

U.S. DEPARTMENT OF TRANSPORTATION
FEDERAL RAILROAD ADMINISTRATION
WASHINGTON, D.C.

Appeal of Glen I. Harshman

(FRA—Locomotive Engineer Certification Case)

DOT Docket # FRA 2001-11015
(FRA Docket No. EQAL 01-34)

THE ADMINISTRATOR'S FINAL DECISION

INTRODUCTION

Petitioner, Glen I. Harshman, through the United Transportation Union (“UTU”), appealed to the Administrator of the Federal Railroad Administration (“FRA”), under the provisions of 49 CFR § 240.411, from a decision of an Administrative Hearing Officer (“AHO”) dismissing petitioner’s hearing request, with prejudice, based upon lack of jurisdiction. The AHO found that petitioner’s hearing request was untimely filed and that the Locomotive Engineer Review Board’s decision became final by operation of law.

The Union Pacific Railroad Company (“UP”) and the FRA filed replies to petitioner’s appeal.

Based upon my lack of jurisdiction to consider an appeal untimely filed, petitioner’s appeal is dismissed, with prejudice, without consideration of its merits.

LEGAL ISSUES TO BE DECIDED

The issues in this case are whether petitioner’s appeal was timely filed and whether, as a matter of law, the appeal should be dismissed because of lack of jurisdiction.

DISCUSSION

The AHO's decision was issued October 8, 2002.

Petitioner, through the UTU, appealed the decision of the AHO in a letter, dated November 12, 2002, addressed to the FRA Docket Clerk. There is no evidence in the FRA docket that this letter was ever mailed to FRA. The FRA docket copy of the letter bears only one fax identifier (at the top of the page) indicating that the letter was faxed from the UTU offices on November 15, 2002, at 2:00 p.m. The UP represents in its reply to the appeal that the November 12, 2002, letter was, in fact, faxed to the railroad on November 15, 2002, which was a Friday.

The FRA docket copy of the November 12, 2002, letter was time-stamped as received on November 18, 2002, at 9:10 a.m., which was a Monday. From the evidence in the FRA docket, I conclude that the November 12, 2002, letter was faxed to FRA on the same day that it was faxed to the UP, namely Friday, November 15, 2002, and that it was not time-stamped into the FRA docket until the following Monday, November 18, 2002. As stated above, there is no evidence that the letter was ever received by FRA by mail, nor is there any evidence that the letter was ever received by FRA by any other means.

An appeal from the decision of a presiding officer (in this case the AHO) must be "filed within 35 days of the issuance of the decision with the Federal Railroad Administrator" 49 C.F.R. § 240.411(a). Accordingly, petitioner's appeal must be "filed" on or before November 12, 2002. The term "filed" means the "submission of a document . . . on the date when the Docket Clerk receives it" 49 C.F.R. § 240.7.

The definition in 49 C.F.R. § 240.7 clarifies that a document may also be considered to be filed "if sent by mail on or after September 4, 2001, the date mailing was completed." This

exception to the Docket Clerk receipt rule, however, does not, by its own terms, apply to documents which are faxed. As stated above, there is no evidence that the appeal in this matter was ever mailed to the FRA Docket Clerk.

Petitioner's November 12, 2002, letter needed to be faxed to the FRA Docket Clerk at least by November 12, 2002, not November 15, 2002, in order to be considered to have been received by the FRA Docket Clerk within the time specified in 49 C.F.R. § 240.111(a) for a valid appeal.

The regulations, which have the force of law, do not allow any latitude on the part of FRA to either waive or ignore the filing provisions with respect to appeals, with the exception of the provisions of 49 C.F.R. § 240.111©). Therefore, a petition which is filed untimely, and not covered by the exception, must be denied.

The exception in 49 C.F.R. § 240.111©) states that:

“[t]he Administrator may extend the period for filing an appeal or a response for good cause shown, provided that the written request for extension is served before expiration of the applicable period provided in this section.

In this case, no written request for exception from the appeal period was served by petitioner on or before November 12, 2002. Accordingly, the exception does not apply, and I may not extend the time period for filing an appeal. The fact that a regulatory exception specifically spells out the circumstances under which the time period for filing an appeal may be extended clearly indicates that no extension of the time period for filing an appeal under circumstances not covered by the regulatory exception should be permitted, as such an extension would be contrary to the provisions of law.

Petitioner's failure to make a written request for an extension of time and to provide any good cause for extending the time for filing an appeal has the legal effect of denying me jurisdiction to further consider the matter. This was the result at the Merit Systems Protection Board, which found that it had no jurisdiction in such circumstances, and this determination was judicially upheld.¹

Petitioner's appeal is untimely filed and, accordingly, I am without jurisdiction to consider the merits of the matter.

CONCLUSION

For the reasons stated above, petitioner's appeal is dismissed with prejudice. Pursuant to 49 C.F.R. § 240.411(a), the decision of the AHO constitutes final agency action.

Dated: [March 18, 2003]

[original signed by]
Allan Rutter
Administrator

¹ John J. Wilder v. Ruth T. Prokop, et al., 846 F.2d 613, 624 (10th Cir. 1988).