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November 23, 1994

Steve McLellan, Secretary
Washington Utilities and
Transportation Commission
PO Box 47250
Olympia, WA 98504-7250

Re: The Disposal Group v. Waste Management Disposal Services
of Oregon, Inc., et al.
Docket No. TG-941154

Dear Secretary McLellan:

On behalf of Respondent, T & G Trucking & Freight Co., in the
above matter, we are enclosing original and two copies of Initial
Brief of Respondent, T & G Trucking & Freight Co.

Very truly yours,



Jack R. Davis

JRD:sa
Encs.
C:\WPDocs\T&GBrf.let

cc: William Rasmussen, Attorney (w/encs.)
Cynthia Horenstein, Attorney (w/encs.)
James Sells, Attorney (w/encs.)
Steve Smith, Assistant Attorney General (w/encs.)

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BEFORE THE
WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

THE DISPOSAL GROUP)	
d/b/a VANCOUVER SANITARY SERVICE)	Docket No. TG-941154
and TWIN CITY SANITARY SERVICE,)	
a Washington corporation (G-65),)	
)	
Complainant,)	
)	
vs.)	INITIAL BRIEF OF
)	RESPONDENT, T & G
WASTE MANAGEMENT DISPOSAL)	TRUCKING & FREIGHT CO.
SERVICES OF OREGON, INC.,)	
d/b/a OREGON WASTE SYSTEMS,)	
a Delaware corporation; and)	
T & G TRUCKING & FREIGHT CO.,)	
an Oregon corporation,)	
)	
Respondent.)	

I.

PRELIMINARY STATEMENT

This matter comes before the Commission upon the Amended Complaint of The Disposal Group, Inc. ("TDG"), alleging generally that Waste Management Disposal Services of Oregon, Inc., d/b/a Oregon Waste Systems ("OWS") and/or T & G Trucking & Freight Co. ("T & G"), violated the law of the State of Washington in hauling solid waste for compensation without having first obtained a certificate declaring that public convenience and necessity required such operation.

Both OWS and T & G answered the Complaint alleging that the activities covered by the Complaint did not constitute practices that were subject to regulation by this Commission under RCW Chapter 81.77.

The Commission assigned this matter to a brief adjudicatory proceeding before John Prusia, Hearing Examiner.

1 Through a series of telephone conferences, the parties
2 agreed upon handling of the matter upon a written record
3 including stipulated facts and the submission of various written
4 statements and exhibits. In addition, Washington Refuse and
5 Recycling Association was allowed to intervene in the proceeding.

6 Based upon agreement of the parties, Initial Briefs are to
7 be postmarked no later than Wednesday, November 23, 1994.

8 II.

9 STATEMENT OF ISSUES

10 Based upon the allegations contained in the Complaint and in
11 the Answers and Affirmative Defenses, it is the position of
12 Respondent T & G that the following issues require disposition:

13 1. Is the material being removed from the Alcoa plant
14 at or near 6200 Old Lower River Road, Vancouver, Washington,
15 "solid waste" subject to the jurisdiction of the Washington
16 Utilities and Transportation Commission ("WUTC") under the
17 provisions of RCW Chapter 81.77?

18 2. Are the activities of Oregon Waste Systems, in
19 accepting the material as Alternate Daily Cover ("ADC") at
20 its recycling center and landfill at Arlington, Oregon,
21 subject to the jurisdiction of the WUTC?

22 3. Are the activities of T & G in transporting loaded
23 containers of sludge from the Alcoa plant to a rail siding
24 in Portland, Oregon, subject to the jurisdiction of the
25 WUTC?

26 4. Has the federal Government preempted WUTC
27 regulation of container on flat car intermodal
28 transportation service under Part IV of the Interstate
Commerce Act?

III.

REFERENCES TO EVIDENCE

References to the stipulated facts herein will be designated
(SF-__) with the paragraph number inserted in the blank.

References to declarations will be made (D WH__) referring
to the Declaration of Wess Hicke and the page number inserted in
the blank.

