[Cite as *State ex rel. Railroad Ventures, Inc. v. Columbiana Cty. Port Auth.*, 2004-Ohio-391.]

STATE OF OHIO, COLUMBIANA COUNTY
IN THE COURT OF APPEALS
SEVENTH DISTRICT

STATE EX REL., RAILROAD VENTURES, INC., RELATOR, VS. COLUMBIANA COUNTY PORT AUTHORITY, ET AL., RESPONDENTS.	))))))))))	CASE NO. 2002 CO 26 OPINION and JOURNAL ENTRY

CHARACTER OF PROCEEDINGS: Complaint in Mandamus

JUDGMENT: Summary judgment granted in part for Relator. Summary judgment granted in part for Respondents. Limited writ to issue.

APPEARANCES:

For Relator:

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JUDGES:

Hon. Gene Donofrio
Hon. Joseph J. Vukovich
Hon. Mary DeGenaro

Dated: January 23, 2004

PER CURIAM.

{¶1} Complaint in mandamus was filed on May 3, 2002 seeking an order to compel Respondent to produce certain documents asserted to be public records under R.C. 149.43, Ohio's Public Records Act.

{¶2} The case was removed to the United States District Court for the Northern District of Ohio and subsequently remanded to this Court for determination. The federal district court held that no federal question was presented and that preemption was to be decided by the state court. *Railroad Ventures, Inc. v. Columbiana Cty. Port Auth.* (Aug. 20, 2002), case No. 4102 CV 1080, Northern District.

{¶3} On September 25, 2002, Respondents filed an answer generally denying that the records sought are subject to disclosure pursuant to Ohio's Public Records Act. Respondents further filed affirmative defenses alluding to ongoing litigation between the parties arising out of orders issued by the Surface Transportation Board (hereafter Board) relative to the ownership and operation of real estate interests transferred to the Respondent Columbiana County Port Authority (hereafter CCPA) by the Relator Railroad Ventures, Inc. (hereafter RVI). Respondents further assert certain records relating to the operation of the railroad are subject to non-disclosure pursuant to 49 U.S.Code Section 11904. Finally, Respondents argue that RVI is attempting to collaterally obtain records on payments from an escrow account used to repair the track, prior to a required final accounting before closure of the account, which is contrary to orders of the Board.

{¶4} On January 22, 2003, this Court put on a discovery order and set a timetable for the filing of respective motions for summary judgment. On April 21, 2003, RVI filed its motion for summary judgment with supporting documentation. On

May 2, 2003, Respondents filed their motion for summary judgment. Attached thereto is the affidavit of Tracy V. Drake, Executive Director of the Columbiana County Port Authority and a decision of the Surface Transportation Board. Relator replied on May 13, 2003. The matter now comes on for decision.

{¶5} A brief recitation of the facts as stated in *Railroad Ventures, Inc. v. Surface Transportation Bd.* (6th Circ. 2002), 299 F.3d 523 is instructive. Contentious litigation centers around a 35.7 mile rail line running between Youngstown, Ohio and Darlington, Pennsylvania. RVI purchased the rail line and disrupted rail service to several businesses using the line, with an intent to remove the line and railroad ties. Funding was obtained to repair the line and rail service was briefly restored. Shortly thereafter, a washout occurred and RVI refused to fund any repairs or cooperate with public agencies or local shippers to resume rail service. On May 19, 1999, RVI filed an application with the Board to abandon the rail line as not economically viable. CCPA then presented an offer of financial assistance ("OFA") pursuant to federal law to achieve a forced sale of the line to assure its continued operation. CCPA was found to be financially responsible and as the parties were unable to agree to a final purchase price, the Board valued the land for the entire line and for the track and materials and set a purchase price. The Board noted that RVI had attempted third party transactions in attempting to sell the utility crossing easements to First Energy Corporation, assigning rights and royalties from third party agreements to Venture Properties of Boardman, Inc., selling certain acreage to Boardman Township Park District and a contingency sale of certain acreage for a bicycle trail. The third party agreements were mostly upheld with the exception of a Grade Separated Crossing Settlement Agreement with Boardman Township, which was deemed void as against public policy. It should also be noted that the court found that due to RVI's interference with the administration of the escrow fund to repair the rail line the Board had directed CCPA to manage the funds directly and complete repairs to the rail line within 270 days. The court found that the Board acted in accordance with federal law in its actions regarding the forced sale of the rail line.

{¶6} It is well settled in law that in order to be entitled to a writ of mandamus relator must demonstrate that he, (1) has a clear legal right to the relief prayed for, (2) that respondent is under a clear legal duty to perform the requested act and (3) that relator has no plain and adequate remedy at law. *State ex rel. Hodges v. Taft* (1992), 64 Ohio St.3d 1. The burden is on RVI to demonstrate a clear right to the relief sought and a clear duty on CCPA to provide the documents.

