railroads, is not being exempted at this time. The rules implementing this exemption are in the Appendix.

***870** BACKGROUND

A. *General*.

The notice (46 Fed. Reg. 14,365 (1981) proposed rules exempting over-the-road TOFC/COFC services of railroad affiliated motor carriers and other motor carriers. The purpose of the proposal was to "round out" the exemption from Commission regulation, granted under 49 U.S.C. §10505, of TOFC/COFC service performed on flatcars and in rail-owned trucks as part of a continuous intermodal movement. *See* Ex Parte No. 230 (Sub-No. 5), *Improvement of TOFC/COFC Regulation*, 364 I.C.C. 731, 46 Fed. Reg. 14,348 (1981) (*TOFC/COFC Exemption)*.[2] *TOFC/COFC Exemption* was based on our finding that regulation of TOFC/COFC service was not necessary to carry out the rail transportation policy, and that the extensive competition among railroads and between railroads and motor carriers would protect shippers of this type of traffic from any abuse of market power. We simultaneously instituted this proceeding to determine whether we should extend the exemption to its logical scope.

Comments and other pleadings were filed on behalf of a broad cross section of transportation and shipper interests, including railroads, motor carriers, freight forwarders, shippers' agents and associations, equipment leasing companies, ocean carriers, and port authorities and public transportation agencies. Generally, the railroads, railroad-affiliated motor carriers, and public transportation agencies favored expanding the exemption as proposed, while the unaffiliated motor carriers and ocean carrier interests opposed it. Shippers, with the exception of certain meat-packer interests, generally were supportive, and ports were divided on the issue depending on where they perceived their interests to lie.

**2 After the comments were filed, *TOFC/COFC Exemption* was in all material respects affirmed. *American Trucking Associations v. I.C.C.*, 656 F.2d 1115 (5th Cir. 1981) (*ATA*). Without explicitly ruling on the Commission's authority to exempt the over-the-road portion of TOFC/COFC service not performed by a railroad, the court addressed many of the legal contentions and most of the practical and policy arguments that the opponents of this proposal raise.

Based on our review of the record, and our experience under *TOFC/COFC Exemption*, we conclude that we should exempt the over-the-road segment of TOFC/COFC operations performed by motor carriers-whether or not they are affiliated with a railroad-as agents of a ***871** railroad or as part of a joint rail/motor holding out. We have decided not to exempt at this time "Plan I" service, which is primarily a holding out to provide transportation by motor carrier.

B. *The Nature of TOFC/COFC Service*.

TOFC/COFC services are intermodal operations in which the various goods to be shipped are not handled individually. Rather, they are loaded (often by the shipper) into a trailer (for inland moves) or container (for inland/water moves) that can then be expeditiously transferred as a unit from one mode of transportation to another. Under a typical COFC operation, for example, a container filled with one or more commodities may be transferred at a port from an ocean vessel to a railroad. The railroad then transports the container to an inland TOFC/COFC ramp. There the railroad turns the container over either to a motor carrier or to one of its own trucks for delivery to the receiver or receivers. *See ICC v. Texas*, 107 S.Ct. 787, 788-89 (1987) (*Texas*).

The principal advantage of TOFC/COFC service, and one reason why Congress has determined that it should be fostered (*see* 49 U.S.C. §§10101 (a)(2)(I), 10101a (4 and 5), and 10505(f)), is that it maximizes efficiency and minimizes the handling of individual goods and the transfer of individual items of lading when different transportation modes are involved. This facilitates intermodalism by allowing the shipper easily to take advantage of the attributes of all modes of transportation.

Historically, there were five traditional "plans" of TOFC/COFC service. For convenience, we are listing the five plans here as they were originally described in *Substituted Service-Piggyback*, 322 I.C.C. 301, 304-305 (1964) (*Piggback)*.[3]
Plan I. Railroad movement of trailers or containers of motor common carriers, with the shipment moving on one bill of lading and billing being done by the motor carrier. Traffic moves under rates in regular motor carrier tariffs.

Plan II. Railroad performs its own door-to-door service, moving its own trailers or containers on flatcars under tariffs usually similar to those of motor carriers.

Plan III. Ramp-to-ramp rates based on a flat charge, regardless of the contents of trailers or containers, usually owned or leased by freight forwarders or shippers. No pickup or delivery is performed by the railroad.

3 ***872 *Plan IV*. Shipper or forwarder furnishes a trailer or container-loaded flatcar, either owned or leased. The railroad makes a flat charge for loaded or empty-car movement, furnishing only power and rails.

Plan V. Traffic moves generally under joint railroad-truck or other combination of coordinated service rates. Either mode may solicit traffic for through movement.

It has long been recognized that the rail and highway or water 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. TOFC/COFC transportation cannot be "compartmentaliz[ed] * * * as *either* rail *or* motor *or* water * * *." Rather, "all piggyback service is, by its essential nature, bimodal" because "its basic characteristic is the combination of the inherent advantages of rail and motor [and sometimes water] transportation." *American Trucking* v. *A.T.&S.F.R. Co.*, 387 U.S. 397, 420 (1967) (*American Trucking*), affirming *Piggyback. See also Texas*, 107 S.Ct. at 789 and n.1; *ATA*, 656 F.2d at 1120 n. 8. Because TOFC/COFC inherently involves services performed by more than one mode, the Commission's insistence in *Piggyback* that the railroads and motor carriers cooperate in furnishing TOFC/COFC promoted the congressional goal of ensuring "a completely integrated interstate regulatory system over motor, railroad, and water carriers * * *." *American Trucking*, 387 U.S. at 409.

