

BARNES & THORNBURG

Richard H. Streeter
(202) 408-6933
Email: richard.streeter@btlaw.com

2/3473
750 17th Street, N.W.
Suite 900
Washington, D.C. 20006 U.S.A.
(202) 289-1313
(202) 289-1330 - Fax

www.btlaw.com

March 4, 2005

Vernon A. Williams, Secretary
Surface Transportation Board
1925 K Street, N.W.
Washington, D.C. 20423



ENTERED
Office of Proceedings

MAR - 4 2005

Part of
Public Record

RE: STB Docket No. AB-556, Railroad Ventures, Inc.--Abandonment
Between Youngstown, OH and Darlington, PA in Mahoning and
Columbiana Counties, OH and Beaver County, PA.

Dear Secretary Williams:

This letter, which responds to the February 25, 2005 letter submitted by counsel for Railroad Ventures, Inc. ("RVI"), is written on behalf of the Columbiana County Port Authority ("CCPA") and Central Columbiana & Pennsylvania Railway ("CCPR"). In its February 25, 2005 letter, RVI insists that the doctrine of *res judicata* would preclude CCPA and CCPR from submitting certain documentary evidence in support of their Joint Petition for Reopening and Reconsideration filed January 3, 2005.

In order for the doctrine of *res judicata* to apply, several elements must be demonstrated. First, as the Board recognized in *Santa Fe Southern Pacific Corporation-Control-Southern Pacific Transportation Company*, F.D. 30400 (Sub-No. 21) 1996 STB LEXIS 311, at *20, n.12, STB, December 10, 1996, there must be a judgment on the merits in the prior suit. In *State ex rel Railroad Ventures, Inc., Relator, vs. Columbiana County Port et al, Respondents*, 2004 Ohio 391, 2004 Ohio App. LEXIS 342, which is the State Court proceeding upon which RVI relies, there was no judgment on the merits with regard to the escrow account. As reflected by its complaint (Attachment 1 hereto), RVI sought a writ of mandamus to obtain "access to and inspection of the following records" that were supposedly in CCPA's possession:

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.

In response, CCPA and Tracy Drake, who were the sole respondents in that proceeding, advised the State Court that the relief sought by RVI was preempted. As they also disclosed at page 2 of their Memorandum in Support, "all documents related to the escrow account that *had been in CCPA's possession* were submitted to the STB as part of the 'Joint Motion Seeking Final

Indianapolis

Fort Wayne

South Bend

Elkhart

Chicago

Washington, D.C.

Vernon A. Williams, Secretary
March 4, 2005
Page 2

Closure of Escrow Account' filed by CCPA and CCPR" (emphasis added). See Attachment 2 hereto.

Contrary to RVI's fallacious representations in its February 25 letter, the State Court *did not consider the merits of that disclosure or rely on that disclosure for any purpose*. Nor did it scrutinize the documents that were provided to the Board along with the Joint Motion Seeking Final Closure of Escrow Account. Instead, the State Court declined to become involved in the controversy and explicitly ruled that all issues related to the escrow account were within the exclusive jurisdiction of the Board. In reaching its decision, the State Court reasoned as follows:

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.

The State Court's explicit reasoning belies RVI baseless and misleading suggestions that (i) CCPA/CCPR represented to the court that "they had submitted to the Board all documents related to the escrow account on January 21, 2003", and (ii) the court's decision denying RVI's document production request was "[b]ased on that representation, and the purported availability of all documents to RVI in 2003 as part of CCPA/CCPR's submission to the Board."¹ Hence, RVI is also wrong when it claims that "the factual issue regarding CCPA/CCPR's alleged production of all documents related to the escrow account was actually litigated and necessary to the outcome of the Ohio Court's decision." *Id.* The issue that was actually litigated in the state court proceeding is not identical to the issues currently involved in the instant proceeding.

A second reason that *res judicata* would not apply is that CCPR, which was the sole custodian of the records that RVI seeks to prevent the Board from considering, was not a party to the State Court proceeding. The only respondents were CCPA and Tracy Drake. Because it was not a party to the state court proceeding, CCPR did not make any representations to that court.

Third, the records that were originally submitted to the Board in January 2003 comprised the records that CCPR gave to CCPA along with its requests for payment. No representation was ever made that those records constituted the entire universe of records related to the escrow. This is of crucial importance in that the Board did *not* require CCPA to conduct an audit of CCPR's books and underlying documentation before it released funds to CCPR. The Board

¹ February 25, 2005 letter at p. 2

Vernon A. Williams, Secretary
March 4, 2005
Page 3

required only that CCPA "keep account of all funds spent," which it did. Because the backup documentation that is now at issue on reopening was never given to CCPA, the statement made to the Ohio Court was correct.