1 The initials CZ refer to the Declaration of Christopher
2 Zepernick.

3 The initials NW refer to the Declaration of Norman Wietting.

4 The initials PV refer to the Declaration of Patricia Vernon.

5 The initials DW refer to the Declaration of Douglas Walters.

6 IV.

7 ARGUMENT OF RESPONDENT T & G

8 A. IS THE SLUDGE SOLID WASTE FOR WUTC REGULATORY PURPOSES?

9 The initial issue to be determined is whether or not
10 the material being collected at Vancouver, WA, and transported to
11 Arlington, Oregon is solid waste or recyclable materials for the
12 purposes of regulation by the Washington Utilities and
13 Transportation Commission (WUTC). There is absolutely no
14 question that insofar as Alcoa is concerned, the material is
15 waste. Alcoa hired Rust, a large multi-state environmental
16 company, for cleanup and remediation of the industrial sludge at
17 the Alcoa plant. (SF-1, 3) As a part of its contract with Alcoa,
18 Rust is required to remove the sludge from the site. (SF-7)
19 Rust, in turn, has contracted with OWS to receive the sludge at
20 Columbia Ridge Landfill and Recycling Center. (CRLRC) (SF-9)
21 Rust pays OWS to accept the material at the landfill. The
22 material when delivered to CRLRC, however, is not co-mingled with
23 the other waste, but is used as Alternate Daily Cover (ADC). (SF-
24 9, 16) The price that Rust pays to OWS to accept the material is
25 lower than the posted gate rate for solid waste by 30% to 50%.
26 (SF-18)

27 The initial issue then becomes essentially a question
28 as to whether or not the sludge should be classified as solid
waste for regulation because OWS receives a fee for accepting the
material at its landfill rather than paying Rust or Alcoa to
obtain the material.

The fact that Alcoa may consider the matter as waste is
not determinative of this issue. Nearly all recyclable
commodities by definition are products of an initial process or
cycle that ended as waste. Except for recycling, all recyclables
would be subject to disposal. The label waste in such context is

1 therefore meaningless. Order M.V. No. 130721, In re Crosby &
2 Overton, Inc., App. No. P-66968 (Oct. 1984).

3 Under WUTC regulation, the term "recyclables" means
4 that the transportation is for recycling, reprocessing,
5 reclamation, or for any purpose that extracts or modifies the
6 commodity or elements within it for reuse or for another
7 commercially valuable purpose. Order M.V. No. 143916, Safco Safe
8 Transport, Inc., App. No. P-73625 (Oct. 1991). The sludge in
9 this instance has value to OWS as ADC. (SF-21) If the sludge was
10 not used as ADC, OWS would charge Rust a higher fee for receiving
11 the material at CRLRC. (SF-22) If OWS was not permitted to use
12 the sludge material as ADC, it would need to locate alternative
13 material for ADC at an expense to OWS. (SF-23) OWS is required
14 to provide daily cover at its landfill pursuant to 40 CFR §258.21
15 and OAR §340-94-040(7) and (8). (SF-20)

16 The controlling element in a determination as to
17 whether or not a commodity is to be transported as property or
18 waste under the regulations of the WUTC appears to be whether or
19 not the commodity has any commercial value. Order M.V. No.
20 143632, C & C Transportation Co., Inc., App. No. E-74249 (July
21 1991). In Order M.V. No. 144941, Risler Contracting Co., App.
22 No. E-75297 (May 1992), this Commission distinguished between
23 "contaminated soil for disposal" and "non-contaminated fill
24 soil", and in Order M.V. No. 144465, Roger Dralle, d/b/a Roger's
25 Dump Trucking, App. No. P-74586 (Jan. 1992), ruled:

26 "Hauling of contaminated soil for disposal is properly
27 done by a hauler holding solid waste from the
28 Commission. Hauling of soils for reuse is properly
done by a common carrier . . ." (p. 6) (sic)

Under the facts as stipulated in this proceeding, there
is no question that the sludge is being transported to OWS to be
used as ADC and has a value to OWS for reuse rather than just for
disposal. It will most likely be argued by complainant and/or
Washington Refuse and Recycling Association ("WRRRA") that the
material should be treated as solid waste because a fee is paid
to OWS for receiving the material. Such position, however, is