Although *TOFC/COFC Exemption* has provided many benefits to the railroads and the shipping public, its major shortcoming is that it does not exempt service in trucks that are not railowned. It appears that railroads and motor carriers have to a large degree been able to work around the anomalous regulatory environment resulting from *TOFC/COFC Exemption*. But by establishing different regulatory regimes for similarly situated carrier groups that action has not fully promoted a completely integrated transportation system among the different modes. The intent of this decision is to remedy that shortcoming, and to enhance services to the public, by providing for more equal treatment of motor carriers.

DISCUSSION AND CONCLUSIONS

At the outset, we note that the evidence and argument filed in this proceeding is several years old. Nevertheless, we do not believe that the passage of time has undercut the basis for the exemption; to the contrary, the competitiveness of the TOFC/COFC business and our understanding of the industry have increased as railroads have gained experience in operating their exempt TOFC/COFC services, as industry has developed technological innovations such as the "double-stack" car, and as railroads and truckers have stepped up their efforts to cooperate in offering coordinated ***873** TOFC/COFC services. Thus, despite the age of the record in this case, we believe that we are better able to make an informed and rational decision now than we would have been when *TOFC/COFC Exemption* was still new and untested. With that in mind, we will now explain why we believe that we can and should take the action proposed.

A. *Statutory Standard*.

****4** Our §10505 exemption authority, which was amended in the Staggers Rail Act of 1980, Pub. L. No. 96-448, 94 Stat. 1985 (Staggers Act), provides that:

(a) In a matter related to a rail carrier providing transportation subject to the jurisdiction of the Interstate Commerce Commission under this subchapter, the Commission shall exempt a person, class of persons, or a transaction or service when the Commission finds that the application of a provision of this subtitle-

(1) is not necessary to carry out the transportation policy of §10101a of this title; and

(2) either (A) the transaction or service is of limited scope, or (B) the application of a provision of this subtitle is not needed to protect shippers from the abuse of market power.

* * * * * * *

(f) The Commission may exercise its authority under this section to exempt transportation that is provided by a rail carrier as part of a continuous intermodal movement.

As the court noted in *ATA*, 656 F.2d at 1120-21, the source of our exemption authority is the "related to a rail carrier" language of §10505(a), while the "transportation provided by rail carrier" language of §10505(f) illustrates a type of service as to which Congress suggested the exemption authority be exercised. Because TOFC/COFC operations comprise a substantial and growing portion of the Nation's surface transportation, the transportation is not "limited in scope," and §10505(a) thus raises two basic issues that must be considered in deciding whether to exempt TOFC/COFC service in trucks that are not owned by a railroad. First is the jurisdictional-type question whether it is a matter related to a rail carrier. Second is the policy-type question whether regulation is necessary to carry out the rail transportation policy, or to protect shippers from the abuse of market power.

B. *Jurisdictional Issues*.

From a factual perspective, motor 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 ***874** highway movement of containers and trailers is an integral and necessary element of TOFC/COFC service. As the Supreme Court recognized in *American Trucking*, 387 U.S. at 1120, and *Texas*, 107 S. Ct. at 788-89, 793, and the reviewing court noted in *ATA*, TOFC/COFC service is, by its very nature, bimodal, and the participants that exchange the lading are natural

business partners. Moreover, from a regulatory perspective it is axiomatic that the regulatory treatment of one of the partners can have a significant effect on the operations of the other partners. In this regard we note the impact the *TOFC/COFC Exemption* had on the international joint rates that were regulated by this agency and the Federal Maritime Commission. In short, 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).

1. *Related To Rail Service*.

****5** Motor carrier TOFC/COFC services performed under agency and joint rate arrangements with railroads are clearly matters related to railroads. In essence, under the agency arrangement[4] the motor carrier performs substituted service that is held out, and often is performed, by the railroad itself (*e.g.*, the old "Plan II" arrangement). And under the joint rate arrangement, while the freight will be handled by more than one carrier and more than one mode, there will be a single charge on a single billing, a joint holding out of service and a joint contractual arrangement with the shipper, and a shared responsibility for completion of the contract. *See Sea-Land Service, Inc. v. FMC*, 404 F.2d 824, 828 (D.C. Cir. 1968). Because of the responsibility of the railroad for the service of the motor carrier that is its agent or joint rate partner, the inherent, well recognized bimodal nature TOFC/COFC service, and the basic purpose of TOFC/COFC-to provide more efficient service through substitution of one mode for another-we cannot conceive of how we could conclude that motor carrier TOFC/COFC services performed under agency or joint rate arrangements are not matters related to rail carriers that are appropriate subjects for the exemption.

***875** 2. *Provided By A Rail Carrier*.

Moreover, although the statute only requires a related-to-rail finding to qualify a service as an exemption candidate, in this case we also find that from a legal perspective these trucking services are in fact "provided by" rail carriers and thus within the scope of §10505(f). In the case of agency arrangements the principal (the railroad) provides the service because it holds out the service to the shipper and "assumes exclusive responsibility for the successful performance of door-to-door transportation." *Sea-Land Service, Inc. v. FMC*, 404 F.2d at 828. And in light of the well recognized unitary nature of joint rates,[5] and the responsibility of each participating carrier for the operations of the others, with the exception of unique areas of regulatory overlap such as international joint rates, we do not believe that the components of a TOFC/COFC joint rate service can be compartmentalized and viewed as if each portion is separately provided by each of the participating carriers. Rather, in a legal sense each leg of the joint service is provided by both the rail and motor carrier.

We accordingly find that TOFC/COFC services of motor carriers that are agents of or joint rate partners with railroads are matters related to rail carriers and in fact are services provided by rail carriers.[6]

3. *Other Arguments Concerning Our Jurisdiction*.