{¶7} The standard for granting summary judgment is expressed in *Welco Industries, Inc. v. Applied Cos.* (1993), 67 Ohio St.3d 344:

{¶8} "Under Civ.R. 56, summary judgment is proper when '(1)[n]o genuine issue as to any material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing such evidence most strongly in favor of the party against whom the motion for summary judgment is made, that conclusion is adverse to that party.' *Temple v. Wean United, Inc.* (1977), 50 Ohio St.2d 317, 327, 4 O.O.3d 466, 364 N.E.2d 267, 274. Trial courts should award summary judgment with caution, being careful to resolve doubts and construe evidence in favor of the nonmoving party. *Murphy v. Reynoldsburg* (1992), 65 Ohio St.3d 356, 604 N.E.2d 138. Nevertheless, summary judgment is appropriate where a plaintiff fails to produce evidence supporting the essentials of its claim. *Wing v. Anchor Media, Ltd. of Texas* (1991), 59 Ohio St.3d 108, 570 N.E.2d 1095, paragraph three of the syllabus."

{¶9} Based on this standard we now examine whether either party is entitled to summary judgment, mindful of the burden of the Relator to clearly demonstrate a right to the relief sought.

{¶10} As noted in the complaint Relator is seeking access and inspection of:

{¶11} "All easements, crossing agreements, licenses, contracts, bank statements, bank account information, copies of checks, invoices, correspondence, notes and other documentation, without limitation, related to the ownership or operation of the real estate interests transferred from Railroad Ventures, Inc. to the

Columbiana County Port Authority pursuant to rulings of the Surface Transportation Board.

{¶12} "All bank statements, bank account information, canceled checks, invoices, contracts, work orders, correspondence, notes, and other documentation, without limitation, related to repairs of the railroad previously owned by Railroad Ventures, Inc., and use of the $375,000 escrow funds designated for such repairs."

{¶13} At issue is whether the requested information must be disclosed under the Public Records Act, Section 149.43 of the Ohio Revised Code. In pertinent part the statute reads as follows:

{¶14} "(B)(1) Subject to division (B)(4) of this section, all public records shall be promptly prepared and made available for inspection to any person at all reasonable times during regular business hours. Subject to division (B)(4) of this section, upon request, a public office or person responsible for public records shall make copies available at cost, within a reasonable period of time. In order to facilitate broader access to public records, public offices shall maintain public records in a manner that they can be made available for inspection in accordance with this division.

{¶15} "(2) If any person chooses to obtain a copy of a public record in accordance with division (B)(1) of this section, the public office or person responsible for the public record shall permit that person to choose to have the public record duplicated upon paper, upon the same medium upon which the public office or person responsible for the public record keeps it, or upon any other medium upon which the public office or person responsible for the public record determines that it reasonably can be duplicated as an integral part of the normal operations of the public office or person responsible for the public record. When the person seeking the copy makes a choice under this division, the public office or person responsible for the public record shall provide a copy of it in accordance with the choice made by the person seeking the copy."

{¶16} Unless it can be shown that the documents sought are not "public records" as defined by R.C. 149.43(A)(1) or not otherwise exempt from disclosure,

then RVI is entitled to copies of the requested information. Mandamus is the appropriate remedy to compel compliance with Ohio's Public Records Act. *State ex rel. Steckman v. Jackson* (2002), 70 Ohio St.3d 420. The Act is to be liberally construed in favor of broad access to and disclosure of public records. *State ex rel. Cincinnati Enquirer v. Krings* (2001), 93 Ohio St.3d 654; *State ex rel. Wallace v. State Med. Bd. of Ohio* (2000), 89 Ohio St.3d 431.

{¶17} Records, as defined by R.C. 149.011(6) includes: "any document, device, or item, regardless of physical form or characteristic, created or received by or coming under the jurisdiction of any public office of the state or its political subdivisions, which serves to document the organization, functions, policies, decisions, procedures, operations, or other activities of the office." The fundamental policy of R.C. 149.43 is to promote open government, not restrict it. *State ex rel. Besser v. Ohio State Univ.* (2000), 89 Ohio St.3d 396.

{¶18} Respondent Columbiana County Port Authority is a quasi-public agency created pursuant to R.C. 4582.02:

{¶19} "Any municipal corporation, township, county, or any combination of a municipal corporation, municipal corporations, township, townships, county or counties, no one of which has been included in a port authority in existence on December 16, 1964, comprising more than one subdivision, may create a port authority. A municipal corporation shall act by ordinance, a township shall act by resolution of the township trustees, and a county shall act by resolution of the county commissioners, in authorizing the creation of a port authority. A port authority created pursuant to this section is a body corporate and politic which may sue and be sued, plead and be impleaded, and has the powers and jurisdiction enumerated in sections 4582.01 to 4582.20, inclusive, of the Revised Code. The exercise by such port authority of the powers conferred upon it shall be deemed to be essential governmental functions of this state, but no port authority is immune from liability by reason thereof."

