

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

Appeal of M. J. Kenny

(FRA—Locomotive Engineer Certification Case)

Docket No. EQAL 2002-65

THE ADMINISTRATOR’S FINAL DECISION

INTRODUCTION

Petitioner, M. J. Kenny (“Kenny”), through the LCA Brotherhood of Locomotive Engineers, appealed to the Administrator of the Federal Railroad Administration (“FRA”), under the provisions of 49 CFR § 240.411(f), directly from a decision of the Locomotive Engineer Review Board (“LERB”), which dismissed Kenny’s petition for review as untimely.

No other party filed a reply to the appeal.

For the reasons stated below, the decision of the LERB is affirmed. Accordingly, petitioner’s appeal is denied.

STANDARD FOR REVIEW

The regulation governing appeals (49 CFR § 240.411) (in this case directly from the LERB under subsection (f)) does not enunciate the standard for review; however, administrative practice suggests that the scope of review is limited to determining if the LERB’s findings of fact are supported by substantial evidence. In other words, a review must be made to determine whether the LERB relied upon such evidence in the record of the hearing as a reasonable mind

might accept as adequate to support the factual findings made.¹ But in making this review, the Administrator's discretion is not to be substituted for that of the LERB in evaluating the evidence.² And the possibility of drawing two inconsistent factual conclusions from the evidence does not necessarily indicate that the LERB's findings are not supported by substantial evidence.³ Issues of law are to be considered de novo, requiring an independent determination of the matter at stake.⁴

Although those adversely affected by decisions of the LERB normally have an administrative proceeding before a hearing officer, pursuant to 49 CFR § 240.409, where both issues of fact and law are considered de novo, this is an appeal directly from the decision of the LERB, requiring the normal standard of review to apply, and only issues of law will be considered de novo.

The facts upon which the LERB relied in dismissing Kenny's petition, such as the date on which Kenny's certification was revoked and the date on which the petition was mailed, are not disputed by the petitioner. Accordingly, the issues relevant to this appeal relate to regulatory interpretation and administrative procedure, matters of law. Accordingly, this decision is based upon a de novo review of the legal issues.

SYNOPSIS OF THE FACTS

¹ Edgar v. Shalala, 859 F.Supp. 521, 524 (D. Kansas, 1994).

² Talbot v. Heckler, 814 F.2d 1456, 1461 (10th Cir. 1987).

³ Consolo v. Federal Maritime Commission, 383 U.S. 607, 620, 86 S.Ct. 1018, 1026 (1966); Gouveia v. Immigration and Naturalization Service, 980 F.2d 814, 818 (1st Cir. 1992).

⁴ Janka v. Department of Transportation, National Transportation Safety Board, 925 F.2d 1147, 1149 (9th Cir. 1991).

The relevant factual setting is not in dispute. On May 24, 2002, the petitioner's locomotive engineer certificate was revoked by the National Railroad Passenger Corporation ("Amtrak"). Kenny's petition of Amtrak's revocation decision to the LERB was dated October 28, 2002, postmarked November 1, 2002, and received by the FRA Docket Clerk on November 4, 2002.

LEGAL ISSUES TO BE DECIDED

The threshold issue in this case is whether the petitioner timely filed his appeal to the Administrator. The primary issue in this case is whether the LERB correctly dismissed Kenny's petition because it was untimely filed.

DISCUSSION

Timeliness of the Appeal to the Administrator

The petitioner's appeal to the Administrator was timely filed. The appeal notice was dated and postmarked certified mail (return receipt requested) on July 11, 2003, being 11 days after the June 30, 2003, decision of the LERB.

Appeals to the Administrator must be filed within 35 days of the issuance of the decision being appealed.⁵ Pursuant to 49 CFR § 240.7, "filing" means the date the Docket Clerk receives the document, but after September 4, 2001, means the date the mailing was complete. Since it is clear that mailing was complete 11 days after the decision of the LERB, the petitioner has met the filing time limit for an appeal to the Administrator.