Nevertheless, some parties argue that the exemption may be applied *only* to rail transportation, because the exemption provisions of §10505 were adopted in railroad legislation,[7] and because a provision that would have exempted all motor TOFC/COFC service was rejected in the motor legislation passed shortly before the Staggers Act.[8] We disagree. As the court noted in *ATA*, 656 F.2d at 1120-21, §10505 does not limit our exemption authority to "rail transportation." Section 10505(a) allows the Commission ***876** to exempt a person, class of persons, or service or transaction in a matter related to a rail carrier, while §10505(f) singles out transportation by rail carrier as part of a continuous intermodal movement (*i.e.*, TOFC/COFC) as a likely candidate for exemption.

****6** We are aware that, during its debates on the MCA, Congress considered but did not adopt a proposal statutorily to exempt from regulation *all* truck service incidental to rail TOFC/COFC service. Instead, it adopted as part of the MCA some special provisions- §§10322(b)(2), 10922(k), and 10923(e)-designed to ease but not eliminate the licensing requirements of this incidental truck service. The opponents of the exemption argue that adoption of these relaxed licensing provisions demonstrates that Congress did *not* intend to give the Commission jurisdiction to exempt any motor service performed in connection with rail TOFC/COFC service.

We disagree. The motor carrier legislation was debated and enacted before Congress completed the 1980 rail legislation, and

Congress at that time had not yet decided whether or to what extent rail piggyback service should be exempted. Thus, although Congress itself did not create an exemption for joint motor/rail TOFC/COFC services at the time that it passed the MCA, later in the Staggers Act it delegated to us the discretion to grant such an exemption by relaxing the requirements for an exemption "in a matter related to a rail carrier" and simultaneously singling out TOFC/COFC as a likely candidate for exemption.[9] When Congress was considering the MCA, however, we conclude that it simply relaxed the licensing provisions that would apply-and have continued to apply-until the Commission decided whether to implement the broad TOFC/COFC exemption that was contemplated in the subsequently enacted Staggers Act.[10]

***877** After reviewing the statute and its legislative history, we conclude, as the *ATA* court found with respect to rail-owned trucks (656 F.2d at 1120), that Congress in the Staggers Act probably had not crystallized its intent as to whether any highway TOFC/COFC service should be exempted. Rather, after Congress concluded generally that TOFC/COFC was a likely exemption candidate, the scope of such an exemption was simply one of the areas in which Congress concluded that "the Commission is more capable through the administrative process of examining specific regulatory provisions and practices * * * to determine where they can be deregulated consistent with the policies of Congress." H.R. Rep. No. 1430, 96th Cong., 2d Sess. 105 (1980) (the Conference Report).[11] If we are correct in concluding that Congress did not address the precise issue, then we are free to do so in any manner that is consistent with the overall statutory scheme. *Chevron, U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984).

We now address whether the proposed exemption is in fact consistent with the policies of Congress.

C. *Rail Transportation Policy and Abuse of Market Power*.

Section 10505(a) requires a finding that continued regulation is not necessary to further the transportation policy of §10101a (RTP) or to protect shippers from potential abuses of market power. The RTP expresses several congressional goals intended to guide the Commission in its regulation of rail carriers.[12] We find that a broadened exemption will promote those goals.

****7 *878** At the outset, we note that the exemption of the motor portion of a TOFC/COFC movement will not result in a completely new transportation environment for TOFC/COFC shippers. To the contrary, shippers by now are already quite familiar with the process of purchasing TOFC/COFC service (including service in rail-owned trucks) under the TOFC/COFC exemption. Thus, a detailed economic model is really not necessary to project the policy implications of the proposal. Rather, the initial (and in this case largely dispositive) focus of our policy inquiry will be on: (1) the experience to date under *TOFC/COFC Exemption* and, in particular, on whether the abuses predicted by the opponents of *TOFC/COFC Exemption* have occurred; and (2) if the experience has been favorable, then on whether there is any other valid reason for not extending the TOFC/COFC exemption to its logical scope.

We find that, despite its inherent limitation, *TOFC/COFC Exemption* has been quite successful in promoting responsive, reasonably priced services for TOFC/COFC shippers. The main practical objection of the parties opposing the proposal here and in *TOFC/COFC Exemption* was that, freed of continual Commission oversight, the railroads would engage in widespread abusive practices regarding rates and service. Yet, in the six years that have passed since *TOFC/COFC Exemption* became effective, railroads and shippers have worked out their exempt transportation arrangements in reasonable and responsible way. Indeed, apart from some initial uncertainty about the scope of the carriers' liability for loss and damage, we have not received a request that the exemption be revoked, or even a single formal complaint alleging rate or other abuses on the part of the railroads,[13] despite our invitation that parties keep us informed of situations that may require further regulatory attention.

Our own internal monitoring of the exemption has confirmed the success of the program. In December 1985, pursuant to our holding out in *TOFC/COFC Exemption*, our Office of Transportation Analysis (OTA) issued a study reviewing carrier data and shipper survey responses to identify traffic trends and shipper experience under the exemption. Some of the more significant findings of that study were as follows:
***879** • Beginning immediately after the Commission's exemption of rail TOFC/COFC service in March, 1981, piggyback traffic grew rapidly, setting consecutive records in 1982, 1983, and 1984, notwithstanding severe declines in other rail traffic during the 1982-1983 recession.

• Thus far [as of December 1985], the principal attraction of TOFC/COFC service to shippers has been the availability of

favorable rates.

• Generally, TOFC/COFC rates have not fluctuated as quickly or widely as anticipated in a free-market situation.

Other significant findings of the study were that cooperation between railroads and motor carriers (affiliated or otherwise) has generally improved since 1981 (pages 28-29), and that motor carrier pickup and delivery service has improved for piggyback traffic since the exemption (page 40).

**8 These findings, which are confirmed by reports in the trade press, support our conclusion that the exemption has worked well and that the self-serving predictions of price instability and rate and service discrimination, mainly from competitors with an interest in retaining traffic over their own lines, has not proven correct under the rail-only exemption.

