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

Appeals of Chicago and North Western Railway Company
and
Federal Railroad Administration

(FRA—Locomotive Engineer Certification Case)

Docket No. EQAL 92—51

THE ADMINISTRATOR'S FINAL DECISION

INTRODUCTION

The Chicago and North Western Railway Company ("C&NW")[1] and the Federal Railroad Administration ("FRA") have appealed, pursuant to 49 C.F.R. §240.411, a decision of an administrative law judge ("ALJ"), served on July 6, 1995. The ALJ's decision reversed a decision of FRA's Locomotive Engineer Review Board ("LERB"), dated December 14, 1993, which upheld C&NW's revocation of the locomotive engineer certification of Richard E. Staggs ("Petitioner") because of a violation of speed restrictions. The ALJ found that C&NW's revocation was improper.

C&NW states in its appeal (p. 3) that the ALJ's decision has "no continuing significance," because "the revocation under review in this proceeding cannot be counted against

[1] The Chicago and Northwestern Railway Company was merged into the Union Pacific Railroad Company on October 1, 1995.

Mr. Staggs, even if upheld."[2] C&NW also states that the National Railroad Adjustment Board ("NRAB") has already denied the Petitioner's claim for compensation resulting from both C&NW's own discipline and the revocation of certification which is the subject of this proceeding. Therefore, assuming C&NW's statements to be correct, the certification action at issue could have no adverse disciplinary effect upon the Petitioner, because the relevant regulation has been revised to provide that this violation does not count in any future action under the regulation. Also, assuming C&NW's statements to be correct, the Petitioner would not be entitled to compensation from C&NW, regardless of the outcome of this proceeding, since the NRAB has already denied the Petitioner's claim. Accordingly, the matter would be legally moot.

In the Administrator's March 6, 1996 order, C&NW and FRA were ordered to file briefs addressing whether this matter is moot and whether FRA has standing as an "aggrieved party," pursuant to 49 C.F.R. §240.411, to appeal a decision of an ALJ which FRA considers to be adverse to its interests. C&NW and FRA filed briefs on April 4, 1996. The Petitioner was given the option of filing a brief, which he did on April 3, 1996. C&NW, FRA, and the Petitioner were given the option of filing responses to the briefs. Only the Petitioner filed a response (April 26, 1996).

POSITIONS OF THE PARTIES

[2] Revised regulations (49 C.F.R. §240.117(i)(1995)) provide that, among other violations, failure to adhere to limitations concerning train speed (occurring prior to the effective date of the amendment to the regulations) shall not be "considered as prior incidents . . . even though such incidents could have been or were validly determined to be violations at the time they occurred." Accordingly, the violation in this case cannot count against the Petitioner in future actions for purposes of determining whether the Petitioner had committed one, two, or more than two incidents of violation (See 49 C.F.R. §240.117(g)(3)(1995)).

C&NW concedes that the case would appear to have no continuing significance because the revocation cannot be counted against the Petitioner in future proceedings, and the Petitioner is entitled to no compensation regardless of the outcome of this proceeding. C&NW points out that the Petitioner requested, in his claim with the NRAB, compensation for both the 10-day disciplinary suspension and the 30-day suspension of the Petitioner's engineer's certificate. C&NW believes that the ALJ's decision should be vacated in its entirety, however, in order to avoid possible precedential effect. Finally, C&NW argues that FRA is an "aggrieved party" for purposes of 49 C.F.R. §240.411.

FRA asserts that this matter has become moot for the reasons suggested in the Administrator's March 6, 1996 order. FRA believes that the proper remedy is to vacate the July 6, 1995 decision of the ALJ and to remand to the ALJ with direction to dismiss, citing United States v. Munsingwear, 30 U.S. 36 (1951). FRA also expressed concern with respect to the precedential effect of the ALJ's decision. With respect to FRA standing as an "aggrieved party," FRA asserts that it does have standing to appeal a decision of an ALJ which FRA considers to be adverse to its interests. FRA distinguishes this case from G. T. Everett, FRA Docket No. EQAL 92-21, which FRA asserts was a request for an advisory opinion. Here, FRA points out, a reversal of the ALJ's decision and reinstatement of the LERB's decision is sought.

The Petitioner argues that the NRAB has prematurely broached the question of certificate revocation, claiming that the NRAB should have waited until the matter was fully adjudicated through these proceedings. Since the ALJ ruled in the Petitioner's favor, it is argued, the Petitioner was improperly held from service for 20 days, thereby causing substantial harm and loss of livelihood. Finally, the Petitioner argues that only locomotive engineers have a statutory

right to an administrative hearing and that FRA does not meet the definition of either "individual" or "aggrieved party," as defined in Black's Law Dictionary.

In his response, the Petitioner reiterates the argument that the NRAB lacked jurisdiction to rule on compensation issues with respect to improper revocation. The Petitioner also argues that the Petitioner's having a clean record does not make this case moot, since the question should still be answered as to whether the revocation was in accordance with law and supported by substantial evidence. With respect to the issue of FRA as an "aggrieved party," the Petitioner discusses the cases cited by the other parties and concludes that appellate standing under 49 C.F.R. §240.411 for FRA would be unnecessary, unwise, and contrary to the Administrative Procedure Act.

DISCUSSION

The three matters to be determined are: (1) whether this case is legally moot, because C&NW's certification action cannot count against the Petitioner in future disciplinary actions under the revised regulation, and because the Petitioner is not entitled to compensation in any event because of the NRAB's decision; (2) in the event the case is legally moot, whether the decision of the ALJ should be vacated and the matter remanded to the ALJ with instructions to dismiss; and (3) whether FRA can be considered to be an "aggrieved party" under 49 C.F.R. §240.411.