{¶20} Any political subdivision within the jurisdiction of a port authority may appropriate and expend public funds not otherwise appropriated to finance or subsidize the purposes of the port authority so created. R.C. 4582.023. Consequently, CCPA is subject to the Ohio Public Records Act. Moreover, as the federal district court has already determined that there was no federal question presented, this Court must determine if defensive preemption under the ICC Termination Act of 1995, 49 U.S.Code Section 10101 et seq., preempts application of the Ohio Public Records Act to compel disclosure.

{¶21} Pursuant to Section 10501(b)(2) of the United States Code the Surface Transportation Board has exclusive jurisdiction over:

{¶22} "(2) the construction, acquisition, operation, abandonment, or discontinuance of a spur, industrial, team, switching, or side tracks, or facilities, even if the tracks are located, or intended to be located, entirely in one state."

{¶23} An analysis of the policy of the federal government in enacting the Termination Act leads to the reasonable conclusion that the impetus was to promote a safe and efficient rail transportation system, to minimize the need for federal regulatory control, to allow for competition as well as reasonable rates for transportation and to encourage fair wages and suitable working conditions in the railroad industry. (Section 10101). With these lofty goals expressed as the federal rail transportation policy, it is obvious that there is no preemption of the Ohio Public Record Act by the Termination Act as regards the specific material requested in the mandamus complaint. It is clear, however, that the Board retains final authority over operational decisions which may negatively impact the viability of the line and affect a national interest to maintain the lines in good working order.

{¶24} Respondents contend that the requested documents are not "public records" as a matter of law. Pursuant to R.C. 4582.901 and 4582.58(B):

{¶25} "(A) Financial and proprietary information, including trade secrets, submitted by or on behalf of an employer to a port authority or to a nonprofit corporation engaged by contract to provide economic development services for a port

authority, in connection with the relocation, location, expansion, improvement or reservation of the business of that employer is not a public record subject to section 149.43 of the Revised Code. Any other information submitted by such an employer under such circumstances is not a public record subject to section 149.43 of the Revised Code until that employer commits in writing to proceed with the relocation, location, expansion, improvement, or preservation."

{¶26} R.C. 4582.58(B) is a regurgitation of R.C. 4582.091(A). Why it exists as a separate statutory enactment is a mystery, but not relevant. A straight-forward reading of the statute leads to the reasonable conclusion that it was enacted to protect businesses that are engaged by the port authority, or the nonprofit corporation acting to achieve economic development, not the records of the port authority itself. As further indicated in the statute, once the employer commits in writing to the economic development project, the information submitted by an employer becomes a public record subject to disclosure. Had the legislature intended to exempt Port Authority records from scrutiny they could have clearly and simply stated that intention.

{¶27} Respondent CCPA contends that it contracted with Central Columbiana & Pennsylvania Railway, Inc. (CCPR) to provide economic development services for the Port Authority by improvement of the line of track previously owned by Relator. Respondent asserts that all documents related to the escrow account had been submitted to the Surface Transportation Board on January 21, 2003 as part of its "Joint Motion Seeking Final Closure of Escrow Account." Again, the CCPA argues that the Board's exclusive jurisdiction and statutory prohibitions under federal and state law would result in a finding by this Court that any public record was not wrongfully withheld.

{¶28} It is acknowledged that in *Railroad Ventures, Inc. v. Surface Transp. Bd.*, 299 F.3d 523 (6th Cir. 2002), it was finally decided that RVI was compelled to transfer ownership of a line of railroad to the Port Authority. As part of that very detailed and extensive decision the court determined that the total value of the rail line was $1,117,868. However,

{¶29} "Because the STB found that RVI acted in 'blatant disregard of its common carrier obligations to provide service,' it acceded to CCPA's request to establish an escrow account for funding 'to ensure that RVI pays for uncovering and restoring paved-over track and for reconnecting signal equipment at road crossings * * *. The STB accordingly directed that $375,000 of the sale price be placed into an escrow account, and ordered RVI to permit CCPA and its agents to inspect the line for damage.'" Id at 545.

{¶30} In validating the establishment of the escrow account the federal court stated:

{¶31} "Considering RVI's conduct since acquiring the rail line, the STB, quite wisely, required an escrow of funds to repair the damage to the track done with RVI''s authorization." Id at 560. RVI had acknowledged that it would be responsible for any repair and reconnection costs.