The second part of our initial policy inquiry is to project whether expanding the exemption of the motor portion of the joint service from only rail-owned trucks to independent and affiliated motor carriers would likely result in the sort of adverse effects predicted by opponents of the earlier exemption (which have not yet materialized), or would otherwise contravene the public interest as described in the RTP. Given the fact that we have received no formal complaints about discriminatory operations of railroads and rail-owned trucks, we cannot see how it could. Rather, it would simply even the playing field by allowing motor carriers that are not owned and operated by railroads the same business opportunities already available to those that are.[14]

*880 The likely positive effects of such an expanded exemption, by contrast, are apparent. Among the other findings in the OTA study is the conclusion that most rail TOFC/COFC service at that time was not "tailored" to specific shippers' needs through the use of joint motor/rail rates, but instead is of the "wholesale" variety, with concentration on ramp-to-ramp (as opposed to door-to-door) service (pages 17-18, 40). That conclusion supports our own concern, which we have had since our 1981 decision, that a partial exemption, by deregulating rail services but not rail/motor services, would not promote intermodalism to the fullest extent possible. In fact, many independent motor carriers have written over the years asking us to adopt the proposal in this proceeding. Intermodalism is by definition coordinated service, and there is no question but that a coordinated service can be better effected when each leg is exempt than when one leg is exempt and the other is regulated.[15] Although the carriers appear to be effecting reasonable coordination in spite of the existing anomalous regulatory environment, if we can facilitate intermodalism further it is our obligation to do so. *See* 49 U.S.C. §10101a(5); *Piggyback*, 322 I.C.C. at 337.[16]

Moving now briefly to the more theoretical realm of competition and the RTP, we note that the overriding regulatory objective of the Staggers Act was to replace regulation with market discipline whenever competitive forces are sufficient to ensure reasonable rates and service. In enacting the legislation, Congress directly reduced the Commission's authority in several respects, and it instructed the Commission to "pursue partial and complete exemptions from remaining regulation" so as to "eventually reduce its exercise of authority to instances where regulation is necessary to protect against abuses of market power, * * * reviewing carrier actions *881 after the fact to correct abuses* * *."[17] Conference Report at 105. Although effective competition is not a prerequisite to an award of an exemption, it clearly is one of the main indicia that an exemption is appropriate, because the fundamental premise of all of the recent transportation legislation is that regulation is unnecessary in a competitive market because, in such a market, carriers will be unable to charge excessive rates symptomatic of market power abuse. *Brae*, 740 F.2d at 1036. Thus, a finding that a particular market is competitive ordinarily satisfies both of the prerequisites to an exemption.

**9 By its very nature, piggyback in general competes with over-the-road truck service. The intermodal equipment used is specifically designed for rail, truck, or both. There is already vigorous competition for piggyback movements in coordinated rail-truck service (using either rail-owned, rail affiliated, or other trucks), and in all-highway service. TOFC/COFC "rates are strictly controlled by truck [and presumably also rail-truck] competition." *Boxcars,* 367 I.C.C. at 433. Moreover, commodities that can move in trailers and containers can also move in conventional truck service and now-exempt boxcar service. *Boxcars*, 367 I.C.C. at 433. We therefore again find that TOFC/COFC service performed by rail, truck, or both is subject to substantial inter and intramodal competition, which promotes the RTP and protects shippers from potential abuse of market power. We also find that extending the benefits of this exemption to independent motor carriers operating in partnership with rail carriers will promote the national transportation policy requirement that all modes be treated as

evenhandedly as possible. 49 U.S.C. §10101(a).

C. *"Plan I" Services*.

Several motor carriers of general freight have asked that we reopen this proceeding and either limit the exemption to motor transportation moving on rail bills of lading, or issue a notice of proposed rulemaking and entertain comments on including Plan I or substituted service in the exemption. Their petitions were filed in response to a colloquy between the Commission and the staff at a September 20, 1984, open conference, in which it was suggested that some or all Plan I service might be exempted.

The petitioning motor carriers argue that an exemption of Plan I service would be unlawful because it was not properly noticed, because it is beyond the Commission's authority, and because such an exemption would impede intermodal transportation. In particular, they argue that there are practical problems associated with a Plan I exemption because ***882** most less-than-truck-load (LTL) carriers do not know until they have aggregated several LTL shipments into a trailer whether they will perform the movement entirely by truck, or in substituted rail-for-motor service. Thus they are concerned that a shipper tendering its freight would not know whether the service it receives would be a regulated service as to which the (sometimes collectively set) tariff rates would apply, or whether it would be exempt. Moreover, the motor carriers argue, the determination whether to use rail or not and, when rail is used, whether to apply the collectively set tariff rates would lead to frequent and unnecessary litigation and potential antitrust exposure. Some railroads have responded in support of the motor carriers' position.

The motor carriers' petitions to reopen the proceeding are denied as moot, because we have decided not to include Plan I services in the exemption. We do not concede that such action would exceed the scope of our notice,[18] and we in fact find that Plan I motor service is indeed "related to" rail carrier service. Moreover, we are not conviced that the so-called "practical" problems that the motor carriers raise-particularly with respect to collective ratemaking-could not be resolved if the parties were truly intent on providing high quality exempt service. (It may well be that now, over two years later, these concerns have diminished.) Nevertheless, we are reluctant in this proceeding at this time to implement a class exemption as to which there is virtually no support in the existing record, particularly when there are other alternatives, such as one-day notice for rate reductions, that may permit motor carriers to compete effectively in the TOFC/COFC market. We will be receptive to any requests for an individual or classwide exemption in this area, but we will not exempt Plan I service at this time.[19]

OTHER MATTERS

A. *Alaska Motor Carriers*.

****10** Our decision in *TOFC/COFC Exemption* was set aside only insofar as it exempted the rail TOFC/COFC service provided by the Alaska Railroad. *ATA*, 656 F.2d at 1127-28. The basis of the court's decision was the fact that the Alaska Railroad was federally owned and subsidized and thus occupied ***883** a different position from the rest of the Nation's railroads. (That state of affairs no longer exists.) Although no parties in this proceeding specifically addressed the matter, we would not exempt Alaska motor/rail piggyback service unless the Alaska rail exemption is reinstated.

