

Solid Waste Removal Contract Held Unenforceable Due to Unlicensed Operator

Hi Tech Trans, LLC v. Avanti Demolition & Carting Corp.

by Joao Ferriera Magalhaes

Any doubts regarding the viability of engaging in solid waste removal outside the purview of state regulatory authority were resolved in *Hi Tech Trans, LLC v. Avanti Demolition & Carting Corp.*, where the Appellate Division held that a contract between the operator of a waste loading facility and a solid waste hauler was void *ab initio* as a matter of public policy because the operator had been unlicensed during the entire term of the contract.¹ The operator, Hi Tech Trans, LLC, had sought to collect outstanding solid waste dumping fees owed under the contract by the solid-waste hauler, Avanti Demolition & Carting Corp. The court ruled that Hi Tech's failure to comply with state environmental regulations rendered the contract unenforceable, and further found that the resulting unenforceability did not unjustly enrich Avanti.

In 2001, pursuant to a license agreement with the Canadian Pacific Railroad (CPR), Hi Tech began operating a construction and demolition debris bulk waste loading facility located at the Oak Island Rail Yard in Newark. Waste delivered to the transload facility would then be loaded onto CPR rail cars for transport to out-of-state disposal facilities. The agreement with CPR required that Hi Tech obtain all necessary permits to operate the facility, and it conditioned use of the premises upon compliance with

federal, state, and municipal authorities. Hi Tech, however, never came into compliance with New Jersey's Solid Waste Management Act (SWMA).² Instead, Hi Tech would ultimately seek to argue that its activity constituted "transportation by rail carrier," and that its activity fell within the exclusive jurisdiction of the Surface Transportation Board (STB) under the Interstate Commerce Commission Termination Act (ICCTA),³ thus preempting the authority of the New Jersey Department of Environmental Protection (NJDEP).⁴

In 2003, Hi Tech and Avanti entered into an agreement allowing Avanti to dump solid waste at the facility. Avanti did so for a few months, dumping about 2,600 tons of construction and demolition debris bulk waste at the facility. Avanti defaulted under its fee arrangement with Hi Tech, resulting in an outstanding balance of \$258,174.65. In May 2003, shortly before Avanti ceased dumping in June, the NJDEP issued an administrative order citing Hi Tech for violating the SWMA by operating without a transload facility permit, and without a certificate of public convenience and necessity.⁵ Hi Tech was ordered to cease operations at the facility within 20 days.

Upon Hi Tech's application for emergent relief, the matter was transferred to the New Jersey Office of Administrative Law (OAL), which concurred with Hi Tech's

argument that the NJDEP was preempted, recommending that Hi Tech's activity be considered "transportation by railroad," since its transload facility "served the railroad in fulfilling its task as a common carrier," thus placing the activity within the exclusive jurisdiction of the STB.⁶

Hi Tech, however, had also sought relief from the STB itself in June 2003, which had rejected this same argument. Additionally, Hi Tech had filed a complaint in the United States District Court for the District of New Jersey—seeking a declaration that federal law preempted state regulations—which had been dismissed on grounds of abstention, with dismissal later affirmed by the Third Circuit.⁷

The NJDEP subsequently reversed the OAL's recommendation, ordering that Hi Tech cease operating its facility. In concluding that its authority was not preempted by federal law, the NJDEP relied on the STB's findings that Hi Tech was not a rail carrier, but instead a shipper, since "[b]y 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..."⁸ The NJDEP's decision was affirmed by the Appellate Division, and Hi Tech's subsequent petition for certification to the Supreme Court was denied.⁹

Subsequently, when Hi Tech

brought suit in the Law Division to recover the outstanding balance owed by Avanti in 2006, Avanti relied on the aforesaid procedural history surrounding Hi Tech's failure to comply with the SWMA. Avanti argued that the agreement was of no legal effect, since Hi Tech had been unlicensed during the term of the agreement. The court agreed, ruling that "Hi Tech did not have the legal authority to engage in solid waste disposal."¹⁰