Mootness

It must be determined whether the effect of the revised regulation upon future disciplinary action and the effect of the NRAB's decision upon the Petitioner's right to compensation cause this matter to be of no continuing legal significance. As with Federal court decisions,

administrative determinations are limited to ongoing cases and controversies. A case becomes moot when no live controversy remains. Deakins v. Monaghan, 484 U.S. 193, 108 S. Ct. 523, 98 L.Ed.2d 529 (1988).

The Petitioner claims that he is entitled to a determination as to whether the revocation of his certificate was proper. The Petitioner states: "Petitioner's having a clean record does not make this case moot. It does not answer the question whether or not CNW/UP's revocation was in accordance with law and supported by substantial evidence. It matters not whether the revocation counts against Petitioner. That is a wholly different question from whether the revocation was proper in the first place." Petitioner's Response, at 3.

The Petitioner's claim is not supported by law. In fact, it does matter that the revocation cannot count against the Petitioner, because the revised regulation essentially has the effect of negating the existence of the current violation with respect to future disciplinary action. The fact that the revised rules (49 C.F.R. §240.117(i) (1995)) provide that revocations for incidents which would not be infractions under the new rules would not be counted against engineers for purposes of progressive discipline speaks directly to the issue of mootness. No live controversy exists if the Petitioner cannot be harmed by the certificate revocation in future actions because the current regulations so provide. In point of fact, the Petitioner is in no way prejudiced by C&NW's certification action, and the issue is legally moot.

Similarly, it does matter that the Petitioner is entitled to no compensation, in any event, because of the ruling of the NRAB. Even if the ALJ's decision were to be upheld, the Petitioner would receive no compensation, an essential element of the relief sought.

The Petitioner argues that the NRAB had no jurisdiction to rule on the issue of the full

30-day suspension and that the NRAB should have waited for final adjudication in this proceeding with respect to the remaining 20-day suspension. But it is the Petitioner who raised the issue of the full 30-day suspension before the NRAB, and it is the Petitioner who requested full compensation for all time lost (the full 30 days) as a result of said suspensions. In essence, the Petitioner submitted to the jurisdiction of the NRAB with respect to all compensation issues, including those relating to the full 30-day suspension. The claim of the Petitioner to the NRAB requested: "removal of discipline entries of ten days suspension by the C&NW and thirty days suspension of Engineer R. E. Staggs' Engineer's Certificate by the C&NW under Federal Regulation 49 C.F.R. Part 240.117(e)." (Emphasis added.) Tab 1, C&NW's May 26, 1995 Brief to the ALJ, at 1. Since it is the Petitioner who sought correction by the NRAB of C&NW's certification action (including compensation) under Federal regulations, the Petitioner cannot now complain, after the NRAB has denied relief, that the NRAB should not have considered the matter. The decision of the NRAB, at the Petitioner's behest, has made the compensation issue legally moot.

In sum, there is no live controversy remaining as a result of the provisions of the revised rules (49 C.F.R. §240.117(i) (1995)) and the ruling of the NRAB with respect to compensation. The Petitioner cannot be harmed by the revocation of his certificate in any future action, and the Petitioner is entitled to no compensation as a result of the suspensions. Therefore, the matter is legally moot.

The Request to Vacate and Remand the ALJ's Decision

C&NW and FRA have argued that if a determination is made that the case is moot, the decision of the ALJ should be vacated. FRA argues that the proper procedure is to vacate the ALJ's decision and remand to the ALJ with direction to dismiss, citing United States v. Munsingwear, id., and other supporting authority.

While it is clear that vacating a decision of a tribunal below is an appropriate action to be taken by the Federal courts pursuant to 28 U.S.C. §2106 (cited by the authorities relied upon by FRA), it does not follow that vacating a decision is appropriate with respect to administrative action. The regulations governing appeals to the Administrator (49 C.F.R. §240.411) do not, in fact, provide for vacating a decision, and I am bound by the agency's regulations. Bahramizadeh v. United States Immigration and Naturalization Service, 717 F.2d 1170 (7th Cir. 1983). If vacating a decision of an ALJ or hearing examiner is considered to be appropriate to administrative actions of this nature, the regulations should be amended to so provide.

Both C&NW and FRA argue that vacating the decision of the ALJ is necessary to avoid adverse precedential effect of the ALJ's decision. But 49 C.F.R. §240.409(u)(5) clearly establishes that the ALJ's decision is not precedential. Nor is it persuasive that prior decisions have been cited in administrative hearings. Such citations may be explanatory, but they are not precedential. Accordingly, there is no compelling need for vacating the ALJ's decision, and, as stated above, I have no authority under the current regulations for administrative use of the procedure, in any event.

FRA As An "Aggrieved Party"

Having determined that this case is moot, and having determined that vacating the ALJ's decision is not an appropriate procedure under 49 C.F.R. §240.411, it is not necessary to determine whether FRA is an "aggrieved party" under the regulations.

CONCLUSION

For the reasons stated above, C&NW's and FRA's appeals to the Administrator are dismissed as legally moot.[3] 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: __[October 3, 1996]_____

[3] It should be noted that dismissal of C&NW's and FRA's appeals does not constitute affirmation, reversal, alteration, or modification of the ALJ's decision. In accordance with 49 C.F.R. §240.409(u)(5), the decision of the ALJ is not to be cited as precedent.