Our decision as to whether to reinstate the Alaska Railroad exemption that was set aside in *ATA* will be issued in the very near future. That decision will address whether or not this motor carrier exemption applies to traffic in Alaska.

B. *Mechanics of the Exemption*.

Some parties have expressed concern about the uncertainties they had with the mechanics of *TOFC/COFC Exemption*, and ask that we explain in detail how this exemption will work. An extensive explanation is not necessary. As the parties note, the earlier exemption was complicated mainly because of the hybrid regulatory treatment that resulted and because it was the first time we used our exemption authority to exempt a class of service. Here we expect no such problems. The affected parties now have had many years of experience. Motor carriers who perform the "over-the-road" portion of exempt TOFC/COFC operations should not file tariffs for these services because they are exempt from the governing provisions of 49 U.S.C. Subtitle IV, with certain minor exceptions.[20] Ocean carriers providing joint TOFC/COFC service with rail and motor carriers may file joint through rates in tariffs with the FMC, but they should not file them with us (joint ocean/motor

rates, on the other hand, must still be filed with us, subject of course to the relaxed filing procedures adopted in Ex Parte No. MC-175, *Revision Tariff Reg. Intl. Jt. Through Rates Ocean Car.*, 1 I.C.C. 2d 978 (1985)).

C. *Freight Forwarders*.

Clipper Express Co. (Clipper) has asked that freight forwarders be included along with motor carriers in the expanded TOFC/COFC exemption. The Surface Freight Forwarder Deregulation Act of 1986, Pub. L. No. 99-521, became law on October 22, 1986. Section 6(d) of the Act repealed former 49 U.S.C. §10562. The Act deregulates freight forwarders, other than forwarders of household goods. Because property freight forwarder operations are now deregulated by statute, it appears that Clipper's request ***884** is moot. If in fact our perception is incorrect, or a still-regulated carrier or carrier group such as the household goods freight forwarders conclude that their operations should be exempt, we will be receptive to a petition for further relief.

D. *Individual Exemption Requests*.

In No. 39626, the Burlington Northern Railroad Company requested an exemption for the "over-the-road" portion of TOFC/COFC service. In No. 39885, Independent Dispatch, Inc. (IDI), requested similar relief, as well as an exemption for brokers. Since we have exempted the "over-the-road" segment of most TOFC/COFC movements from regulation their petitions are essentially moot and will be dismissed.

FINAL RULES ADOPTED

****11** The final rules we are adopting, which will become effective 30 days from *Federal Register* publication, are set forth in the Appendix. They reflect the substantive conclusions reached in this decision, and also certain technical changes in language and organization made in the interests of greater clarity.

Because the expanded exemption is no longer strictly limited to rail carriers, we will remove it from Part 1039 of the regulations and will instead place it under the appropriate heading of "Intermodal Transportation" in Part 1090.[21]

We have made it clear in this decision and in the exemption rule itself that neither our tariff regulations nor any others, with specified exceptions, will hereafter apply to exempted TOFC/COFC service. A proviso to that effect in each individual regulation would be both superfluous and not in keeping with past practice.

FINDINGS

We find that, under our authority at 49 U.S.C. §10505, (1) TOFC/COFC services performed by railroad-affiliated and other motor carriers either as agents or partners of railroads are related to rail carrier transportation; and (2) application of the Interstate Commerce Act is not necessary to carry out the transportation policy of 49 U.S.C. §10101a or to protect ***885** shippers from the abuse of market power.

This action will not significantly affect the quality of the human environment or energy conservation. The exemption should have beneficial energy consumption and environmental impacts. The exemption also could help reduce road damage on the nation's highway network. To the extent that the exemption encourages the increased use of intermodal TOFC/COFC service in place of all-highway service, the net effect on the environment and on energy consumption should be favorable, because it is generally recognized that transportation by rail has a smaller environmental impact and uses less fuel than transportation by highway. This exemption will also tend to reduce highway congestion. It is not possible accurately to predict the magnitude of these effects since they will depend entirely on the actions and choices of individual carriers and shippers in an economic environment free from regulation under the Interstate Commerce Act. There is, however, no reason to expect the effect to be of major significance.

This action will have a significant economic impact on a substantial number of small entities. It imposes no new regulatory burden or requirements on any person, but instead relieves a large number of persons, including small businesses, of such burdens and requirements. In this decision, we have described the purposes and anticipated effects of the exemption, as well as the alternatives (no exemption, partial exemption of various forms of TOFC/COFC service) open to us. In each case we

have chosen the feasible alternative that imposes the fewest, and removes the most, regulatory burdens on small businesses and other entities.

AUTHORITY: 49 U.S.C. §§10505 and 10321(a); 5 U.S.C. §553.

It is ordered:

**12 1. The over-the-road portion of TOFC/COFC services provided by rail-affiliated or independent motor carriers as part of a continuous intermodal movement is exempted from regulation as to the extent noted above.

2. The petitions in Nos. 39626 and 39885 are dismissed.

3. This decision is effective July 23, 1987.

By the Commission, Chairman Gradison, Vice Chairman Lamboley, Commissioners Sterrett, Andre, and Simmons.

. Also embraces No. 39626, *Petition of Burlington Northern Railroad Company For Exemption From Requirements of 49 U.S.C. Subtitle IV in Connection with TOFC/COFC Truck Service Provided By Motor Carriers*, and No. 39885, *Independent Dispatch, Inc.-Petition for Exemption*.

