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

Appeal of K. L. Hensley

(FRA—Locomotive Engineer Certification Case)

Docket No. EQAL 2003–56

DOT Docket No. FRA 2004-18065

THE ADMINISTRATOR'S FINAL DECISION

INTRODUCTION

Petitioner, K. L. Hensley ("Hensley"), represented by Thomas H. Geoghegan, Despres, Schwartz & Geoghegan, 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 Hensley's hearing request with prejudice.

A reply was filed by the FRA and by the Union Pacific Railroad Company ("UP").

STANDARD FOR REVIEW

The regulation governing appeals from decisions of presiding officers (in this case an AHO) (49 CFR § 240.411) does not enunciate the standard for review; however, administrative practice suggests that the scope of review is limited to determining if the AHO's findings of fact are supported by substantial evidence. In other words, a review must be made to determine whether the AHO 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

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

Administrator's discretion is not to be substituted for that of the AHO in evaluating the evidence.[2] And the possibility of drawing two inconsistent factual conclusions from the evidence does not necessarily indicate that the AHO'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]

SYNOPSIS OF THE FACTS AND PROCEDURAL HISTORY

The essential facts relevant to this appeal are not in dispute. On October 16, 2001, Hensley was certified as a Class 1 locomotive engineer. On June 20, 2003, Hensley was notified by the UP that, as a result of deficiencies or errors documented in an event recorder evaluation of a March 31, 2003, trip, his Class 1 locomotive engineer certification was being changed to a Class 3 student engineer certification, with a ride evaluation to occur in approximately 30 days. Eventually, Hensley's Class 1 locomotive engineer certification was restored.

On October 15, 2003, Hensley filed a petition with the FRA requesting review of the UP's decision to "revoke" the Class 1 locomotive engineer certification. The Locomotive Engineer Review Board ("LERB") dismissed Hensley's petition, on May 18, 2004, finding that no denial or revocation of Hensley's certification occurred.

Hensley filed with FRA a request for an administrative hearing, pursuant 49 CFR § 240.407, and the UP filed a motion to dismiss. The AHO dismissed Hensley's hearing request

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[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).

with prejudice, on August 23, 2007, finding that an AHO did not have broad, remedial powers, that Hensley's locomotive engineer certificate was never suspended, and that an AHO had no authority to pass upon the constitutionality of administrative action.

LEGAL ISSUES TO BE DECIDED

The initial legal issue is whether Hensley's appeal was timely filed.

The second issue on appeal is whether Hensley has enunciated any error of law in the decision of the AHO.

The third issue on appeal is whether the remedies requested by Hensley are permissible pursuant to the regulations governing this process.

A final legal issue is whether Hensley was denied due process of law in violation of the United States Constitution.

DISCUSSION

Timeliness of the Appeal

Appeals to the Administrator must be filed within 35 days after 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. The AHO issued his decision on August 23, 2007. Accordingly, Hensley must have completed mailing of the appeal by September 27, 2007. Hensley's appeal was dated September 25, 2007, and was indicated as having been received and filed by the DOT Docket Clerk on October 2, 2007. Nothing in the docket entries or on in the file indicates the actual date of mailing. However, the certificate of service accompanying the filing indicates overnight delivery via

[5] 49 CFR § 240.411(a).

United Parcel Service on September 25, 2007, which would have met the deadline.[6] In its request for an extension of time to file a response to Hensley's appeal, the FRA acknowledges that the appeal was timely filed.[7]

It seems clear from the certificate of service accompanying the appeal, which bears the September 25, 2007, date, and from the overnight mail shipping document, which bears the same date, that the appeal was properly mailed on September 25, 2007.

The appeal was timely filed.

Error of Law

The basis for Hensley's appeal is clear–he regards the change from a Class 1 to a Class 3 license to be the functional equivalent of a revocation with respect to the requirement for a hearing under 49 CFR § 240.307. He states that the UP may not "revoke or suspend or otherwise diminish in any significant way his property right in his full professional license–a federal license–without a prior or contemporaneous due process hearing . . . ."[8] (Emphasis added.) According to Hensley, the AHO has essentially made the same error of law by adopting similar logic and not allowing a reduction in license rights to trigger the requirements of 49 CFR § 240.307. On the contrary, Hensley claims, the loss of a right need not be total and immediate to justify a hearing under the regulation.

Hensley's argument has a superficial, gut-level appeal. There is no question that the

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[6] Hensley's representative has submitted a copy of a United Parcel Service shipping document indicating that the appeal was posted on September 25, 2007.

[7] Neither the FRA's acknowledgment of timely filing, nor my reiteration of this acknowledgment in my decision of October 16, 2007, granting the request for an extension of time, is dispositive of the issue as to whether the appeal was actually mailed prior to September 27, 2007.

[8] Appeal to the FRA Administrator, September 25, 2007, at 3.

rights present in a Class 1 license are different from and higher than those present in a Class 3 license, and that the railroad effected a change in status–even if temporary–by virtue of the action of which Hensely complains. Therefore, there is logic to the suggestion that Hensley has been adversely affected. But appeals to the Administrator may not be determined by resort to gut-level feelings. Rather, they must be decided following the principles of statutory and regulatory construction and in accordance with law.

