

IN THE SUPREME COURT OF OHIO

08-0359

TRANS RAIL AMERICA, INC.,

Appellee,

v.

JAMES J. ENYEART, M.D.,
HEALTH COMMISSIONER,
TRUMBULL COUNTY HEALTH
DEPARTMENT

Appellant.

CASE NO. 2007-1549

On Appeal from the Franklin County
Court of Appeals, Tenth Appellate
District

**REPLY BRIEF OF APPELLANT JAMES J. ENYEART, M.D.,
HEALTH COMMISSIONER, TRUMBULL COUNTY HEALTH DEPARTMENT**

RONALD JAMES RICE CO., LPA

Robert C. Kokor*
48 West Liberty Street
Hubbard, Ohio 44425
Phone: (330) 534-1901
Fax: (330) 534-3933
*Counsel for Appellee
James J. Enyeart, M.D., Health
Commissioner*

ULMER & BERNE, LLP

Robert J. Karl*
Sherry L. Hesselbein
88 E. Broad Street, Suite 1600
Columbus, Ohio 43215
Phone: (614) 229-0000
Fax: (614) 229-0001
*Counsel for Amicus Curiae
Hubbard Environmental and Land Preservation*

**MORGANSTERN, MACADAMS &
DEVITO CO.**

Michael A. Partlow*
623 West St. Clair Avenue
Cleveland, Ohio 44113
Phone: (216) 621-4244
Fax: (216) 621-2951
*Counsel for Appellant
Trans Rail America, Inc.*

**NANCY H. ROGERS, Attorney General of Ohio
BENJAMIN C. MIZER*, Solicitor General**

Kimberly A. Olson
Deputy Solicitors
Sari L. Mandel
Assistant Attorney General
30 East Broad Street, 17th Floor
Columbus, Ohio 43215
Phone: 614-466-8980
Fax: 614-466-5087
Counsel for Amicus Curiae State of Ohio

FILED
OCT 06 2008
CLERK OF COURT
SUPREME COURT OF OHIO

WALTER & HAVERFIELD, LLP

Michael A. Cyphert*

Leslie G. Wolfe

Jonathon R. Goodman

The Tower at Erieview

1301 E. Ninth Street, Suite 3500

Cleveland, Ohio 44114-1821

Phone: (216) 781-1212

Fax: (216) 575-0911

Counsel for Amicus Curiae

*Construction and Demolition Assoc.
of Ohio, Inc.*

* Counsel of Record

FROST BROWN TODD, LLC

Terrence M. Fay

Christopher S. Habel

10 W. Broad Street, STE 2300

Columbus, Ohio 43215

Phone (614) 464-1211

Fax: (614) 464-1737

Counsel for Amicus Curiae

National Solid Waste Management Assoc.

TABLE OF CONTENTS

INTRODUCTION1

REPLY ARGUMENT1

CONCLUSION.....3

PROOF OF SERVICE.....4

TABLE OF AUTHORITIES

CASES

Cty. Waste Co., Inc. v. Schregardus (1998), EBR 043952, 1998 Ohio ENV LEXIS 121

Dayton Power & Light Co. v. Schregardus (1997), 123 Ohio App.3d 476, 479.....2

Dr. Kevin Lake v. Jones (2003), ERAC 255300, 2003 Ohio ENV LEXIS 112

STATUTES AND REGULATIONS

Ohio Adm. Code 3745-37-023

R.C. 3714.032

INTRODUCTION

Trans Rail submitted to the Trumbull County Health Department ("Health Dept.") its initial application for a license to operate a CD&D facility on May 21, 2004. The Health Dept. notified Trans Rail that the application was incomplete. Over a year and half later, Trans Rail submitted additional information, but the Health Department notified Trans Rail the application was still incomplete. Trans Rail then submitted two follow-up letters to the Health Dept., but neither of the letters completed the application. The Health Department notified Trans Rail by letter dated May 31, 2006, that its application was incomplete and could not be considered. Trans Rail appealed to ERAC for review of the letter in which the Health Department had determined the application to be incomplete.

Despite the Appellee's position, the only issues presented before this court are: 1) Does ERAC have the authority to hear an appeal claiming the Health Dept. failed to act; and 2) If the answer is in the negative, then is the letter informing Trans Rail that its application was incomplete an appealable action by the Health Dept? As ERAC properly determined, it has authority to review only final actions by the Health Dept., and the letter simply informing Trans Rail that its application was incomplete was not a final action that could be appealed.

REPLY ARGUMENT

Clearly, in view of years of established law, as delineated in the Health Dept.'s Merit Brief, ERAC only has authority to review a final act or action by the Health Dept. Thus, the next step is to determine whether the letter from the Health Dept. notifying Trans Rail that its application is incomplete constitutes a final act or action.

The question of whether a particular document qualifies as an act or action is a question of fact and necessarily involves an investigation into both the form and substance of the document. *Cty. Waste Co., Inc. v. Schregardus* (1998), EBR 043952, 1998 Ohio ENV LEXIS 12

at 6. As discussed in the Health Dept.'s Merit Brief, the Health Dept. letter informing Trans Rail that the application was incomplete certainly does not qualify as a final act or action based upon its form. Therefore, we must then look to the substance of the letter at issue. If the letter does not satisfy the traditional indicia relating to form, it may still nonetheless qualify as a final act or action if the substance of the document adjudicates with finality any legal rights of the appealing party. *Dr. Kevin Lake v. Jones* (2003), ERAC 255300, 2003 Ohio ENV LEXIS 11; see also, *Dayton Power & Light Co. v. Schregardus* (1997), 123 Ohio App.3d 476, 479.