APPENDIX

**13 Title 49, Chapter X of the Code of Federal Regulations is amended as follows:

1. Section 1039.13 is deleted. It should read: See Part 1090.

2. Part 1090 is revised to read as follows:

*886 PART 1090 - PRACTICES OF CARRIERS INVOLVED IN THE INTERMODAL MOVEMENT OF CONTAINERIZED FREIGHT

Sec.

(AUTHORITY: 49 U.S.C. §§2321(a) and 10505; 5 U.S.C. §553)

§1090.1 *Definition of TOFC/COFC service.*

(a) Rail trailer-on-flatcar/container-on-flatcar (TOFC/COFC) service means the transportation by rail, in interstate or foreign commerce, of -

(1) any freight-laden highway truck, trailer, or semitrailer,

(2) the freight-laden container portion of any highway truck, trailer, or semitrailer having a demountable chassis,

(3) any freight-laden multimodal vehicle designed to operate both as a highway truck, trailer, or semitrailer and as a rail car,

(4) any freight-laden intermodal container comparable in dimensions to a highway truck, trailer, or semitrailer and designed to be transported by more than one mode of transportation, or

(5) any of the foregoing types of equipment when empty and being transported incidental to its previous or subsequent use in TOFC/COFC service.

(b) Highway TOFC/COFC service means the highway transportation, in interstate or foreign commerce, of any of the types of equipment listed in paragraph (a) as part of a continuous intermodal movement that includes rail TOFC/COFC service, and during which the trailer or container is not unloaded.

§1090.2 ***Exemption of rail and highway TOFC/COFC service.***

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. Tariffs heretofore applicable to any transportation service exempted by this section shall no longer apply to such service.

§1090.3 ***Use TOFC/COFC service by water carriers.***

(a) Except as otherwise prohibited by these rules, water common and contract carriers may use rail TOFC/COFC service in the performance of all or any portion of their authorized service.

(b) Water common carriers may use rail TOFC/COFC service only if their tariff publications give notice that such service may be used at their option, but that the right is reserved to the user of their services to direct that in any particular instance TOFC/COFC service not be used.

(c) Water contract carriers may use rail TOFC/COFC service only if their transportation contracts and tariffs make appropriate provisions therefor.

****14** (d) Tariffs of water common or contract carriers providing for the use of rail TOFC/COFC service shall set forth the points between which TOFC/COFC service may be used.

Footnotes

[2] Since this exemption has been in effect, there has been some question as to whether it encompasses trucks leased by railroads. That was our intent. For purposes of the exemption the characteristics of rail-owned and leased equipment are the same.

[3] For a further description of five plans and their features, *see* 322 I.C.C. at 309-12. Several additional plans, such as "II-1/2" and "II-1/4," have developed in the intervening years as minor variants of the five main plans. It is not necessary for present purposes to discuss them. In addition, the descriptions of the basic plans no longer are accurate to the extent that they rely on rail tariffs that no longer are filed due to *TOFC/COFC Exemption*. However, the definitions are useful for an understanding of the operational aspects of TOFC/COFC movements.

[4] Historically, railroads have been permitted to provide TOFC/COFC services either on their own flatcars or through substituted motor-for-rail service. In substituted service, the traffic is moved at rail rates and on rail billing, but part of the service provided by the rail carrier is performed by a motor carrier under an agency arrangement. *See, e.g., Rock Island M. Transit Co.-Purchase-White Line Frt.*, 55 M.C.C. 567, 584 (1949)

[5] *See Trailer Marine Transport Corp. v. FMC*, 602 F.2d 379, 395 n.69 (D.C. Cir. 1979).

[6] In *TOFC/COFC Exemption* we suggested that it might be appropriate to single out rail affiliated motor carriers for exemption because of their close relationship to their rail parents. We continue to believe that railroads will closely cooperate with their affiliated motor carriers in offering TOFC/COFC services, and that such services performed by

affiliated motor carriers are plainly matters related to rail service. Indeed, because the difference between a rail-owned truck (which is already exempt) and a rail affiliated motor carrier is mainly one of corporate form, we can conceive of no basis for exempting one but not the other. Yet in view of our determination here that a broad exemption would promote the public interest, and the potential adverse effect that special treatment for affiliates could have on the opportunities of other motor carriers to participate in intermodalism, we see no reason to single out affiliates as the only motor carriers whose TOFC/COFC services should be exempted.

[7] The Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210, 90 Stat. 31 (4R Act).

[8] Motor Carrier Act of 1980, Pub. L. No. 96-448, 96 Stat. 793 (MCA). ATA and the ocean conferences also point out that Congress in the 1980 motor legislation rejected the so-called "master licensing" concept and instead relaxed the procedures for motor carrier licensing. They argue, as they did in *TOFC/COFC Exemption*, that any exemption of trucking services violates the congressional prohibition of master licensing. We disagree. An exemption eliminates regulation; other than with respect to unique situations such as foreign motor carriers that have been subject to explicit and recent Congressional attention, it removes operators of the over-the-road portion of TOFC/COFC service from the licensing arena entirely.

[9] This exemption, however, promotes the objectives of the 1980 motor carrier legislation: to reduce unnecessary regulation by the Federal Government, to promote competitive and efficient transportation services to meet the needs of shippers, to allow a variety of quality and price options, to encourage the most productive use of equipment, to promote service to small communities, and to further intermodalism. It also furthers several of the other objectives of the generally applicable National Transportation Policy of 49 U.S.C. §10101, by placing motor carriers on essentially the same regulatory footing as rail-owned trucks and by promoting economical, reasonably priced, and efficient transportation services.

[10] Contrary to the arguments of some of the parties, our decision is not inconsistent with the provisions of §11344(c), which is directed toward railroad or rail-affiliated motor carrier applications to control other motor carriers. The exemption does not apply to control transactions, and thus this decision does not permit a motor carrier-even one performing TOFC/COFC service-to be controlled by a rail carrier without Commission approval.