1 entirely inconsistent with the policy of the state legislature to
2 promote recycling and waste reduction. RCW Chapter 70.95C
3 declares that reuse or reclamation of valuable spent material is
4 one of the highest waste management priorities. As a part of
5 such priority, OWS requested the Oregon Department of
6 Environmental Quality (DEQ) to authorize it to use sludge
7 collected at Alcoa site as an alternative to daily soil coverage
8 at CRLRC. (SF-14) Based upon the DEQ authorization, all of such
9 material is used as ADC. (SF-15, 16) If the sludge was not used
10 as ADC, OWS would charge Rust a higher fee for receiving the
11 material and would deplete existing landfill capacity at CRLRC by
12 requiring sludge to be disposed of as solid waste and covered by
13 other daily cover. (SF-23, D-NW, p.3-5) Clearly, the use of the
14 material as daily cover results in waste reduction by an amount
15 equal to the total amount of sludge used as cover.

16 It would be totally inappropriate for this Commission
17 to adopt a standard that the material had to have a value in
18 excess of its cost of transportation and handling in order to be
19 classified as a recyclable material. Such a standard would
20 result directly in a significant reduction in recycling and a
21 substantial increase in waste generation. The fact that the
22 sludge has value to OWS as ADC was a material factor in Rust's
23 decision to have the material delivered to CRLRC in Oregon. (D-
24 CZ, p.2) If the material had to be classified as waste and could
25 not be reused as ADC, it would have cost Rust more to have it
26 removed and would have depleted the landfill facilities of CRLRC.

27 It is common knowledge that the market for recyclable
28 materials is highly volatile and subject to substantial
fluctuations. It is an incentive to commercial and industrial
generators of waste to recycle materials to reduce the cost of
handling and transporting the material even if the value the
material is less than the cost of collection. For example, if it
costs \$30.00 a ton to have cardboard picked up and transported to
a recycling facility which, in turn, pays only \$10.00 a ton for
the cardboard, there is an incentive to accomplish the recycling,
as long as the net cost of recycling is below the disposal cost.

1 In this proceeding, reuse of the material as ADC results in a
2 saving of between 30% and 50% as compared to the gate rate for
3 disposal of the material at CRLRC. (SF-18) Such a saving is
4 clearly an incentive to recycle and resulted in sending the
5 material to Arlington for use by OWS as ADC. (SF-4)

6 Based upon the entirety of the evidence and the
7 policies of this state concerning waste reduction and the prior
8 decisions of this Commission, it is respectfully submitted that
9 the sludge collected from the Alcoa facility is in fact a
10 "recyclable material" subject to being transported as a commodity
11 by a carrier of property and not properly classified as solid
12 waste under RCW Chapter 81.77.

13 B. ARE THE ACTIVITIES OF OWS AND/OR T & G SUBJECT TO
14 REGULATION UNDER RCW CHAPTER 81.77?

15 If this Commission for any reason determines that the
16 material should be classified as solid waste, it must then
17 determine whether or not it has and should exercise regulatory
18 jurisdiction over the activities of:

- 19 (1) Rust;
- 20 (2) OWS; and/or
- 21 (3) T & G.

22 There are three separate functions involved in the
23 process of removal of the material from the Alcoa plant and
24 delivering it to CRLRC in Oregon. The first step is the site
25 cleanup and reclamation by Rust. That function involves the
26 operation of construction and land clearing equipment in removing
27 the sludge from the site and loading it into top-loading
28 containers mounted on wheeled trailers or chassis at the site.
(SF-8) Rust does not perform any transportation services, but
contracts with OWS to have the sludge delivered to CRLRC to be
used solely as ADC. (SF-1, 7, 8, 9)

OWS contracts with Union Pacific Railroad and T & G for
movement of the loaded containers of sludge from the Alcoa site
over the public highways of the States of Washington and Oregon
to a railroad siding at or near Portland for loading on to flat
cars operated by Union Pacific for movement in container on flat

