

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

302709

ENTERED
Office of Proceedings
July 12, 2021
Part of
Public Record

Docket No. FD 36511

WASTE MANAGEMENT OF WASHINGTON, INC. AND WASTE MANAGEMENT
DISPOSAL SERVICES OF OREGON, INC.

REPLY TO WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION'S
MOTION TO STRIKE

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

Michael F. McBride, DC Bar #243998
VAN NESS FELDMAN LLP
1050 Thomas Jefferson Street NW
Seventh Floor
Washington, D.C. 20007
Tel: 202-298-1989
mfm@vnf.com

Counsel for Waste Management of Washington, Inc.
and Waste Management Disposal Services of Oregon, Inc.

July 12, 2021

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

Docket No. FD 36511

WASTE MANAGEMENT OF WASHINGTON, INC. AND WASTE MANAGEMENT
DISPOSAL SERVICES OF OREGON, INC. –

REPLY TO WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION’S
MOTION TO STRIKE

INTRODUCTION

Waste Management of Washington, Inc. and Waste Management Disposal Services of Oregon, Inc. (collectively, “WM”) hereby respectfully submit this Reply to the Washington Utilities and Transportation Commission’s (“WUTC”) July 1, 2021 Motion to Strike. WM sought leave to file its Reply in Support of Verified Petition for Declaratory Order (“Reply”) for two reasons. First, the Reply was necessary to complete the record. Following the submission of the opposition briefs, there were significant factual developments that directly affect the Surface Transportation Board’s (“STB” or “Board”) analysis. Second, Waste Connections US Holdings, Inc. and Murrey’s Disposal Company, Inc. (collectively “Waste Connections”) made various arguments that were never made to or addressed by the WUTC. WM had no reason to anticipate that Waste Connections would make these meritless arguments to the STB and could only address them in reply. In the interest of a just determination of the complete record, the

Board should grant WM's request for leave to file its Reply and deny the WUTC's Motion to Strike.

ARGUMENT

Although 49 C.F.R. § 1104.13(c) indicates that “[a] reply to a reply is not permitted,” the Board has frequently waived that provision for good cause. *See, e.g., Sierra R.R. Co. v. Sacramento Valley R.R. Co., LLC*, STB Docket No. NOR 42133 at 1, n.1 (served Mar. 9, 2012); *Cross Oil Ref & Mktg., Inc. v. Union Pac. R.R. Co.*, STB Docket No. 33582 at 1 (served Oct. 27, 1998); *see generally* 49 C.F.R. § 1100.3 (“The rules will be construed liberally to secure just, speedy, ad inexpensive determination of the issues presented.”). The Board generally grants leave to file a reply to a reply when further factual development is necessary and when arguments were made in a reply that could not have been anticipated. *See, e.g., American Rocky Mountaineer, LLC – Petition for Exemption from 49 U.S.C. Subtitle IV*, F.D. 36468 (served May 28, 2021), slip op. at 3 n.3, *citing City of Alexandria, Va – Pet. for Declaratory Order*, FD 35157, slip op. at 2 (served Nov. 6, 2008) (allowing a reply to a reply “[i]n the interest of compiling a full record.”).

A. Significant Factual Development Affecting the Board's Analysis Necessitated Further Briefing.

WM submitted its Petition on May 5, 2021. On May 25, the WUTC petitioned for leave to intervene and filed its Reply. On June 4, Waste Connections filed its Reply.

Following briefing by the parties, significant factual developments relevant to the Board's analysis occurred. On June 4, the Thurston County Superior Court heard argument on WM's motion to stay the WUTC's Order pending resolution of the administrative appeal on the merits. At that time, WM was transporting 400-500 tons of OCC Rejects every day from Port

Townsend Paper and McKinley Paper via COFC service. This is equivalent to roughly 30,000,000 pounds per month. Because the WUTC's Order required immediate cessation of WM's COFC service, WM argued that irreparable harm would result if the Order was not stayed. The Thurston County Superior Court disagreed and declined to stay the Order.