Most importantly, at no time during the life of the escrow account did the Board require CCPA to audit CCPR's underlying documentation, much less indicate that CCPA should compel CCPR to submit records of billing sheets or time logs, and receipts for vehicle and travel expenses along with its requests for payment. Indeed, until the Board issued its *December 2004* Decision, neither CCPA or CCPR had any indication whatsoever that such documentation would have been required as a prerequisite for payment.

In closing, the undersigned notes that RVI claims to have filed its Reply to the Joint Petition for Reconsideration on February 24, 2005. As of this date, the undersigned has not yet been served. Moreover, the undersigned counsel did not receive a copy of the February 25, 2005 letter from RVI and its counsel.

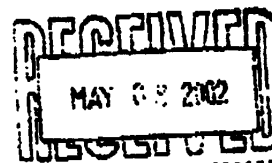
Very truly yours,



Richard H. Streeter
Barnes & Thornburg LLP
Counsel for Columbiana County Port
Authority and Central Columbiana &
Pennsylvania Railroad

RHS:rs
Attachments
cc: All parties of record

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



STATE EX REL.
RAILROAD VENTURES, INC.
721 Boardman-Poland Road
Youngstown, OH 44512

Relator

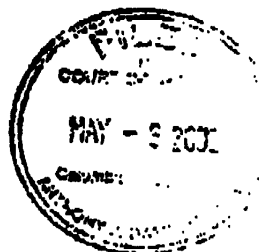
v.

COLUMBIANA COUNTY PORT
AUTHORITY
1250 St. George Street
East Liverpool, OH 43920

TRACY V. DRAKE
Executive Director of the Columbiana
County Port Authority
1250 St. George Street
East Liverpool, OH 43920

Defendants

Case No. **2002-CO-26**
On Remits - 230-486-4379
Post-It Fax Note 7671
To *Keith O'Brien* From *Tracy Drake*
No. Dept. **FAXED**
Phone #
Fax # *202-654-4404*



NOW COMES the Relator and for its Complaint/Petition in Mandamus against the Defendants states as follows:

1. This Court of Appeals has original jurisdiction over this Complaint/Petition in Mandamus pursuant to Ohio R.C. §2731.02.
2. Relator, Railroad Ventures, Inc., is an Ohio Corporation whose principal place of business is located in Boardman Township, Mahoning County, Ohio. Relator brings this action for writ of mandamus in the name of the State of Ohio on behalf of Relator.
3. Defendant, Columbiana County Port Authority, is a port authority created and existing pursuant to the provisions of Ohio R.C. §4582.01, et seq., operating in Columbiana County, Ohio.
4. Defendant, Tracy V. Drake, is the executive director of Defendant, Columbiana

County Port Authority.

5. Defendant, Columbiana County Port Authority, is a public office required to keep, prepare, and make available for inspection all of its public records pursuant to Ohio R.C. §149.43.

6. On or about January 24, 2002, and then again on February 11, 2002, and then again on March 12, 2002, Relator, by and through legal counsel, sought access to and inspection of the following records:

(A) 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.

(B) 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.

Copies of the public records request letters dated January 24, 2002; February 11, 2002; and March 12, 2002 are attached hereto as Exhibits "A," "B," and "C."

7. Defendants have ignored the aforesaid requests thereby effectively denying the Relator access to and inspection of the aforesaid public records.

8. The aforesaid records sought by the Relator constitute public records within the meaning of Ohio R.C. §149.43, and the Relator has a clear legal right to have access to such records.

9. Defendants have a clear legal duty under Ohio R.C. §149.43(B) to make the records available to Relator for inspection and copying.

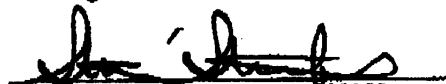
10. Relator has no plain and adequate remedy in the ordinary course of law.

11. Relator is further entitled to an award of reasonable attorneys' fees pursuant to

Ohio R.C. §149.43(C).

WHEREFORE, Relator requests that this Court immediately issue a peremptory writ of mandamus or writ of mandamus to the Defendants compelling them to make the records requested available to Relator for inspection and copying; Relator further demands judgment in favor of Relator and against the Defendants for reasonable attorneys fees pursuant to Ohio R.C. §149.43(C); the costs of this action; and any further relief that this Court deems just and proper.

Respectfully submitted,
ROTH, BLAIR, ROBERTS, STRASFELD & LODGE
A Legal Professional Association

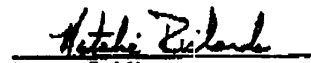

Stuart A. Strasfeld, Esq. #012399
600 City Centre One
Youngstown, OH 44503
(330) 744-5211; FAX: (330) 744-3184
Attorney for Relator

STATE OF OHIO }
COUNTY OF MAHONING } SS:
}

David L. Handel, being first duly sworn states that he is the President of Relator, Railroad Ventures, Inc.; that he has read the foregoing Complaint; and that the statements and allegations therein contained are true as he verily believes.


David L. Handel

SWORN TO AND SUBSCRIBED before me, a Notary Public, in and for the State of Ohio, on this 2nd day of May, 2002.


