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

Appeal of Robert E. Carpenter

(FRA—Locomotive Engineer Certification Case)

Docket No. EQAL 97-48

THE ADMINISTRATOR'S FINAL DECISION

INTRODUCTION

Petitioner, Robert E. Carpenter ("Carpenter"), represented by Lawrence M. Mann, Alper & Mann, P.C., 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 Carpenter's petition for various forms of relief. The AHO found that, as a matter of law, he had no authority to certify the petitioner as a locomotive engineer, to order retraining and retesting, or to determine whether one of the carrier's instructors was qualified to conduct certification training.

The FRA filed a response to Carpenter's notice of appeal. Carpenter filed a reply to the FRA's response. The FRA filed a motion to strike Carpenter's reply to the FRA's response, which motion is granted. For the reasons stated below, the decision of the AHO is affirmed. Accordingly, petitioner's administrative appeal is denied.

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 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] This appeal involves issues relating 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 AND PROCEDURAL HISTORY

Petitioner was given training by the predecessor railroad to BNSF required for certification as a locomotive engineer. Petitioner failed three simulator skill tests in 1993, and the carrier denied certification.

Carpenter filed a petition for review with the Locomotive Engineer Review Board

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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).

("LERB").[5] The LERB determined that the carrier's denial of certification was improper, but allowed the carrier to retroactively cure legal deficiencies by taking certain remedial actions, which the carrier carried out. Petitioner filed a second petition for review with the LERB,[6] and the LERB approved BNSF's denial of Carpenter's certification. Following the LERB's second decision, Carpenter requested a hearing and determination by the AHO.

LEGAL ISSUES TO BE DECIDED

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

An additional initial legal issue is whether FRA's motion to strike should be granted.

The primary legal issue is whether the AHO correctly determined that he had no authority to grant the various forms of relief requested by petitioner.

A final legal issue is whether petitioner 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.[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 AHO issued his decision on October 27, 2003. Petitioner's appeal was dated November 25, 2003, and was postmarked in Washington, DC on the same date. The appeal was

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[5] FRA Docket No. EQAL 95-58.

[6] FRA Docket No. EQAL 97-48.

[7] 49 CFR § 240.411(a).

received by the FRA's Executive Secretariat on December 2, 2003, and by the FRA's Office of Chief Counsel on December 3, 2003. Regardless of the date on which the Docket Clerk actually received the appeal, it is clear that petitioner has met the filing deadline, under the definition of "filing" set forth in 49 CFR § 240.7, since the appeal was postmarked 29 days after the issuance of the AHO's decision. The appeal was timely filed.

FRA's Motion to Strike

The FRA filed a motion to strike petitioner's reply brief to FRA's response as legally impermissible, since it is not provided for in the regulation governing appeals.[8] In the alternative, the FRA requests leave to reply to petitioner's reply brief.

There is no question that the regulation governing appeals to the Administrator, cited above, provides only for a single reply to the initial appeal. No other responsive pleading is provided for in the regulation.

In the absence of regulatory authority providing for a specific type of pleading, I lack the authority to allow for such a pleading. It is well settled that an executive agency of the Government is bound by its own regulations, which have the force and effect of law, and the failure of an agency to follow its regulations renders its decision invalid.[9]

The regulation governing pleadings permitted to be filed in this matter is a properly promulgated legislative rule of the FRA. A valid legislative rule is binding upon all persons, and on the courts, to the same extent as a congressional statute.[10] I lack the authority to exercise my

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[8] 49 CFR 240.411.

[9] Gulf States Manufacturers, Inc. v. National Labor Relations Board, 579 F.2d 1298, 1308 (5th Cir. 1978).

[10] National Latino Media Coalition v. F.C.C., 816 F.2d 785, 788 (D.C. Cir. 1987).

discretion in any manner which would violate a valid regulation having the same effect as a congressional statute, and I decline to do so.

For the reasons stated above, the FRA's motion to strike Carpenter's reply brief is granted.

Authority of the AHO

The AHO declined to consider remedies requested by petitioner, finding that the AHO had no authority to certify the petitioner as a locomotive engineer, to order retraining and retesting, or to determine whether one of the carrier's instructors was qualified to conduct certification training. The AHO correctly analyzed his limited role under the FRA regulations.