1 car (COFC) intermodal service for delivery to CRLRC in Arlington,
2 Oregon. (SF-11)

3 T & G is in the business of providing the
4 transportation of cargo containers having a prior or subsequent
5 movement by water or rail. (D-DW, p.1) T & G operates under
6 authority issued by the Interstate Commerce Commission in
7 Certificate No. MC-241170 and under permit issued by the Oregon
8 PUC in Permit No. 27642. T & G does not hold operating authority
9 from the WUTC. (D-DW, p.1) T & G does not hold out its services
10 to transport solid waste. (D-DW, p.1) T & G contracted to
11 provide motor carrier transportation of the material upon the
12 basis that it was tendered as part of a continuous intermodal
13 COFC movement from origin to destination. (D-DW, p.2) T & G is
14 not involved in any manner with the collection of the sludge from
15 the facilities of Alcoa for loading into the containers in the
16 State of Washington. (D-DW, p.2) T & G picks up an empty
17 container from the rail siding in Oregon, moves it to the Alcoa
18 plant site where it is loaded with sludge by Rust while the
19 driver waits in the truck and then transports the loaded
20 container back to the rail siding. When the container arrives at
21 the rail siding, it is loaded onto a rail car and moves to
22 Arlington, Oregon each day. There is no stopping in transit for
23 storage processing or transfer to a different container. (D-DW,
24 p.2) T & G does not consider the material to be solid waste, but
25 understands that it is used as cover at the landfill rather than
26 being mixed with solid waste for disposal. (D-DW, p.2-3) The
27 bills of lading upon which the material is shipped specify on
28 their face that the material originated at Vancouver, Washington,
is destined to Arlington, Oregon, and is:

"To be recycled as daily cover at Columbia Ridge
Landfill and Recycling Center." (OWS, Ex. H and I)

The provisions of RCW 81.77.100 provide that Chapter
81.77 shall not apply to commerce among the several states except
as permitted under the Constitution of the United States and the
acts of Congress with a proviso that the state shall regulate all
solid waste collection companies conducting business in the State

1 in order to protect public health and safety and insure solid
2 waste collection services are provided to all areas of the state.

3 The WUTC has applied such statute historically as
4 prohibiting an Oregon-based company from performing operations as
5 a solid waste collection company in the State of Washington for
6 disposal in the State of Oregon without first obtaining a
7 Certificate of Public Convenience and Necessity from the WUTC.

8 **Cause No. TG-1911, Evergreen Waste Systems, Inc., (May 1986)** The
9 Commission has also ruled that a company which provides garbage
10 and refuse collection service to a single customer is not exempt
11 from regulation under Chapter 81.77. **In re Arrow Sanitary**
12 **Service, Inc., d/b/a Oregon Paper Fiber, Cause No. TG-2197 (Dec.**
13 **1989).**

14 The most recent decision of the Commission in respect
15 to the interstate commerce issue is **Enoch Rowland, d/b/a**
16 **Kleenwell Biohazard and General Ecology Consultants, Docket No.**
17 **TG-920304 (Jan. 1993)** referred to herein as "Kleenwell".
18 Kleenwell cited to the Commission the cases of **Medigen of**
19 **Kentucky, Inc., Medigen of Pennsylvania, Inc., v. Public Service**
20 **Commission of West Virginia, 787 F.Supp. 590, and 787 F. Supp.**
21 **602 (S.D. W.Va. 1991)**, as determining that the requirement for
22 making a showing of convenience and necessity prior to engaging
23 in the transportation of medical waste across a state line
24 violates the rights of an out-of-state corporation which engaged
25 solely in the interstate transportation of waste. The Commission
26 distinguished the operations of Kleenwell from those of Medigen
27 in ruling that Kleenwell was engaged as a solid waste collection
28 company in intrastate operations. The fundamental determination
of the Commission that Kleenwell was operating in intrastate
commerce was based upon a conclusion that Kleenwell's waste
generators were indifferent as to whether or not the waste was
disposed of in state or out of state and the intent to move the
material in interstate commerce was solely the intent of
Kleenwell. As a second proposition, the Commission ruled that if
there is any interstate commerce at all, it does not begin until
the waste has begun to move as an article of trade from one state

