

ORIGINAL

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

In the Matter of Determining the)	Docket No. TG-920304
Proper Carrier Classification of:)	
)	RESPONSE OF SUREWAY
ENOCH ROWLAND, d/b/a KLEENWELL)	MEDICAL SERVICES, INC.
BIOHAZARD AND GENERAL ECOLOGY)	TO PETITION FOR
CONSULTANTS.)	ADMINISTRATIVE REVIEW
)	

This response is filed by SureWay Medical Services, Inc. (hereafter "Sureway"), a subsidiary of Rabanco, Ltd., to respond to the Petition for Administrative Review filed by Enoch Rowland, d/b/a Kleenwell Biohazard and General Ecology Consultants (hereafter "Kleenwell"), seeking review of the Findings of Fact, Conclusions of Law and Initial Order ("Initial Order") entered August 31, 1992.

INTRODUCTION

Kleenwell has raised fourteen exceptions to the Initial Order. Exceptions A, C and L relate, in whole or in part, to findings that there is a lack of shipper or generator intent to have the waste transported in interstate commerce. Exceptions C, I and K relate, in whole or in part, to findings and conclusions

that the Washington Utilities and Transportation Commission ("Commission" or "WUTC") may regulate the intrastate collection of medical waste even though the waste is subsequently transported out of state. The remainder of the exceptions focus on Kleenwell's primary argument that the Commission's regulation of Kleenwell's activities would establish an impermissible burden on interstate commerce.

BACKGROUND

Kleenwell is a Washington corporation (TR 54, l. 36) and is located in Washington (TR 54, l. 23-25). Its stockholders are Washington residents (TR 54, l. 7-13). Kleenwell has no permit or operating authority which has been granted by the Interstate Commerce Commission (TR 55, l. 10-15). By his own admission, Enoch Rowland testified that the only reason he transports infectious waste outside the State of Washington is to avoid the WUTC's jurisdiction (TR 98, l. 11 - TR 99, l. 3). He only began to transport waste out of state after his intrastate application was denied (TR 55, l. 16-TR 56, l. 14).

RESPONSE

1. Shipper's Intent.

Kleenwell excepts (Exceptions A, C and L) to certain findings and conclusions in the Initial Order that there is no shipper or generator intent that the infectious waste be shipped in

interstate commerce. However, Kleenwell cites to no evidence in the record to the contrary. Kleenwell's only argument is that Kleenwell's intent is that the waste be shipped to California.

A determinant of whether interstate commerce has occurred is the persistent intent of the shipper, not the transportation company, at the time shipment begins. Baltimore and O.S.W.R. Co. v. Settle, 260 U.S. 166, 67 L. Ed. 189 (1922). The evidence amply demonstrates the lack of persistent shipper intent that the work be transported in interstate commerce. Mr. Rowland admitted that he began going out of state only after his intrastate application was denied (TR 55, l. 16 - TR 56, l. 14). Mr. Rowland himself picked California as the disposal site (TR 84, l. 10-12). He also testified that he advised the shippers of the disposal site and not the other way around (TR 84, l. 10-12). In fact, Mr. Rowland stated that he would refuse, if requested, to transport waste to Ferndale, Washington, his disposal site at the time that he operated while seeking a Commission permit (TR 84, l. 13-17). Finally, the shippers cannot possess the necessary intent because, according to Mr. Rowland's testimony, they are indifferent as to whether the waste is disposed of inside or outside the state (TR 57, l. 17-21).

As a business matter, the cost of transporting to the out-of-state facility, Security Environmental Systems, is two to three times the cost of an in-state disposal site (TR 59, l. 3-10).

This underscores the fact that the only reason Kleenwell chose an out-of-state disposal site was to avoid the WUTC's jurisdiction. Therefore, it is clear that Mr. Rowland's intent is to avoid Washington jurisdiction; the shippers' intent is merely to have their waste properly disposed of, wherever that may be. The exceptions should be denied.