The FRA dispute resolution procedures provide only for review of certification, recertification, or certification revocation:

> (a) Any person who has been denied certification, denied recertification, or has had his or her certification revoked and believes that a railroad incorrectly determined that he or she failed to meet the qualification requirements of this regulation when making the decision to deny or revoke certification, may petition the Federal Railroad Administration to review the railroad's decision.[11]

Similarly, the petition requirements in 49 CFR § 240.403(a) speak to what is required "[t]o obtain review of a railroad's decision to deny certification, deny recertification, or revoke certification. . . ."

In describing the role of the LERB, the regulations clearly state its limited role:

> (f) The Board will determine whether the denial or revocation of certification or recertification was improper under this regulation (*i.e.*, based on an incorrect determination that the person failed to meet the qualification requirements of this regulation) and grant or

[11] 49 CFR § 240.401(a).

> deny the petition accordingly. The Board will not otherwise consider the propriety of a railroad's decision, *i.e.*, it will not consider whether the railroad properly applied its own more stringent requirements.[12]

Clearly, the LERB is limited by this regulation to a review of a railroad's denial or revocation of certification or recertification, and the LERB can only determine whether the railroad acted properly or improperly with respect to a specific aggrieved employee. The LERB has no authority to provide other remedies or to engage in disciplinary activity directed at a railroad. Necessarily, the LERB's role under the dispute resolution procedures is adjudicatory and not broadly remedial with respect to how a railroad's locomotive engineer certification program is organized or conducted. In the absence of specific regulatory authority to engage in remedial action, the LERB simply has none.

The situation is the same with respect to the power of an AHO. The dispute resolution procedures provide for review of the LERB decision through a de novo hearing.[13] There is nothing in the dispute resolution procedures which gives an AHO the authority to order remedial action directed at a railroad beyond sustaining or overturning the denial or revocation of certification or recertification with respect to the specific petitioning employee.

If there is no statute conferring authority on an administrative agency, it has none.[14] This necessarily includes those actions of an administrative agency conducted by an AHO. An agency literally has no power to act unless and until Congress confers power upon it.[15] It

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[12] 49 CFR § 240.405(f).

[13] 49 CFR § 240.409.

[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).

follows, since regulations may only be promulgated in accordance with powers granted by Congress, that the power to act under regulation is limited to the powers therein granted. Nor can the parties themselves confer subject-matter jurisdiction on a tribunal, in this instance the deliberations of an AHO.[16]

The remedies petitioner seeks are simply beyond the legal authority of either the LERB or the AHO. These adjudicatory authorities have no lawfully constituted power to order a railroad to certify the petitioner as a locomotive engineer, to order retraining and retesting, or to determine whether one of the carrier's instructors was qualified to conduct certification training.

The AHO correctly determined that he lacked the authority to grant the various forms of relief requested by petitioner.

Due Process of Law

Petitioner claims that he was denied due process of law, in violation of the United States Constitution, because the AHO did not conduct a de novo review, as required by the FRA regulations, of certain issues which petitioner believes must be reviewed in order for him to be deprived of his property interest in employment.

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. Accordingly, I decline to determine whether the AHO acted constitutionally.

Though I am without power to make a determination on this issue, it should be noted that the premise of the constitutional issue is flawed. Petitioner bases his challenge on the absence of

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[16] Dunklebarger v. Merit Systems Protection Board, 130 F.3d 1476, 1480 (Fed. Cir. 1997).

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

de novo review of the issues he believes should have been reviewed. But the AHO did conduct a de novo review of the issues the AHO believed needed review. It is not for petitioner to determine which issues must be reviewed by the AHO. Further, it appears that in selecting the issues for de novo review, the AHO was guided by the Joint Statement of Issues agreed to by the parties themselves. Petitioner may not agree to a list of issues for determination by the AHO and then complain on appeal about the absence of AHO review of other issues. Objections not presented to an administrative agency may not be made for the first time to a reviewing court, or, by analogy, on appeal to the Administrator.[18]

It does not appear that there is any valid legal basis for the constitutional question raised, though, as noted above, no determination is here made of it.

CONCLUSION

For the reasons stated above, FRA's motion to strike is granted, the decision of the AHO is affirmed, and petitioner's appeal is denied. My decision constitutes the final action of the FRA in this matter, pursuant to
49 CFR § 240.411(e).

Dated: _[February 19, 2004]______ [original signed by]_____________

Allan Rutter
Administrator

[18] United States v. L.A. Trucker Truck Lines, 344 U.S. 33, 37, 73 S.Ct. 67, 69, 97 L.Ed. 54 (1952).