⁵ 49 CFR § 240.411(a). Although appeals from the LERB are governed by 49 CFR § 240.411(f), that subsection does not set forth a time limit for appeals. The 35-day rule in 49 CFR § 240.411(a) states that it applies to appeals from a decision of a presiding officer, but in the absence of any other rule in the subsection governing the time for filing an appeal, the 35-day rule should be considered to also govern appeals from the LERB.

The LERB's Dismissal of the Petition

The LERB correctly determined that Kenny's petition should be dismissed as untimely. The petitioner failed to comply with the provisions of 49 CFR § 240.403, and presents no valid excuse on appeal for failure to file timely.

The LERB found that Kenny filed his petition 161 days after the date of the railroad's revocation decision, and that the applicable regulation (49 CFR § 240.403(d)) allows only 120 days for such filing. Kenny does not dispute these facts on appeal.

The regulatory requirements for filing a petition with the LERB include that the petition "be filed in a timely manner."⁶ The regulation specifically defines timeliness, with respect to seeking a review of a railroad's decision to revoke certification, in 49 CFR § 240.403(d) as being governed by the 120-day rule referenced by the LERB.

The regulation also allows discretion for the LERB to extend the 120-day period "provided the request for extension is filed before the expiration of the period provided in this paragraph (d); or . . . provided that the failure to timely file was the result of excusable neglect."⁷ There is no evidence on the record before the LERB or presented on appeal which suggests that the petitioner might have qualified for an extension of time for filing his petition with the LERB.

The fact that a regulatory exception specifically spells out the circumstances under which the time period for filing a petition may be extended clearly indicates that no extension of the time period for filing a petition under circumstances not covered by the regulatory exception

⁶ 49 CFR § 240.403(b)(6).

⁷ 49 CFR § 240.403(d)(1) and (2).

should be permitted, as such an extension would be contrary to the provisions of law.

The petitioner's failure to make a written request for an extension of time, pursuant to the regulation, and to provide any good cause for extending the time for filing a petition has the legal effect of denying the LERB 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.⁸ The LERB correctly applied the law in this case.

The reasons enunciated by the petitioner in his appeal for reconsideration are not legally persuasive. First, the petitioner cites a missing copy of the regulation. But this copy relates to the time limit for filing an appeal to the Administrator. As I have determined that the petitioner did comply with this regulation, and filed a timely appeal, its absence from the LERB decision is not relevant, as the petitioner has in no manner been prejudiced by its deletion.

Second, the petitioner, acting through his union representative, mentions that he was under a misapprehension with respect to the regulation governing petitions to the LERB, citing unfamiliarity with the "new" regulation. The regulation which is cited as being "new" was amended in 1999, and the petition to the LERB was made in 2002. Three years seems like enough time for a union representative to become familiar with the operative filing requirements. In any event, mere ignorance of a law (or of a regulation, which has the effect of law) or lack of knowledge of a filing deadline does not justify equitable tolling or other exceptions to the requirement.⁹

⁸ John J. Wilder v. Ruth T. Prokop, et al., 846 F.2d 613, 624 (10th Cir. 1988).

⁹ Felder v. Johnson, 204 F.3d 168, 172 (5th Cir. 2000).

Third, the petitioner cites illness and vacation. But illness and vacation might have constituted excusable neglect under the regulation governing petitions to the LERB, had these provisions been complied with. The petitioner admits that illness and vacation are not relevant to the matter by stating that he was not aware of the 120-day deadline, in any event, and suggests that he was not intending to file at that time. These reasons should be ignored.

CONCLUSION

For the reasons stated above, the decision of the LERB is affirmed, and Kenny's appeal is denied. My decision constitutes the final action of the FRA in this matter, pursuant to 49 CFR § 240.411(f).

_____ [original signed by]

Allan Rutter
Administrator

Dated: [August 21, 2003]

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