1 to another and that the collection of the material by Kleenwell
2 and placing it in storage was solely an intrastate activity prior
3 to any movement in interstate commerce. As a third proposition,
4 the Commission ruled that solid waste collection is a local
5 service not affecting interstate commerce. In this respect, the
6 Commission stated specifically:

7 "The principal concern of the 'shipper' (waste
8 generator) is not where the waste goes but that it does
9 go; there is no customer on the other end.³ Unlike the
10 transportation of freight having value where the
11 transportation is the essence of the transaction
12 between the shipper and the hauler, the transportation
13 of waste for disposal is incidental to the collection
14 process, and irrelevant to the purpose of the
15 'shippers.' A collection company's election to follow
16 the purely local function of collecting waste with an
17 interstate movement of the collected waste does not
18 make the collection process an interstate service."

19 Footnote 3 states:

20 "Moreover, by the very nature of the service, the waste
21 is co-mingled precluding a shipper-by-shipper selection
22 of specific disposal sites. Also, the state, through
23 county comprehensive solid waste plans, has largely
24 preempted any individual determination regarding
25 disposal sites. See, Chapter 70.95 RCW." *Order TG-*
26 *920304, page 9.*

27 The Commission goes on to quote from *Order M.V.G. No.*
28 *1451, In re Sure-Way Incineration, Inc., App. No. GA-868 (Nov.*
1990):

19 "It is not necessary to request authority from the
20 Commission to transport the waste across state lines
21 and, in fact, the Commission has no power to grant
22 authority of that nature. . ." (p. 7) *Order TG-920304,*
23 *p.2.*

24 At page 11 of the Kleenwell decision, the Commission
25 states:

26 "The Commission has never taken the position that the
27 foreign portions of isolated long haul movement of
28 biomedical waste from a Washington warehouse to an out-
of-state disposal facility is a movement over which the
Commission exercises jurisdiction."

1 In attempting to apply the Kleenwell decision to the
2 facts of the instant proceeding, it is difficult to determine
3 what activity involved in this proceeding would be considered by
4 the Commission as the local activity of solid waste collection.
5 As noted above, Rust operates construction and land-clearing
6 equipment in removing the sludge from the Alcoa site and loading
7 it into top-loading containers mounted on wheeled trailers or
8 chassis at the site. This is clearly a local activity and
9 involves a form of collection of the material from the site to
10 place it in the container for transportation. Rust has nothing
11 whatsoever to do with the transportation of the material across
12 the highways of the state and in fact is not named as a party
13 respondent in the proceeding.

14 OWS contracts with Rust for removal of the material and
15 acceptance of the material as ADC at its facility in Oregon. OWS
16 controls the transportation by contracting with T & G and Union
17 Pacific Railroad for movement of the loaded containers of sludge
18 from the Alcoa site over the public highways of Washington and
19 Oregon to a railroad siding for loading onto flat cars for
20 movement onto CRLRC in Arlington, Oregon. Insofar as T & G and
21 the railroad are concerned, OWS is the shipper and/or generator
22 who has evidenced a specific intent to have the material
23 transported from the origin site in Washington to the destination
24 site in Oregon in a thru COFC intermodal movement. OWS does not
25 accomplish any portion of the loading of the containers or the
26 transportation of the material.

27 T & G transports empty containers from Oregon to
28 Washington and loaded containers from Washington back to Oregon.
T & G does not perform any function of collecting the material
from the Alcoa site for loading it into the container, but
performs solely the specific isolated long haul transportation
function between Washington and Oregon. The bills of lading
under which T & G transports the material shows the origin as
Vancouver, Washington, and the destination as Arlington, Oregon.
(OWS Ex. H & I)

1 The only evidence in this proceeding relating to the
2 intent of the parties regarding the destination and/or disposal
3 site of the material shows a clear and persisting intent on the
4 part of all parties that the material go to CRLRC at Arlington,
5 Oregon. There is no co-mingling of the material either before or
6 during transportation and no evidence of any right by any party
7 to divert the material to a different location other than
8 Arlington, Oregon.