[11] We note, however, that Congress expressed its approval of the Commission's vigorous pursuit of exemptions under the 4R Act. Indeed, the House Committee on Interstate and Foreign Commerce, which "followed the Commission's exemptions closely and [found that] the Commission has proceeded on a sound basis * * * easing unnecessary regulatory restraints and providing an improved competitive transportation environment." specifically referred to the Commission's Advance Notice of Proposed Rules (ANPR) that preceded *TOFC/COFC Exemption* (44 Fed. Reg. 49,270 (1979). The ANPR clearly contemplated exempting the motor carrier portion of TOFC/COFC service. *See* 44 Fed. Reg. at 49,280.

[12] The particular RTP objectives that are most relevant to this proceeding are the following:
(1) to allow, to the maximum extent possible, competition and the demand for services to establish reasonable rates for transportation by rail;
(2) to minimize the need for Federal regulatory control over the rail transportation system * * *;
(4) to ensure the development and continuation of a sound rail transportation system with effective competition among rail carriers and with other modes, to meet the needs of the public and the national defense;
(5) to foster sound economic conditions in transportation and to ensure effective competition and coordination between rail carriers and other modes;
(7) to reduce regulatory barriers to entry into and exit from the industry;
(13) to prohibit predatory pricing and practices, to avoid undue concentration of market power and to prohibit unlawful discrimination; and
(15) to encourage and promote energy conservation.

[13] Because of what we view as the inherent competitiveness of TOFC/COFC service, we received no such rate complaints for several years before the exemption; thus the absence of complaints in a heightened competitive climate is not unexpected.

[14] Some of the parties have alleged that railroads will engage in discriminatory or predatory practices if motor carriers are freed of regulatory constraints. From a theoretical perspective we cannot understand why any carriers would find it to their advantage to discriminate, rather than use the most efficient alternatives available, in such a competitive market (*see, e.g.*, the individual application of Burlington Northern, which has stated that this carrier divides TOFC/COFC traffic among its motor carrier affiliate and independent motor carriers, personally based on which can provide the best and cheapest service); nor can we believe that such carriers could successfully maintain a predatory pricing strategy, *see Lawfulness of Vol. Discount Rates-Mot. Com. Car.*, 365 I.C.C. 711 (1982). But from a more practical perspective, we do not see how freeing *motor carriers* of regulatory constraints would give the *railroads* any greater opportunity to engage in predatory or discriminatory conduct than they already have. To the contrary, this exemption will reduce any opportunity the railroad had to perfer its own service. However, as we have said throughout these proceedings, we stand ready to take appropriate action-including full or partial revocation of the exemption-to respond to respond to abuses of market power.
Some opponents also express concern about the impact of a motor exemption on international joint ocean/domestic services. But the proposed exemption does not really change the status quo, inasmuch as it only applies, in the international context, to joint ocean/rail rates that are already exempt. Moreover, we assume that the concerns about international rate stability have been largely allayed by §8(a)(1) of the Shipping Act of 1984, which requires through rate filings at the FMC.

[15] In particular, consistent treatment of all legs of a joint movement would facilitate joint operations by eliminating any doubts about the propriety or format of a joint rate between a regulated and unregulated entity, the relationship of the two entitities, the nature of the holding out, and so forth. This in turn would serve the well recognized desire of shippers for a single-rate service in which they can deal with a single carrier entity.

[16] This exemption, for obvious reasons, would promote other aspects of the RTP by substituting competition for rate regulation (49 U.S.C. §10101a(1), (4), (5)); minimizing regulatory control over the rail (or, in this case, coordinated rail/motor) system (49 U.S.C. §10101a(2)); reducing regulatory barriers to entry into and exit from the industry through the use of truckers as agents or joint rate partners (49 U.S.C. §10101a(7)); and promoting energy conservation by diverting traffic from fuel-intensive all-motor service into more fuel-efficient motor/rail service (49 U.S.C. §10101a(15)).

[17] *See Exemption From Regulation-Boxcar Traffic*, 367 I.C.C. 425, 427 (1983) *(Boxcars,) aff'd in part, Brae Corp. v. United States* 740 F.2d 1023 (D.C. Cir. 1984) *(Brae), cert. denied, Interstate Commerce Commission v. Brae*, 105 S. Ct. 2149 (1985).

[18] See our NPR, 46 Fed. Reg. 14,365, particularly the separate expression of Commissioner Clapp: "The proposed modification * * * would exempt all motor carrier TOFC/COFC transportation * * *. I encourage parties particularly to address this jurisdictional issue."

[19] While Southern Pacific Transportation Company (SP), in its reply, argues that an exemption of Plan I LTL traffic is not feasible, it suggests that Plan I truckload (TL) traffic can and should be exempted. We agree with SP that a Plan I TL exemption would be practically simpler than an exemption of LTL, and we will be receptive to an exemption petition with respect to this traffic.

[20] Foreign motor carriers will continue to be subject to the requirements of 49 U.S.C. §§10922(1) and 10530(b) (*see, e.g., Applications For Certificates of Registration For Certain Foreign Carriers*, 50 Fed. Reg. 20,773 (1985), and all motor carriers must comply with the liability provisions of section 11707 and the Department of Transportation's safety and insurance regulations found at 49 C.F.R. Parts 387 and 390 *et seq*. Those regulated motor carriers also engaged in other operations not subject to the exemption will, of course, continue to be subject to all Commission regulations governing those non-exempt operations.

[21] We note that the definition section, §1090.1, is expanded to define highway TOFC/COFC service, since the existing definition only covers rail TOFC/COFC service. The definition is also augmented to include use of such bimodal vehicles as the "Roadrailer," and also to unmistakably include the trailer-sized marine shipping containers that move

in TOFC/COFC service today and have been under discussion by all parties throughout the proceeding, but may not technically fit under the existing definition.

