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

Appeal of Ernest W. Wood III

(FRA—Locomotive Engineer Certification Case)

Docket No. EQAL 92—40

THE ADMINISTRATOR'S FINAL DECISION

INTRODUCTION

Petitioner, Ernest W. Wood III, has appealed (September 21, 1995) to the Administrator of the Federal Railroad Administration ("FRA"), under the provisions of 49 C.F.R. § 240.411, from an August 18, 1995, decision of an Administrative Law Judge ("ALJ") sustaining the action of his employer, Norfolk Southern Corporation ("NS"), revoking his locomotive engineer certification for 30 days because of his violation of NS's operating rules and practices by not following a contact instruction on the date in issue, resulting in a violation of 49 C.F.R. § 240.117(e)(4). After holding an evidentiary hearing on February 23-23, 1995 (at which petitioner was represented by the General Chairman of the United Transportation Union), the ALJ upheld the violation, concluding that NS's decertification of petitioner was proper under the provisions of 49 C.F.R. § 240.117(c).

On the basis of the completed record, for the reasons set forth below, I am adopting the ALJ's decision. Accordingly, petitioner's administrative appeal is denied.

SYNOPSIS OF THE FACTS

The essential facts are not in dispute, having been stipulated to by the parties. On March 10, 1992, petitioner, a locomotive engineer for NS's subsidiary, Norfolk & Western Railway Company, operated train 233 from Roanoke, Virginia, to Bluefield, West Virginia. The movement of this train was governed by NS's Virginia Division Timetable No. 2, and occurred over its Main Track No. 1 in traffic control territory. Before departing Roanoke terminal at 4:30 a.m., petitioner received Dispatcher's Bulletin 2374, which contained a contact instruction requiring westbound trains to contact a named track supervisor before passing milepost N-360.0 en route to Bluefield terminal. Although petitioner reviewed the bulletin twice, he overlooked the contact instruction and proceeded beyond the identified milepost without having contacted the track supervisor. As train 233 approached milepost N-360.3, roadway workers carrying tools and equipment had to clear their work area within 15 seconds in order to avoid the approaching train. They dispersed, and the train passed without incident.

PETITIONER'S BASES FOR APPEAL

Petitioner makes two principal arguments in his appeal. First, it is argued that contact instructions do not fall within the scope of 49 C.F.R. § 240.117(e)(4) because: (1) there are no definitional provisions for contact instructions to establish "track segments," an essential element in the above-cited regulation, and (2) contact instructions do not employ either active stop signals or passive stop signals, which are governed by another section of the regulations. Second, it is argued that petitioner was denied due process because: (1) a de novo hearing held almost three years after the railroad hearing cannot correct the infirmities of the railroad hearing, (2) the remedy in a de novo hearing does not include reimbursement for lost wages, (3) petitioner

was denied his right to counsel in the railroad hearing under the provisions of the Administrative Procedure Act ("APA"), and (4) the railroad did not inform petitioner on the record of the basis for decertification.

FRA'S REPLY TO PETITIONER'S BASES FOR APPEAL

In its reply, FRA addresses each of petitioner's bases for appeal as follows.

In supporting the ALJ's determination that contact instructions fall within the scope of 49 C.F.R. § 240.117(e)(4), FRA argues that Federal regulations do not require railroads to identify track segments to which contact instructions apply. Rather, FRA argues, the applicable regulation prohibits violations of operating rules and practices involving occupying main track without proper authority, and that contact instructions constitute operating rules and practices governing movement of petitioner's train. FRA further argues that petitioner's compliance with a clear signal indication (covered by 49 C.F.R. § 240.117(e)(1)) does not relieve him from the obligation to comply with all restrictive conditions, including a contact instruction (covered by 49 C.F.R. § 240.117(e)(4)).

With respect to due process requirements, FRA argues that once a party is afforded a de novo review, any irregularities at a lower proceeding are immaterial. FRA further argues, with respect to the right to counsel, that the APA does not apply to railroad investigative hearings and that NS is neither an agency nor an agent of a Federal agency for purposes of this proceeding. Finally, FRA argues that petitioner has had adequate notice of the reasons for revocation of his certification.

STANDARD FOR REVIEW

The regulation governing appeals from decisions of presiding officers (in this case an ALJ) (49 C.F.R. § 240.411) does not enunciate the standard for review; however, administrative practice suggests that the scope of review is limited to determining if the ALJ's findings of fact are supported by substantial evidence. In other words, a review must be made to determine whether the ALJ 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 ALJ in evaluating the evidence.[2] And the possibility of drawing two inconsistent factual conclusions from the evidence does not necessarily indicate that the ALJ'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]

DISCUSSION

Contact Instructions and 49 C.F.R. § 240.117(e)(4)

The ALJ determined as a matter of law that NS's contact instructions were within the purview of 49 C.F.R. § 240.117(e)(4), which prohibits entering upon a railroad track segment without proper authority (1991 version) or the occupation of a railroad main track without such

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[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).

authority (1993 version).[5] The ALJ found that the regulation conveys a broad mandate to railroads concerning the formulation and implementation of their operating rules and practices. Accordingly, the ALJ concluded that NS made contact instructions part of its operating rules and practices, that these were applicable to the movement of petitioner's train, and that said contact instructions were essential to ensure proper authority for train movements over tracks on which roadway workers were present.