9 The activities of Rust in this proceeding are similar
10 in effect to the activities of Crosby & Overton, Inc. in Order
11 M.V. No. 130721, App. P-66968 (Oct. 1984). In that case, Crosby
12 & Overton engaged in the business of cleanup of industrial and
13 marine facilities sites and areas. In Order M.V. No. 130721, at
14 page 3, the Commission held:

15 "Tank cleaning is not a regulated activity. The
16 protestants contend strenuously, the applicant agreed
17 at oral argument, and the Commission rules, that tank
18 cleaning as an activity is not regulated by this
19 Commission and that the transportation of liquid
20 materials and liquid hazardous materials resulting from
21 tank cleaning or environmental cleanup is incidental to
22 that activity and is not regulated by the Commission."
23 (Referring to proprietary carriage)

24 The Commission went on to rule that when Crosby &
25 Overton utilized its own equipment to transport the material from
26 the tank cleaning process to a reprocessing center that it was
27 engaged in private carrier operations which were merely
28 incidental to the conduct of the specialized tank cleaning
operations. The Crosby & Overton ruling would appear to apply to
the activities of Rust in picking up the sludge and loading the
containers as being an activity not regulated by the WUTC.

If the material from the tank cleaning work of Crosby
and Overton became the property of said company upon removal from
the truck for proprietary transportation purposes, it would
appear that in this proceeding the sludge becomes the property of
Rust once removed from the settling pond. This would then make
Rust the "shipper" of the material when the services of a for-
hire carrier are used. The fixed and persisting intent of Rust

1 is that the sludge be moved from Vancouver, WA to Arlington, OR
2 in continuous movement. (D-CZ, p.2) Since the sludge is not
3 comingled with any other material, the shipper's intent should be
4 a major factor in determining the interstate nature of the
5 shipments in this proceeding. Kleenwell (supra).

6 The activities of T & G certainly do not appear to fall
7 within this Commission's prior determinations and definition of
8 solid waste collection as a local activity. T & G does not hold
9 itself out to transport solid waste. It is in the business of
10 providing the transportation of cargo containers having a prior
11 or subsequent movement by water or rail. (D-DW, p.1) T & G has a
12 contract to perform services exclusively for OWS and has no
13 relationship directly with either Rust or Alcoa. T & G is not
14 affiliated in any way with OWS or Rust. The sole and singular
15 services provided by T & G is the transportation of an empty
16 container from Oregon to Washington and the transportation of a
17 full container from Washington back to Oregon as a part of an
18 intermodal COFC interstate movement. T & G does not consider the
19 material as solid waste, but handles it exclusively under bills
20 of lading indicating:

21 "To be recycled as daily cover at Columbia Ridge
22 Landfill and Recycling Center." (OWS Ex. H & I)

23 T & G was hired solely for the purpose of participating
24 in the intermodal movement of the empty and loaded containers
25 between Oregon and Washington. T & G does not perform any
26 functions that could be considered as local intrastate solid
27 waste collection service.

28 Accordingly, the facts presented in this proceeding do
not appear to involve any local in-state activities by Rust, OWS
and/or T & G that are central to the health, safety and welfare
of the citizens of the state so as to require regulation by the
WUTC under RCW Chapter 81.77.