Trans Rail argues in its merit brief that, due to the amendment of R.C. 3714.03, the letter of the Health Dept. informing Trans Rail that its application was incomplete took with finality from Trans Rail a legal right, because any application submitted now will be reviewed under the more stringent requirements under the amended statute. (Appellee Merit Brief p. 7). Trans Rail argues that it had a "right" to have its application reviewed under the prior statute, and that the letter from the Health Dept. has taken away that right. However, that argument is without merit. Trans Rail had the ability to, and failed to, resubmit a completed application prior to the July 1, 2005 deadline imposed by the amendment. Any "right" Trans Rail may have had in this regard was taken from it by its own neglect, not any "action" taken by the Health Dept.

Had Trans Rail simply provided the requested information, the Health Dept. could have found the application to be complete. Once found complete, the Health Dept. could then have determined whether Trans Rail met the requirements for a license. Instead, Trans Rail waited over a year to try to rehabilitate the application, thereby ending its opportunity to be reviewed under the requirements of the prior statute by its own volition.

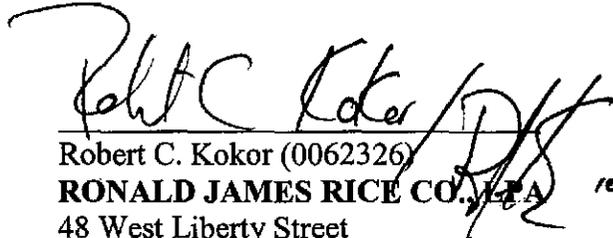
The Health Dept. letter did not take with finality one of Trans Rail's legal rights, Trans Rail itself took away its ability to have its application reviewed under the prior statute.

CONCLUSION

The Health Dept. can only consider a complete application for a CD&D landfill facility, pursuant to Ohio Adm. Code 3745-37-02. Trans Rail failed to submit a complete application. The Health Dept. letter informing Trans Rail of the incomplete status of its application is not a final act or action that is reviewable by ERAC.

For all of the reasons set forth above, Appellant James J. Enyeart, M.D., Health Commissioner respectfully requests this Court reverse the decision of the Court of Appeals and reinstate the order of dismissal entered by the Environmental Review Appeals Commission.

Respectfully submitted,



Robert C. Kokor (0062326)

RONALD JAMES RICE CO., L.P.A.

48 West Liberty Street

Hubbard, Ohio 44425

Phone: (330) 534-1901

Fax: (330) 534-3933

Counsel for Appellee

James J. Enyeart, M.D., Health

Commissioner

10-6-08

PROOF OF SERVICE

I certify that a copy of the foregoing was sent by ordinary U.S. mail this 6th

day of October, 2008, to all counsel of record. Counsel of record are:

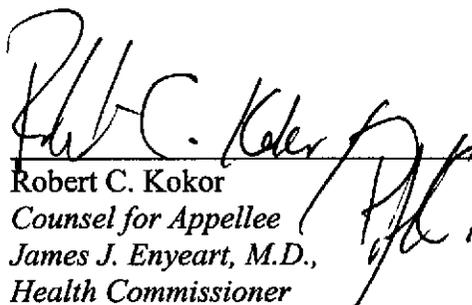
Michael A. Cyphert
Leslie G. Wolfe
Jonathon R. Goodman
WALTER & HAVERFIELD, LLP
The Tower at Erieview
1301 E. Ninth Street, Suite 3500
Cleveland, Ohio 44114-1821
*Counsel for Amicus Curiae
Construction and Demolition Assoc.
of Ohio, Inc.*

ULMER & BERNE, LLP
Robert J. Karl*
Sherry L. Hesselbein
88 E. Broad Street, Suite 1600
Columbus, Ohio 43215
Phone: (614) 229-0000
Fax: (614) 229-0001
*Counsel for Amicus Curiae
Hubbard Environmental and Land Preservation*

FROST BROWN TODD, LLC
Terrence M. Fay
Christopher S. Habel
10 W. Broad Street, STE 2300
Columbus, Ohio 43215
Phone (614) 464-1211
Fax: (614) 464-1737
*Counsel for Amicus Curiae
National Solid Waste Management Assoc.*

NANCY H. ROGERS, Attorney General of Ohio
BENJAMIN C. MIZER, Solicitor General
KIMBERLY OLSON, Deputy Solicitor
Sari L. Mandel
Assistant Attorney General
30 East Broad Street, 17th Floor
Columbus, Ohio 43215
Counsel for Amicus Curiae State of Ohio

MORGANSTERN, MACADAMS &
DEVITO CO.
Michael A. Partlow
623 West St. Clair Avenue
Cleveland, Ohio 44113
Phone: (216) 621-4244
Fax: (216) 621-2951
*Counsel for Appellant
Trans Rail America, Inc.*


Robert C. Kokor
Counsel for Appellee
James J. Enyeart, M.D.,
Health Commissioner 10-6-08