Only after June 4th was the WUTC's Order requiring immediate cessation of COFC service felt by the parties. WM was required to coordinate with the Union Pacific Railroad and the Puget Sound and Pacific Railroad to immediately halt the rail transportation of OCC Rejects. This development changed the nature of WM's Petition and created additional critical facts that bear directly on the Board's analysis. Prior to the Thurston County Superior Court's order denying the stay, the Board was being asked to consider state agency action that *could* have the effect of interfering with rail transportation, depending on the outcome of an administrative appeal. By the time WM filed its Reply, however, the Board was being asked to consider a different situation: one in which agency action had the literal and immediate effect of interfering with and halting rail transportation. Absent the Reply, the Board would not have been aware of these facts. Indeed, WM believed it was obliged to advise the Board of these additional, critical facts. In the interest of a complete record, the Board should deny the WUTC's Motion to Strike.

B. Waste Connections and the WUTC Raised New, Unanticipated Arguments That Required a Response.

The WUTC's Motion to Strike should be denied for the additional reason that a full and complete record required WM to respond to the unanticipated arguments set forth by Waste Connections and the WUTC. WM will not rehash all of the arguments made but provides the following examples to demonstrate why WM's Reply was necessary to fully develop the record.

The sole issue before the Board is whether the STB has jurisdiction over the distinctive COFC service utilized by WM. WM anticipated a lively debate over this legal question. WM did not anticipate that Waste Connections would attempt to mischaracterize the issue before the Board as a question of whether the STB has jurisdiction over “the enforcement of Washington’s system of assigning service territories against Waste Management’s intermodal transportation of containerized solid waste.” Waste Connections’ Reply at 9. WM does not dispute the WUTC’s jurisdiction over transportation of solid waste *except* where, as here, it is preempted by federal jurisdiction. WM’s Reply was necessary to confirm that its Petition did not seek the declaratory relief now described by Waste Connections and to instead direct the Board back to the relief actually requested by WM: “a declaratory order to confirm . . . that the STB has exclusive jurisdiction over Petitioners’ container-on-flat-car (“COFC”) transportation of solid waste from” McKinley Paper and Port Townsend Paper in the State of Washington to the Columbia Ridge Landfill in the State of Oregon. Petition at 1.

After mischaracterizing the issue before the Board, Waste Connections fashioned multiple new arguments in support of its theory that the WUTC can usurp the STB’s exclusive jurisdiction over COFC service. For example, Waste Connections argued, for the first time, that WM should have first sought leave from the WUTC to perform COFC service—a service over which the WUTC lacks authority—and characterized this leave as an “administrative remedy” that WM was required to “exhaust.” To refute this unsupported argument, it was necessary for WM to file its Reply to inform the Board that it had already appealed the WUTC’s Order, that its request to stay the Order had been denied, and that there was no “exhaustion” requirement as crafted by Waste Connections before WM could seek declaratory relief.

Waste Connections also argued, for the first time, that the local police power exception allowed the WUTC to regulate COFC service notwithstanding federal preemption. Waste Connections had never before developed this argument beyond a vague reference in a prior pleading. Nevertheless, the local police power exception became a central element of Waste Connections' arguments to the Board. WM's Reply was necessary to provide the Board with a full and complete record of the relevant issues and to explain why the local police power exception was not relevant under these circumstances.

As for the WUTC, WM could not anticipate any arguments made in its Reply beyond those made in its Order granting summary determination in favor of Waste Connections. Until it filed its Reply, the WUTC was acting as a decisionmaker – the arbiter of its own jurisdiction. Upon filing its Reply, the WUTC became an interested party and advocate. In any event, WM's Reply was largely a response to the new and unanticipated arguments made by Waste Connections. WM's Reply only addressed arguments made by the WUTC in connection with identical arguments set forth by Waste Connections.

