

NEW YORK STATE
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

-----X
: Application of :
: J.F. LOMMA, INC. :
: for a declaratory ruling Pursuant :
: to Section 204 of the State :
: Administrative Procedure Act :
: :
-----X

DECLARATORY RULING
72-04

INTRODUCTION

This matter has been referred to the New York State Department of Environmental Conservation ("Department") Office of General Counsel by the Department's Office of Hearings for a declaratory ruling pursuant to 6 NYCRR §481.10(f)(4). The sole issue to be decided is whether J.F. Lomma, Inc. ("Lomma"), an out-of-state company, must pay a regulatory fee assessed by the Department in connection with a waste transporter permit that was issued to Lomma but was never used.

BACKGROUND

On January 12, 1987, the Department sent Lomma an invoice assessing a \$700.00 Waste Transporter Program Fee based on a permit that was issued on November 19, 1985, to Lomma for the transportation of hazardous waste in New York

State through November 30, 1986. In accordance with Environmental Conservation Law ("ECL") §72-0201(5) and 6 NYCRR Part 481, Lomma disputed imposition of the fee. The dispute was referred to the Department's Office of Hearings. After a prehearing conference, the Administrative Law Judge ("ALJ") determined that no issues of fact were in dispute and, acting pursuant to 6 NYCRR §481.10(f)(4), cancelled the hearing, prepared a report summarizing the material facts and disputed issues, and referred the matter to the Office of General Counsel for a declaratory ruling.

According to the ALJ's report, Lomma is a New Jersey company that needed a New York State Waste Transporter Permit in order to bid on a waste transportation project involving the hauling of burned debris from Long Island, New York to Indiana. Lomma applied for and obtained permit number JA-214, "industrial" category, issued November 19, 1985, with an expiration date of November 30, 1986, for two vehicles bearing the license plates numbers "681TEG" and "753TOA". Lomma was unsuccessful in its bid and therefore never actually used the permit.

Lomma contends that it should not have to pay a regulatory fee because it never used its permit and that, under these circumstances, the permitting system is a restraint on trade.

ANALYSIS

The Waste Transporter Program Fees are set forth in ECL Article 72, Title 5 and its implementing regulations, 6 NYCRR Part 484. ECL §72-0502 states that:

All persons required to obtain a permit, certificate or approval pursuant to the waste transporter permit requirements set forth in title three of article twenty-seven of this chapter shall submit annually to the department a fee in an amount to be determined as follows:

1. In the case of persons permitted pursuant to title three of article twenty-seven of this chapter to transport industrial-commercial waste:

- (a) \$500.00 for the first vehicle permitted pursuant to title three of article twenty-seven of the chapter and

- (b) 200.00 for each additional vehicle permitted (emphasis added).

The statutory language makes it clear that fees are owed by all persons who obtain a waste transporter permit (or who conduct activities which require such a permit) and does not limit the imposition of fees to circumstances where the permit was actually utilized.

This interpretation is reinforced by ECL §72-0201(1), which states:

Notwithstanding any general or special law to the contrary, all persons who require a permit or approval pursuant to a state environmental regulatory program, or who are subject to regulation under a state environmental regulatory program shall submit a fee as authorized under this article annually to the Department, on such forms and at such times as specified by the department.

Lomma, as the holder of a Department Waste Transporter Permit, is a regulated entity which therefore must pay a fee.

This issue concerning fee liability for a permit not yet in use was raised in the case of Bohlander v. Williams, 494 N.Y.S.2d 155, 114 A.D.2d 540 (3d Dept. 1985). In that case, the Department assessed a fee upon Westchester County as the holder of a State Pollution Discharge Elimination System ("SPDES") Permit even though the facility was not yet operational. The County argued that it should not have to pay a fee because ECL §72-0602 imposed fees only on those "discharging" at a specified daily rate. The court decided that since ECL §72-0602 only authorized a fee for a facility engaged in "discharging" no fee liability enures during the construction process.¹ 494 N.Y.S.2d at 156.

The circumstances in the present case are quite different from those in Bohlander. Unlike former ECL §72-0602, the

¹ The Legislature saw fit to reverse the court's determination by changing the statutory language to state that fees are owed by those "having a permit to discharge or discharging" at a particular daily rate. (Chapter 62 of the laws of 1989).

statute here in question, ECL §72-0502, does not contain any language hinging fee liability to the use of a permit. ECL §72-0502 specifically states that the amount of fees owed is based, not upon the amount a waste transporter vehicle is utilized or on the amount of waste hauled, but on the number of vehicles that have a permit.

Lomma argues that imposing the Waste Transporter Program Fee is a restraint on trade. However, the imposition of this fee does not discriminate against out-of-state companies which bid on jobs in New York State. These fees are imposed on all permitted transporters, regardless of whether the transporter is located in New York State. If a New York State transporter applied for and received a waste transporter permit, the in-state transporter would also be subject to the fee whether or not the permit was utilized. Consequently, imposition of the fee is a permissible exercise of this State's regulatory powers and is not in violation of the Commerce Clause of the United States Constitution. 15 C.J.S. Commerce §60 (1967); e.g. Southern Pacific Co. v. State of Arizona ex rel. Sullivan 325 U.S. 761, 65 S.Ct. 1515 (1945) Huron Portland Cement Co. v. City of Detroit, 362 U.S. 440, 443 S.Ct. 813 (1960).

CONCLUSION

Under ECL §72-0502, during the fee year in question, Lomma was a permitted industrial-commercial waste transporter which must pay regulatory program fees, and related interest and penalties.

DATED: Albany, New York
September 19th 1989


Marc S. Gerstman