2. Kleenwell's Collection Activities Are Subject to Regulation.

Kleenwell takes exception (Exceptions C, I, K) to portions of the Initial Order which found that Kleenwell's waste collection activities are intrastate in nature and the conclusion that those activities are subject to regulation. Kleenwell cites no evidence to contradict the findings in the Initial Order.

In fact, Kleenwell's infectious waste collection and transportation business does consist of two parts: (1) collection and storage of medical and infectious waste, and (2) the transporting of that waste to the final disposal site. The testimony of Enoch Rowland admits that his operation consists of these two parts (TR 74, l. 18-22). Furthermore, he testified that the waste may be stored up to 90 days before any thought is given to transporting it out of the state (TR 28-31). 2 parts

As a basis for many of its arguments, Kleenwell relies heavily on the Medigen case. Medigen of Kentucky, Inc. v. Public Service Commission of West Virginia, 787 F. Supp. 590 (S.D.W.Va.

1991); Medigan of Kentucky, Inc. v. Public Service Commission of West Virginia, 787 F. Supp. 602 (S.D.W.Va. 1992). However, on this issue there is an important distinction to be drawn. In Medigen, it was stipulated that the two Medigen companies did not transport medical waste from one point within the state of West Virginia to another point within the state of West Virginia. 787 F. Supp. at 592. Kleenwell's operation clearly has one part of its operations within the state of Washington (the collection and transportation of medical waste to storage facilities) and another part of its operations crossing state boundaries (moving the waste from storage to the disposal site). TR 31-33. Clearly, the collection of waste and transportation to a storage facility is an intrastate operation. Z

The distinction between the movement of commodities in local, intrastate commerce and interstate commerce was drawn in a case related to the transportation of logs within the State of Washington. The Court reasoned in Burlington Northern v. Weyerhaeuser Co., 719 F.2d 304 (9th Cir., 1983):

Whenever a commodity has begun to move as an article of trade from one State to another State, commerce in that commodity between States has commenced. But this movement does not begin until the articles have been shipped or started for transportation from one State to another. The carrying of them in carts or vehicles, or even floating them, to the depot where the journey is to commence is no part of the journey.

719 F.2d at 309, quoting from Coe v. Errol, 116 U.S. 517, 6 S.Ct. 475, 29 L. Ed 715 (1886).

In Burlington Northern, the Court had to decide at what point the shipment of logs entered interstate commerce. The Court concluded that the interstate portion did not begin until after the intrastate shipments had been gathered together. By way of analogy, Kleenwell collects the infectious waste and stores the waste in a centralized repository (the intrastate portion) and later moves all of the waste to its final destination out of state (interstate portion).¹

Kleenwell admits that its local collection activities are properly regulated by the Seattle/King County Health Department. If that regulation is permissible, so is regulation by the Commission. Local collection activity requires a certificate. See, In re Evergreen Waste Systems, Inc., TG-1911 (1986); In re Sure-Way Incineration Service, Inc., Order M.V.G. 1533, GA-868 (1992). Again, the exceptions should be denied.

3. Commerce Clause Issues.

The remainder of Kleenwell's exceptions center around the contention that regulation of Kleenwell's activities would constitute an impermissible burden on interstate commerce.

This issue has been fully addressed by the parties in their briefs to the Administrative Law Judge, particularly in Commission Staff brief at pages 10-34. Kleenwell raises no new arguments and

¹This is the issue raised by Ryder in its Petition for Administrative Review.

cites to no evidence to support its position, except to argue that the evidence supporting the finding that medical or infectious waste in the waste stream poses a significant public health risk is insufficient because medical testimony was not offered. While Mr. Rowland and Mr. Turnberg are not medical doctors, they are certainly qualified to speak on the subject of infectious waste. TR 63 (Rowland's qualifications) and TR 121-124 (Turnberg's qualifications and experience). Further, where Kleenwell's president and shareholder testifies that there is such a risk, there is no need for further evidence. Kleenwell's exceptions F and J are without merit, as are all of the exceptions on the commerce clause issue.

SUMMARY

SureWay respectfully requests that Kleenwell's exceptions be denied.

RESPECTFULLY SUBMITTED this 13th day of October, 1992.

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