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

Appeal of C. J. Gazarkiewicz

(FRA—Locomotive Engineer Certification Case)

Docket No. EQAL 2004-29

THE ADMINISTRATOR'S FINAL DECISION

INTRODUCTION

Petitioner, C. J. Gazarkiewicz ("CJG"), represented by Don M. Menefee, General Chairman, Brotherhood of Locomotive Engineers and Trainmen, appealed directly to the Administrator of the Federal Railroad Administration ("FRA"), under the provisions of 49 CFR § 240.403(e), from a decision of the Locomotive Engineer Review Board ("LERB") denying CJG's petition for relief as untimely.[1]

No responsive pleading has been filed to the appeal.[2]

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[1] The LERB decision was issued January 4, 2005. CJG's appeal was dated January 18, 2005, and received by the FRA Docket Clerk on January 26, 2005, being the earliest of the various stamps on the first page of the appeal. (See footnote 8, below.) Thereafter, the Docket Clerk improperly assigned the appeal to FRA's administrative hearing officer, who returned the matter to the Docket Clerk on July 10, 2007, correctly noting that he had no jurisdiction over the matter.

[2] 49 CFR §240.411(b) provides for a reply within 25 days of service of the appeal. No additional time is being provided for a responsive pleading, since the Docket Clerk was properly served in 2005, and neither the Docket Clerk nor FRA's administrative hearing officer acted in a timely manner to apprise individuals within FRA of the opportunity to file a responsive pleading. Regulatory filing deadlines will not be waived or modified because of mishandling of pleadings by FRA personnel. In any event, more than 25 days have passed since the matter was correctly returned to the Docket Clerk for handling as a direct appeal to the Administrator.

STANDARD FOR REVIEW

The regulations governing direct appeals from decisions of the LERB denying petitions as untimely (49 CFR §§ 240.403(e) and 240.411(f)) do not enunciate the standard for review. 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 as a reasonable mind might accept as adequate to support the factual findings made.[3] But in making this review, the Administrator's discretion is not to be substituted for that of the LERB in evaluating the evidence.[4] 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.[5] Issues of law are to be considered de novo, requiring an independent determination of the matter at stake.[6]

In this case, there are both issues of fact and law raised in the appeal. In accordance with the above standards, only issues of law will be considered de novo.

SYNOPSIS OF THE FACTS AND PROCEDURAL HISTORY

CJG's locomotive engineer certification was revoked by CSX Transportation, Inc. on January 16, 2004, stemming from allegations that CJG had operated into a work limit without authority.

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

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

[5] 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).

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

CJG filed a petition for review with the LERB on June 3, 2004, being beyond the 120-day deadline established by 49 CFR §240.403(d), and requesting of the LERB an extension of time for filing based upon "excusable neglect." The LERB found that CJG filed his petition after the regulatory deadline set forth in 49 CFR § 240.403(d) and found no evidence of "excusable neglect." Accordingly, on June 4, 2005, the LERB denied CJG's petition for review.

CJG filed a direct appeal to the Administrator from the LERB's decision, dated January 18, 2005, which was thereafter handled as described in footnote 1, above.

LEGAL ISSUES TO BE DECIDED

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

The ultimate issue on appeal is whether CJG has met the test for "excusable neglect" with respect to the untimely filing of his petition for review to the LERB, and whether CJG has demonstrated, pursuant to the standard for review, any relevant factual issues upon which the LERB relied not supported by substantial evidence.

DISCUSSION

Timeliness of the Appeal

Appeals to the Administrator must be filed within 35 days after the issuance of the decision being appealed.[7] 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 LERB issued its decision on June 4, 2005. Petitioner's appeal was dated January 18, 2005, but it is not clear from the record when mailing was complete. However, the appeal was marked received by the FRA's Office of Chief Counsel (attributable to the Docket

[7] 49 CFR § 240.411(a).

Clerk) initially on January 26, 2005.[8] It is clear that under any set of facts, the petitioner has met the filing deadline, since the date of receipt by FRA is only 22 days after the date of the LERB's decision. The appeal was timely filed.