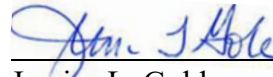
CONCLUSION

WM's Reply responded to new and unanticipated arguments set forth by Waste Connections and the WUTC. But more importantly, the Reply provided the Board with additional facts that significantly impact the Board's analysis of the issues presented in the Petition. The Board is no longer being asked to analyze agency action that could, if not overturned on appeal, have the effect of regulating rail transportation. In light of the Thurston County Superior Court's refusal to stay the WUTC's Order, the Board is now confronted with agency action that has had the literal effect of immediately halting rail transportation. The Reply

was necessary to provide the Board with a full and complete record. Accordingly, the WUTC's Motion to Strike should be denied.

DATED this 12th day of July 2021.

Respectfully Submitted,



Jessica L. Goldman, WSBA #21856

Jesse L. Taylor, WSBA #51603

SUMMIT LAW GROUP PLLC

315 Fifth Avenue S., Suite 1000

Seattle, WA 98104

Tel: (206) 676-7000

jessicag@summitlaw.com

jesset@summitlaw.com



Michael F. McBride, DC Bar #243998

VAN NESS FELDMAN LLP

1050 Thomas Jefferson Street NW

Seventh Floor

Washington, D.C. 20007

Tel: 202-298-1989

mfm@vnf.com

Counsel for Waste Management of
Washington, Inc. and Waste Management
Disposal Services of Oregon, Inc.

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon all parties of record in this proceeding by email, as agreed to by the parties.

Attorneys for Murrey's Disposal Co., Inc.

Blair I. Fassburg, WSBA #41207
David W. Wiley, WSBA #08614
Sean D. Leake, WSBA #52658
WILLIAMS, KASTNER & GIBBS PLLC
601 Union Street, Suite 4100
Seattle, WA 98101-2380
Legal Asst: Maggi Gruber
dwiley@williamskastner.com
bfassburg@williamskastner.com
sleake@williamskastner.com
mgruber@williamskastner.com

- ☐ Via Legal Messenger
- ☐ Via U.S. Mail
- ☒ Via Email

*Attorneys for Waste Connections, Inc. and
Murrey's Disposal Co., Inc.*

Robert Rosenberg
Peter A. Pfohl
A. Rebecca Williams
SLOVER & LOFTUS LLP
1224 Seventeenth Street NW
Washington, D.C. 20036
rdr@sloverandloftus.com
pap@sloverandloftus.com
arw@sloverandloftus.com

- ☐ Via Legal Messenger
- ☐ Via U.S. Mail
- ☒ Via Email

Attorneys for Washington Utilities and Transportation Comm.

Jeff Roberson, WSBA No. 45550
Assistant Attorney General
Office of the Attorney General
Utilities and Transportation Division
P.O. Box 40128
Olympia, WA 98504-0128
jeff.roberson@utc.wa.gov

- ☐ Via Legal Messenger
- ☐ Via U.S. Mail
- ☒ Via Email

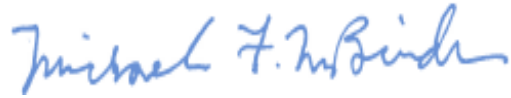
Attorneys for Association of American Railroads

Kathryn D. Kirmayer
Timothy J. Strafford
J. Frederick Miller, Jr.

- ☐ Via Legal Messenger
- ☐ Via U.S. Mail
- ☒ Via Email

ASSOCIATION OF AMERICAN RAILROADS
425 Third St. SW
Washington, DC 20024
kkirmayer@aar.org
tstrafford@aar.org
fmler@aar.org

DATED this 12th day of July, 2021.



Michael F. McBride, DC Bar #243998
VAN NESS FELDMAN LLP
1050 Thomas Jefferson Street NW
Seventh Floor
Washington, D.C. 20007
Tel: 202-298-1989 (office)
202-413-4785 (cell)
mfm@vnf.com

Counsel for Waste Management of
Washington, Inc. and Waste Management
Disposal Services of Oregon, Inc.