{¶32} As RVI would be entitled to receive any remaining proceeds after the account is closed, it is only appropriate that there be an accounting to show that the funds in escrow were expended solely for the purposes for which the account was established. Respondents assert that on January 21, 2003, they submitted to the Board all documents related to the escrow account, along with their motion to close the account. If RVI has an issue with the manner of the expenditure of funds from the escrow account it is within the province of the Board to address and resolve those concerns. A complaint in mandamus cannot be utilized as a collateral attack to secure information on the expenditure of escrow funds through an account created by order of the Surface Transportation Board and found to be valid by a federal court. It is the prerogative of the Board to rule on any challenge to the expenditure of the escrowed funds. It is not a record kept in the ordinary course of business, rather an account ordered by the Board to be monitored by the Board. Therefore, as to all documentation involving the escrow account, Respondents are granted summary judgment.

{¶33} Relator also seeks access to and inspection of "(A) All easements, crossing agreements, licenses, contracts, bank statements, bank account information, copies of checks, invoices, correspondence, rules and other documentation, without limitation, related to the ownership or operation of the real estate interests transferred from Railroad Ventures, Inc. to the Columbiana County Port Authority pursuant to rulings of the Surface Transportation Board."

{¶34} RVI acknowledges in its motion for summary judgment that "At times between September 23, 2002 and January 21, 2003, the CCPA finally made some public records available." Production was accomplished through providing them to legal counsel or to the Surface Transportation Board. Relator does note that it is unsure whether CCPA has provided all the records requested, as it continues to refuse inspection.

{¶35} For its part, Respondent CCPA claims that it had "no easements, crossing agreements, licenses or contracts other than those that it had been given by RVI pursuant to the Board's Decisions." The Public Records Act does not require the creation of new documents to meet a requester's demand. *State ex rel. Fant v. Mengel* (1991), 62 Ohio St.3d 197.

{¶36} In this case Relator has not identified with any specificity the public records which it knows to exist which have continued to be denied. However, that does not mean Relator was foreclosed from filing this complaint. At the time it was filed, CCPA had not provided the requested documents which fall under the umbrella of public records. We find that mandamus is an appropriate remedy to obtain the records noted in paragraph 6(A) of the complaint.

{¶37} In conclusion, we find that the quasi-public agency known as the Columbiana County Port Authority is subject to Ohio Public Records Law, R.C. 149.43 insofar as there is no statutory exemption of a specific document requested. Regarding the specific items requested in this case, we find that all documentation relative to the escrow account created through order of the Board is subject to the purview of the Surface Transportation Board and questions as to expenditures from

that account are to be resolved exclusively by the Board as allowed by federal law. As that account was established during ongoing litigation between the parties and procedures were established for the management and final accounting, Relator was provided a means to acquire and challenge documents submitted with the final accounting. Thus, mandamus to compel disclosure of the escrow account records is not an available remedy.

{¶38} As regards the documents listed in paragraph 6(A) of the complaint, we find that the Ohio Public Records Act applies, as there is no specific exemption for those documents enumerated in R.C. 149.43(A)(1), nor does federal law under the Termination Act prohibit their discovery.

{¶39} As regards an award of attorney fees this Court is granted discretion to award such fees. *State ex rel. Fox v. Cuyahoga Cty. Hosp. Sys.* (1988), 39 Ohio St.3d 108, 529 N.E.2d 443. The standard to apply is the reasonableness of the failure to comply with the public records request and the degree to which the public will benefit from the release of the records. *State ex rel. Warren Newspapers, Inc. v. Hutson* (1994), 70 Ohio St.3d 619, 626, 640 N,E.2d 174, 180. We find that the Respondent's claim of non-disclosure under federal law was reasonable. The stance taken by Respondent on an unsettled legal issue was rational. Accordingly, Relator's request for attorney fees is denied.

{¶40} For all the reasons stated above a limited writ is issued and Respondent CCPA is ordered to allow Relator access to the public records noted in paragraph 6(A) of its complaint, as provided by the Ohio Public Records Act.

{¶41} Clerk to service notice as provided by the civil rules.

Vukovich and DeGenaro, JJ., concur.

Donofrio, J., concurs in part and dissents in part. See concurring in part and dissenting in part opinion.

DONOFRIO, J., concurring in part and dissenting in part.

{¶42} I dissent in part to the majority opinion only as it relates to the denial of reasonable attorney fees in regards to the documents in paragraph 6(A) of the complaint. I would award those fees since the Ohio Public Records Act applies, as there is no specific exemption for those documents enumerated in R.C. 149.43(A)(1), nor does federal law under the Termination Act prohibit their discovery. I concur in the balance of the majority opinion.