Natalie Richards
Notary Public

NATALIE RICHARDS
OHIO NOTARY PUBLIC
MY COMMISSION EXPIRES 10-31-2002

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

STATE EX REL.	)	
RAILROAD VENTURES, INC.,	)	
	)	Case No. 2002 CO 26
Relator,	)	
	)	
v.	)	MEMORANDUM IN SUPPORT OF
	)	RESPONDENTS' MOTION FOR
COLUMBIANA COUNTY PORT	)	SUMMARY JUDGMENT AND IN
AUTHORITY and TRACY DRAKE,	)	OPPOSITION TO RELATOR'S MOTION
Executive Director of the Columbiana	)	FOR SUMMARY JUDGMENT
County Port Authority	)	
	)	
Respondents.	)	

COME NOW Columbiana County Port Authority ("CCPA") and Tracy Drake, Executive Director of the Columbiana County Port Authority (hereinafter jointly referred to as "Respondents"), by and through counsel, and file this "Memorandum in Support of Respondents' Motion for Summary Judgment and in Opposition to Relator's Motion for Summary Judgment."

Summary of Argument

Railroad Ventures, Inc. ("RVI") is not entitled to a grant of summary judgment because it cannot show that CCPA and Tracy V. Drake have wrongfully withheld the release of any "public records" that are subject to section 149.43 of the Revised Code. It is respectfully submitted that the requested documents are not "public records" as a matter of law. Both R.C. 4582.091 and 4582.58(B), which became effective May 17, 2000, expressly state that:

Financial and proprietary information, including trade secrets,
submitted by or on behalf of an employer to a port authority
...engaged by contract to provide economic development

services for a port authority, in connection with the ... improvement, or preservation of the business of that employer is not a public record subject to section 149.43 of the Revised Code.

In this case, Central Columbiana & Pennsylvania Railway, Inc. ("CCPR") is engaged by contract to provide economic development services for CCPA in connection with the improvement and preservation of CCPR's business, namely the provision of common-carrier railroad services over the line of track that was previously owned by RVI. Furthermore, all of the records related to the escrow account involve financial and proprietary information that was submitted by CCPR to CCPA. That information never became a public record until it was released to RVI in the context of the ongoing proceeding before the Surface Transportation Board ("STB" or "Board"), which has exclusive jurisdiction over the escrow account.

On January 21, 2003, all documents related to the escrow account that had been in CCPA's possession were submitted to the STB as part of the "Joint Motion Seeking Final Closure of Escrow Account" filed by CCPA and CCPR. Given the STB's jurisdiction over the escrow account and procedures, as well as the statutory prohibitions under Ohio law and 49 U.S.C. § 11904, RVI may not be heard to complain that CCPA wrongfully withheld any public record from it.

In addition, even if the requested documents were found to be public records, the question remains whether relief is preempted, which issue was remanded to this Court by Judge Economus in his Order dated August 19, 2002. Insofar as RVI sought documents related to repairs of the railroad and use of the \$375,000 escrow funds designated for such repair, CCPA at all times was acting under color of law provided by effective

Decisions of the Board.¹ Because the Board's *November 2001 Decision* specifically directed CCPA to account for expenditures from the escrow account *following* its closure, RVI's action in seeking to force the premature disclosure of documents related to the escrow was an impermissible collateral attack on the STB's orders.

Furthermore, because RVI and CCPA were at all times involved in ongoing litigation concerning the escrow account and the records associated therewith, as well as the threat of further litigation,² the use of R.C. 149.43 by RVI to circumvent the discovery procedures of the STB and the terms and conditions imposed by the Board is improper. *Accord, State ex rel. Perrysburg Township v. Rossford* (2002), 148 Ohio App. 3d 72, 76, 772 N.E.2d 152, 155.

Last, RVI is not entitled to attorney fees. Plainly, this action has not conferred, and will not confer, any benefit on the public. Second, unlike the cases in which the courts have awarded attorney fees upon finding that an agency has repeatedly violated the public records statutes, there is no showing that CCPA has previously failed to comply with that statute. Nor is there any indication that it would do so in the future.

Background

In order to place this controversy in its proper context, the Court's attention is invited to the decision of the United States Court of Appeals for the Sixth Circuit in *Railroad Ventures, Inc. v. Surface Transportation Board*, 299 F.3d 523 (6th Cir. 2002)

¹ The STB's Decisions establishing the escrow account were affirmed by the Sixth Circuit in *Railroad Ventures, Inc. v. Surface Transportation Board*, 299 F.3d 523 (6th Cir. 2002). A second appeal challenging the STB's November 2001 Decision, which modified the terms and conditions of the escrow account, is currently pending before the Sixth Circuit in *Railroad Ventures, Inc. v. Surface Transportation Board*, Case No. 01-4262. Because no stay was sought, the STB's November 2001 Decision became effective as a matter of law.

² See, Affidavit Tracy Drake, at ¶ 12.