The ALJ's reasoning is sound. There is substantial evidence that NS's general operating rules and practices made contact instructions applicable to the instant situation. The record is replete with evidence supporting the ALJ's findings that the Dispatcher's Bulletin containing the contact instruction was in effect and that petitioner was expected to comply with it. Also, I conclude, as a matter of law, that the failure to comply with contact instructions constituting valid operating rules and practices is a violation of 49 C.F.R. § 240.117(e)(4) (1991 version), which prohibited entering a track segment without proper authority.[6] A petitioner would violate FRA's regulation by not observing contact instructions.

The ALJ next turns to the interplay of clear block indications and contact instructions. The ALJ rejects petitioner's arguments that: (1) because he was in compliance with a clear block indication, he did not need to comply with contact instructions; and (2) 49 C.F.R. § 240.117(e)(4) did not apply to the instant situation because petitioner was in signaled territory covered by 49 C.F.R.§ 240.117(e)(1). The ALJ concludes that the most restrictive condition governs any

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[5] Although the 1991 version of the regulation applies to an incident in 1992, the ALJ determined, as a matter of law, that petitioner violated both standards.

[6] It is not necessary to determine whether petitioner violated the 1993 version of the regulation, since it is not applicable to the instant situation. Also, there is no definitional problem with respect to the 1991 regulation, since clearly a "track segment" was entered by petitioner in the movement of his train.

operational situation, and that signal practices and written instructions are consistent requirements.

The ALJ's conclusions make sense. As pointed out in the ALJ's decision (p. 11), the subsections of 49 C.F.R. § 240.11(e) are not listed alternatively. Therefore, the violation of any applicable subsection constitutes a violation of railroad operating rules and practices, and the compliance with any one or a number of the subsections cannot negate the obligation to comply with all of them.

Petitioner's compliance with block signal requirements did not relieve him from the obligation to comply with contact instructions. As pointed out in the ALJ's decision (p. 11), 49 C.F.R. § 240.117(e)(4) is intended to ensure that engineers follow any kind of instructions, whether by signal or in writing, which control proper authority. A contrary conclusion would make a nullity of the regulatory requirements and adversely affect the ability of railroads to determine appropriate operating rules and practices.

Due Process

The ALJ notes in his decision (p. 13) that he suggested at the hearing that the question with respect to representation at the railroad hearing may have been abandoned by petitioner, since it was not raised before the Locomotive Engineer Review Board. Nevertheless, the ALJ allowed the issue to be briefed by the parties. After reviewing this issue, and the others related to due process arguments, the ALJ determined that petitioner has been afforded a full measure of fairness and due process, concluding that whatever infirmities may have existed in the original NS hearing, petitioner has had a de novo hearing in this proceeding, and was represented by counsel of his choice. The ALJ goes on to state (p. 13) that the record supports the sanction

imposed.

I concur. The provision of a de novo review of this matter, with a full hearing before an ALJ, and with petitioner being represented by counsel of his choice, cures any alleged defects at the prior proceeding.[7] Petitioner has been afforded a complete opportunity to be represented by counsel of his choosing, to raise any issues, to advance any arguments, to offer and cross-examine any witnesses, and to argue any points of law. Furthermore, there is no evidence that petitioner has been prejudiced by any defects in the prior proceeding (if they, in fact, existed), including anything which may or may not have been placed in the record therein.

The fact that the ALJ hearing occurred almost three years after the railroad hearing is not persuasive. The de novo hearing was based upon the facts as they existed at the time of the incident. Petitioner has presented no evidence that he has been prejudiced by the passage of time in the presentation of those facts or in his representation.

Petitioner argues that he has an inadequate remedy in the ALJ proceeding, because Federal regulations do not provide for reimbursement or recovery of lost wages due to improper decertification. It is not necessary to rule on this argument, because I find there to be no improper decertification. However, it should be pointed out that the Part 240 regulations were never intended to address a railroad's authority over disciplinary actions and their monetary effects. (See 49 C.F.R. § 240.5(e).) Such must be resolved under applicable employment agreements and labor relations law.

Petitioner argues that he was denied due process in the railroad hearing because the railroad was acting as a representative of FRA and, hence, was covered by certain requirements

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[7] Haskell v. United States Department of Agriculture, 930 F.2d 816, 820 (10th Cir. 1991).

of the APA (specifically 5 U.S.C. 555(b) (right to counsel in appearance before Federal agencies)). FRA correctly argues in its brief that NS is not a Federal agency or agent of a Federal agency for purposes of this proceeding. Because the APA applies only to Federal agency action, it does not apply to hearings conducted by railroad companies. There is not the requisite extensive, detailed, and virtually day-to-day supervision by FRA over NS's activities in conducting hearings for "Federal agency" status to attach to a non-Federal entity.[8]

CONCLUSION

For the reasons stated above, the decision of the ALJ is affirmed, and petitioner's appeal is denied. My decision constitutes the final action of the FRA in this matter, pursuant to 49 C.F.R. § 240.411(e).

_[original signed by]_____
Jolene M. Molitoris
Administrator

Dated: ___[February 8, 1996]_____

[8] Singleton Sheet Metal Works, Inc. v. City of Pueblo, 727 F.Supp. 579, 581 (D. Colo., 1989).