3 I.C.C.2d 869, 1987 WL 101284

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APPENDIX 6

United States Code Annotated
Title 49. Transportation (Refs & Annos)
Subtitle IV. Interstate Transportation (Refs & Annos)
Part A. Rail (Refs & Annos)
Chapter 105. Jurisdiction (Refs & Annos)

49 U.S.C.A. § 10501

§ 10501. General jurisdiction

Currentness

(a)(1) Subject to this chapter, the Board has jurisdiction over transportation by rail carrier that is--

(A) only by railroad; or

(B) by railroad and water, when the transportation is under common control, management, or arrangement for a continuous carriage or shipment.

(2) Jurisdiction under paragraph (1) applies only to transportation in the United States between a place in--

(A) a State and a place in the same or another State as part of the interstate rail network;

(B) a State and a place in a territory or possession of the United States;

(C) a territory or possession of the United States and a place in another such territory or possession;

(D) a territory or possession of the United States and another place in the same territory or possession;

(E) the United States and another place in the United States through a foreign country; or

(F) the United States and a place in a foreign country.

(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.

(c)(1) In this subsection--

(A) the term "local governmental authority"--

(i) has the same meaning given that term by section 5302 of this title; and

(ii) includes a person or entity that contracts with the local governmental authority to provide transportation services; and

(B) the term "public transportation" means transportation services described in section 5302 of this title that are provided by rail.

(2) Except as provided in paragraph (3), the Board does not have jurisdiction under this part over--

(A) public transportation provided by a local government authority; or

(B) 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.

(3)(A) Notwithstanding paragraph (2) of this subsection, a local governmental authority, described in paragraph (2), is subject to applicable laws of the United States related to--

(i) safety;

(ii) the representation of employees for collective bargaining; and

(iii) employment, retirement, annuity, and unemployment systems or other provisions related to dealings between employees and employers.

(B) The Board has jurisdiction under sections 11102 and 11103 of this title over transportation provided by a local governmental authority only if the Board finds that such governmental authority meets all of the standards and requirements for being a rail carrier providing transportation subject to the jurisdiction of the Interstate Commerce Commission that were in effect immediately before January 1, 1996. The enactment of the ICC Termination Act of 1995 shall neither expand nor contract coverage of employees and employers by the Railway Labor Act, the Railroad Retirement Act of 1974, the Railroad Retirement Tax Act, and the Railroad Unemployment Insurance Act.

CREDIT(S)

(Added Pub.L. 104-88, Title I, § 102(a), Dec. 29, 1995, 109 Stat. 807; amended Pub.L. 104-287, § 5(21), Oct. 11, 1996, 110 Stat. 3390; Pub.L. 110-432, Div. A, Title VI, § 602, Oct. 16, 2008, 122 Stat. 4900; Pub.L. 114-94, Div. A, Title III, § 3030(g), Dec. 4, 2015, 129 Stat. 1497.)

Notes of Decisions (194)

49 U.S.C.A. § 10501, 49 USCA § 10501
Current through P.L. 116-149.

End of Document

APPENDIX 7

United States Code Annotated
Title 49. Transportation (Refs & Annos)
Subtitle IV. Interstate Transportation (Refs & Annos)
Part A. Rail (Refs & Annos)
Chapter 105. Jurisdiction (Refs & Annos)

49 U.S.C.A. § 10502

§ 10502. Authority to exempt rail carrier transportation

Currentness

(a) In a matter related to a rail carrier providing transportation subject to the jurisdiction of the Board under this part, the Board, to the maximum extent consistent with this part, shall exempt a person, class of persons, or a transaction or service whenever the Board finds that the application in whole or in part of a provision of this part--

(1) is not necessary to carry out the transportation policy of section 10101 of this title; and

(2) either--

(A) the transaction or service is of limited scope; or

(B) the application in whole or in part of the provision is not needed to protect shippers from the abuse of market power.

(b) The Board may, where appropriate, begin a proceeding under this section on its own initiative or on application by the Secretary of Transportation or an interested party. The Board shall, within 90 days after receipt of any such application, determine whether to begin an appropriate proceeding. If the Board decides not to begin a class exemption proceeding, the reasons for the decision shall be published in the Federal Register. Any proceeding begun as a result of an application under this subsection shall be completed within 9 months after it is begun.

(c) The Board may specify the period of time during which an exemption granted under this section is effective.

(d) The Board may revoke an exemption, to the extent it specifies, when it finds that application in whole or in part of a provision of this part to the person, class, or transportation is necessary to carry out the transportation policy of section 10101 of this title. The Board shall, within 90 days after receipt of a request for revocation under this subsection, determine whether

to begin an appropriate proceeding. If the Board decides not to begin a proceeding to revoke a class exemption, the reasons for the decision shall be published in the Federal Register. Any proceeding begun as a result of a request under this subsection shall be completed within 9 months after it is begun.

(e) No exemption order issued pursuant to this section shall operate to relieve any rail carrier from an obligation to provide contractual terms for liability and claims which are consistent with the provisions of section 11706 of this title. Nothing in this subsection or section 11706 of this title shall prevent rail carriers from offering alternative terms nor give the Board the authority to require any specific level of rates or services based upon the provisions of section 11706 of this title.

(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.

(g) The Board may not exercise its authority under this section to relieve a rail carrier of its obligation to protect the interests of employees as required by this part.

CREDIT(S)

(Added Pub.L. 104-88, Title I, § 102(a), Dec. 29, 1995, 109 Stat. 808.)

Notes of Decisions (51)

49 U.S.C.A. § 10502, 49 USCA § 10502
Current through P.L. 116-150.

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