On appeal, Hi Tech posited that it had justifiably relied on the belief "that in the context of rail transload facilities, [NJDEP permitting requirements] can be and are often preempted by the ICCTA," and it noted "the uncertain and evolving state of this field of law."¹¹ To establish justifiable reliance, Hi Tech referenced an informal STB staff opinion (allegedly stating that the STB had jurisdiction over the facility), it cited a 2003 NJDEP notification concerning discussion of partial federal preemption of solid waste transfer facilities, and it stated that the issue of whether it was subject to state regulations was debatable at the time of its contract with Avanti.¹² In addition, Hi Tech argued that the lower court failed to consider the public benefits derived from its services, and urged the Appellate Division to invoke an equitable balancing test in determining whether the decision should have retroactive effect. Hi Tech further contended, in the alternative, that irrespective of the contract's legality or illegality, Avanti would be unjustly enriched should it be allowed to rely on the lower court's ruling as a means to escape its liability to pay for previously rendered services, and thus that the court should apply the equitable exception to the general rule of non-enforcement of illegal contracts.¹³

Although the Appellate Division commented on the apparent "visceral appeal" of Hi Tech's arguments, these positions were rejected in their entirety under a strictly objective analysis. In rendering its

decision, the court first ruled that Hi Tech's activity clearly fell within New Jersey's regulatory scheme for regulating solid waste disposal, codified at N.J.S.A. 13:1E-1 to -99.47 and N.J.A.C. 7:26-1.1 to-17.26.¹⁴

Having found that Hi Tech had operated a solid waste facility without either a permit or a certificate of public necessity and convenience, the court proceeded to dismiss Hi Tech's purported good faith arguments on several grounds:

1. The agreement with CPR required proper licensing;
2. Hi Tech knew it had not obtained rail carrier status from the STB, having submitted notices to the STB, which were subsequently withdrawn, and having never sought a formal declaration; and
3. Hi Tech failed to provide a plausible rationale for why their facility was exempt from New Jersey regulations at the time of the Avanti contract.¹⁵

The court noted that Hi Tech's unlawful operation of the facility was attributable to "lax governmental regulation and enforcement," rather than complex or novel issues of law.¹⁶

Hi Tech's final arguments were likewise disregarded by the court. In dismissing Hi Tech's arguments concerning retroactivity, the court ruled that the illegality of the contract with Avanti arose from the moment Hi Tech commenced operating a transload facility without proper licensing. Thus, later court rulings merely "affirmed that such operation was indeed illegal."¹⁷

Lastly, with regard to potential equity considerations, the court noted that Hi Tech had performed a service, and that Avanti had received a benefit. Nevertheless, the court found that Hi Tech had represented to Avanti compliance with state and federal law, a misrepresentation that ultimately resulted in Avanti being named a defendant in litigation.¹⁸

Hi Tech Trans serves as a

reminder that courts will sternly apply state environmental regulations. Any operators or users of solid waste facilities must, at the onset of any commercial transaction, conduct due diligence regarding compliance with the applicable state regulatory regime. Speculative defenses are no substitute for conservative practice. ■

ENDNOTES

1. 2009 WL 1257676 at **6-9 (N.J. Super.App. Div. May 8, 2009).
2. See N.J.S.A. 13:1E-1 to -99.47.
3. *Hi Tech Trans*, 2009 WL 1257676 at *1 (citing 49 U.S.C.A. § 10501(b)).
4. *Id.*
5. See N.J.A.C. 7:26-2.8, 7.26H-1.6; see also N.J.S.A. 13:1E-1 to -99.47.
6. *Hi Tech Trans*, 2009 WL 1257676 at *1 (citations omitted).
7. *Id.* (citing *High Tech Trans, LLC v. New Jersey*, 382 F.3d 295 (3d Cir. 2004)).
8. *Id.* at **1, 7-8 (citations omitted).
9. *Id.* at *1 (citing *Dep't of Envtl. Prot. v. Hi Tech Trans, LLC*, 181 N.J. 543 (2004)).
10. *Id.* at *3.
11. *Id.*
12. *Id.* at **3-4.
13. *Id.* (citing *Lowenschuss v. Resorts Int'l, Inc.*, 181 F.3d 505, 512-13 (3d Cir. 1999)).
14. *Id.* at *6.
15. *Id.* at **6-8.
16. *Id.* at *7.
17. *Id.* at *8.
18. *Id.* at *9.

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