C. FEDERAL PREEMPTION OF COFC INTERMODAL TRANSPORTATION
SERVICES.

Another matter of consideration in this proceeding is
whether or not the State of Washington has the ability to require

1 T & G to obtain any type of authority to engage in the COFC
2 intermodal interstate transportation activity involved in
3 transporting the sludge from Washington to Oregon. One of the
4 issues raised in the Kleenwell case (supra) was the possibility
5 of federal preemption. In Kleenwell, the Commission cited Joray
6 Trucking Corp Common Carrier Application, 99 MCC 109 (1965) and
7 Transportation of "Waste" Products for Reuse and Recycling, 114
8 MCC 92 (1971), as holding that ICC jurisdiction does not apply to
9 the motor carrier transportation of garbage or refuse across a
10 state line. (Order TG-920304, p. 15) In Joray, the ICC held that
11 motor carrier transportation of rock and demolition debris was
12 not subject to full economic regulation under Part II of the
13 Interstate Commerce Act and that the activity proposed appeared
14 to be private carriage since the applicant held beneficial
15 ownership of the material at the time of transportation. 99 MCC
16 at 110.

17 The case of Transportation of "Waste" Products for
18 Reuse and Recycling, 114 MCC 92 (1971), similarly ruled that the
19 transportation of trash and rubbish, which had no property value,
20 solely for the purpose of disposal was not subject to economic
21 regulation by the ICC under Part II of the Interstate Commerce
22 Act (114 MCC at 104). Such case also held however that articles
23 to be recycled assumed all the characteristics of "property"
24 under Part II of the Act and were subject to full economic
25 regulation. (114 MCC at 105). Neither case makes any reference
26 to rail transportation and/or intermodal rail truck
27 transportation under Part IV of the Interstate Commerce Act.

28 The Federal government has in fact preempted the field
of intermodal container on flat car transportation services.
Under 49 USC §10505, the Interstate Commerce Commission ("ICC")
is authorized to exempt rail carrier transportation service from
regulation under certain specified conditions. The ICC has acted
to exempt railroad and truck transportation as part of a
continuous intermodal movement under 49 CFR 1039.11 and 1090.2.
It has been judicially determined that such exemption preempts
intrastate regulation of TOFC/COFC traffic. ICC v. Texas, 479 US

1 450, 93 L.Ed.2d 809, 107 S.Ct. 787 (1987). It appears that such
2 exemption preempts state regulation of intermodal COFC activities
3 to the extent that any state commission's assertion of regulatory
4 jurisdiction is inconsistent with the federal standard. As this
5 regulation relates to Part IV of the Act, neither Joray supra
6 nor Transportation of "Waste" (supra) apply.

7 V.

8 CONCLUSION

9 Based upon the stipulated facts in this proceeding, there
10 are three totally separate and distinct reasons that the
11 Commission should dismiss the Complaint in this proceeding.

12 1. The material being transported has value and as
13 such is property subject to the jurisdiction of the ICC and
14 outside the scope of WUTC regulation under Chapter 81.77
15 RCW; and

16 2. Neither OWS or T & G perform any local
17 "collection" activities which are central to the health,
18 safety and welfare of the citizens of the State of
19 Washington; and

20 3. The transportation services being performed by T &
21 G are part of an intermodal truck-rail container on flat car
22 movement which has been exempted from regulation under Part
23 IV of the Interstate Commerce Act preempting any regulation
24 by the WUTC.

25 Any one of such reasons is a sufficient legal basis to rule
26 in favor of respondents herein.

27 WHEREFORE, it is respectfully requested that the Complaint
28 be denied and dismissed in its entirety.

Respectfully submitted,

DAVIS, BALDWIN & HAFFNER

By: _____

Jack R. Davis
Attorney for Respondent
T & G Trucking & Freight
Co.

CERTIFICATE OF SERVICE

I hereby certify that I have this date served the foregoing Initial Brief of Respondent, T & G Trucking & Freight Co., upon William Rasmussen, Attorney, 2600 Century Square, 1501 4th Avenue, Seattle, WA 98101; Cynthia Horenstein, Attorney, 900 Washington Street, Ste. 900, PO Box 694, Vancouver, WA 98666; James Sells, Attorney, 510 Washington, Bremerton, WA 98310; and Steve Smith, Assistant Attorney General, Heritage Plaza Building, 1400 S. Evergreen Park Drive SW, Olympia, WA 98504, Mail Stop FY-11, by mailing a copy thereof, properly addressed, with first class postage prepaid.

DATED this 23rd day of November, 1994.



Jack R. Davis

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