Where the plain meaning of a regulation is clear, and not doubtful or ambiguous, its provisions must be enforced, not modified or expanded, or otherwise interpreted to carry out policy objectives.[9]

The regulation in question–49 CFR § 240.307–clearly states that it is invoked only upon revocation of certification. That is the title of the section, and all of the applicable provisions (subsections (a) and (b)) are triggered by revocation alone. There is nothing in the regulation which provides that a diminution in the quality of a license is to be considered to be a revocation under the regulation or to otherwise invoke its provisions.

The locomotive engineer certification regulations include specific provisions concerning various classes of service.[10] It was clearly known at the time the regulation was promulgated that diminutions in class of service were possible personnel actions which might be taken by railroad companies. Nevertheless, in promulgating the regulation concerning revocation of certification, no provision was made which suggests that such diminutions should be construed to be included in the term "revocation." In the absence of a definition including such

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[9] Hill v. Richardson, 740 F.Supp. 1393, 1397-8 (S.D. Ind., 1990).

[10] 49 CFR § 240.107.

diminutions as being revocations, they must be excluded.

Hensley cites, and FRA counters, the import of a certain letter to the UP, dated August 2, 2007, from Jo Strang, Associate Administrator for Safety. The letter is cited by Hensley as evidence of FRA's intent in construing the term "revocation" in its regulations. While deference should be given to an agency's construction of its own regulations, this deference is due only when the plain meaning of the rule is doubtful or ambiguous.[11] Here there is no ambiguity in the language of the regulation itself; therefore, extraneous construction tools should not be relied upon. Therefore, I decline to consider the letter.

As pointed out by the UP and by FRA, the dispute resolution procedures in the regulations are consistent with respect to how the terms "certification," "recertification," and "revocation" are used.[12] Without resorting to any external materials, it seems clear that the remedial provisions of the regulations are limited to those instances where a locomotive engineer has had his or her certification actually revoked, and that a change in class does not qualify as revocation.

Remedies

Hensley's prayer for relief requests the Administrator to: (1) expunge references in his work record with respect to the loss of his Class 1 license, (2) direct the UP to cease and desist from taking similar action with respect to similarly situated employees, and (3) restrain the AHO and other FRA officials from allowing or assisting the UP to engage in similar practices.

The regulation governing appeals provides only that the Administrator may "remand,

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[11] Exportal Ltda. et al. v. United States et al., 902 F.2d 45, 50 (D.C. Cir. 1990).

[12] See: 49 CFR §§ 240.401(a), 240.403(a), and 240.409(q).

vacate, affirm, reverse, alter or modify the decision of the presiding officer,"[13] here the AHO. No other remedies are provided in the regulation.

If there is no statute conferring authority on an administrative agency, it has none.[14] By extension, this necessarily includes the actions of the Administrator on appeal from a decision of the AHO. An agency literally has no power to act unless and until Congress confers power upon it.[15] It follows, since regulations may be promulgated only in accordance with powers granted by Congress, that the power to act under regulation is limited to the powers therein granted.

The remedies Hensley requests are beyond the legal authority of the Administrator to provide. I have no lawfully constituted power to order a railroad to modify its personnel records, to order a railroad to refrain from taking personnel actions with respect to other employees, or to direct FRA officials to act in a particular manner so as to prevent a railroad from taking specific personnel actions.

Constitutional Issues

Hensley claims that he was denied due process of law, in violation of the United States Constitution, because the UP did not conduct a hearing prior to the downgrading of his locomotive engineer certification from Class 1 to Class 3, which Hensley deems to be a revocation. Hensley further claims that by ratifying the UP's actions, the AHO has committed a constitutional tort, based upon the same deprivation of a property right without due process of law.

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[13] 49 CFR § 240.411(e).

[14] Michigan v. E.P.A., 268 F.3d 1075, 1081 (D.C. Cir. 2001).

[15] Railway Labor Executives' Ass'n. v. National Mediation Board, 29 F.3d 655, 670 (D.C. Cir. 1994).

As has been previously enunciated,[16] Federal administrative agencies are without power or expertise to pass upon the constitutionality of administrative action.[17] This is a matter which is necessarily reserved for a reviewing court. The AHO correctly relied upon this precedent. Accordingly, I decline to determine whether either the UP or the AHO acted constitutionally.

It should be noted, however, that in reviewing the Carpenter decision and affirming it, the United States Court of Appeals, Ninth Circuit, has found that the multiple levels of administrative review afforded by FRA's dispute resolution procedures provide fundamental due process, namely notice and an opportunity to be heard.[18]

CONCLUSION

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

Dated: **[1 FEB 08]**

[Original Signed by]
Joseph H. Boardman
Administrator

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[16] Appeal of Robert E. Carpenter, Docket No. EQAL 97-48, February 19, 2004, at 7-8.

[17] Spiegel, Inc. v. F.T.C., 540 F.2d 287, 294 (7th Cir. 1976).

[18] Carpenter v. Mineta, 432 F.3d 1029, 1036 (9th Cir. 2005).