Excusable Neglect and Substantial Evidence

In order for the LERB to exercise its discretion to not deny a petition which has been untimely filed, there must be cause shown and the LERB must find that the failure to file was the result of excusable neglect.[9]

The regulation itself does not define the term. But the legislative history sheds some light on the provision by stating that the concept is modeled on rule 6(b) of the Federal Rules of Civil Procedure and providing that: "the mere assertion of excusable neglect unsupported by facts is insufficient. Excusable neglect requires a demonstration of good faith on the part of the party seeking an extension of time and some reasonable basis for noncompliance within the time specified in the rules."[10]

While the concept of excusable neglect is not limited to those circumstances where the failure to timely file is due to circumstances beyond control of the filer;[11] nevertheless, counsel's misapplication of clear and unambiguous procedural rules cannot excuse failure to file timely

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[8] The initial stamp by FRA's Office of Chief Counsel is January 26, 2005. There is an additional stamp on the appeal by the Department of Transportation on January 31, 2005, presumably caused by the Docket Clerk sending the document to DOT's Docket Management System for data entry. The document was evidently returned to FRA's Office of Chief Counsel and again stamped there on February 28, 2005. This is consistent with the mishandling described in footnote 1, above.

[9] 49 CFR § 240.403(d)(2).

[10] 64 FR 60966, 60983 (November 8, 1999).

[11] Pioneer Investment Services Co. v. Brunswick Associates Limited Partnership, 507 U.S. 380, 391 (1993).

and will not constitute excusable neglect.[12]

In Pioneer, the court sets forth the test for making an equitable determination with respect to excusable neglect, namely: (1) the danger of prejudice to the non-moving party, (2) the length of the delay and its potential impact on the proceedings, (3) the reason for the delay, including whether it was within the reasonable control of the movant, and (4) whether the movant acted in good faith.[13] But the determination of fault in the delay remains the most important single factor in determining whether the neglect is excusable.[14]

In this case, the LERB correctly applied the standards set forth in Pioneer. The LERB found that the regulation concerning filing deadlines was entirely clear. The LERB found that CJG's primary excuse–that his local chairman was unaware that, with respect to FRA's regulations, the date of the railroad's revocation decision would be controlling–did not meet the test for "excusable neglect" under the Pioneer standards. Clearly, CJG, through his local chairman, should have known the long-standing practice and followed the clear language of the regulation with respect to when a petition to the LERB had to be filed following an adverse decision of the railroad. Such knowledge is entirely within the control of the petitioner, and there is no evidence that CJG or his representative were in any way misled by the railroad, the LERB or FRA with respect to the process. As stated above, the determination of fault is the most important factor in making a legal determination under the Pioneer standards, and it was here given proper weight and correctly applied.

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[12] United States v. Torres, 372 F.3d 1159, 1163 (10th Cir. 2004).

[13] Pioneer, at 395.

[14] Torres, at 1163.

The LERB was unpersuaded by CJG's other excuse that legible copies of exhibits were not available from the railroad in a timely manner. The LERB found that unavailability of legible copies of exhibits most likely did not delay CJG's response more that several days and that a timely appeal could have been filed even without legible copies of these exhibits. There is nothing in CJG's appeal which controverts the factual or legal basis for these findings.

Finally, it should be noted that CJG's complaints with respect to the use of precedent are unfounded. The non-precedential nature of decisions is properly limited to those of FRA's administrative hearing officer.[15] It is entirely appropriate for other decisions to be cited as precedent, and particularly court decisions bearing upon the administrative application of procedural rules, such as here in construing the term "excusable neglect." Contrary to the suggestion of bias made by CJG, the administrative review process at FRA is designed to be a neutral process under law, and reliance upon precedent for the consistent application of procedural and other rules is an aid to that neutrality. I find there to be no improper reliance upon precedent in this case.

CONCLUSION

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

[8 August 2007] **[Original signed by]**

Dated: _____ _____

Joseph H. Boardman
Administrator

[15] 49 CFR §240.409(u)(5).