

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

Appeal of Dennis Bourgeois, Jr.

(FRA—Locomotive Engineer Certification Case)

Docket No. EQAL 97-79

THE ADMINISTRATOR'S FINAL DECISION

INTRODUCTION

Petitioner, Dennis Bourgeois, Jr. (“Bourgeois”), through the Brotherhood of Locomotive Engineers, 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 Bourgeois’ hearing request, based upon lack of standing under 49 C.F.R. § 249.407(a). The FRA and the Union Pacific Railroad Company (“UP”) filed separate replies to Bourgeois’ notice of appeal.

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

Although Bourgeois seeks review of the facts underlying his decertification, the facts upon which the AHO relied in dismissing Bourgeois' hearing request—based upon lack of standing—are not in dispute. The issues relevant to this appeal relate 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

The relevant factual setting is not in dispute. On April 11, 1997, Bourgeois, a locomotive engineer, was decertified by his employer, UP, for failure to control a train consistent with a signal indication requiring a complete stop before passing it, pursuant to 49 C.F.R. § 240.117(e)(1). On October 13, 1997, Bourgeois filed a petition for review before the Locomotive Engineer Review Board ("LERB"), which petition was received by the LERB on October 15, 1997. The LERB denied Bourgeois' petition, finding that it was filed untimely, in

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).

violation of 49 C.F.R. § 240.403(d). Bourgeois filed a request for an administrative hearing before the AHO, on May 12, 1998, claiming procedural error by the LERB. The AHO dismissed the hearing request on April 16, 1999,⁵ finding that because Bourgeois was not adversely affected by the LERB's decision, he lacked standing under 49 C.F.R. § 249.407(a)⁶ to maintain an appeal.

LEGAL ISSUES TO BE DECIDED

The issue in this case is whether the AHO correctly determined that Bourgeois lacked standing under 49 C.F.R. § 249.407(a) because he was not adversely affected by the LERB's decision. A complementary issue in this case is whether, as a matter of law, the AHO must have dismissed Bourgeois' hearing request because neither the AHO nor the LERB had jurisdiction to consider this case on the merits, because, under 49 C.F.R. § 240.403(d), Bourgeois' petition was untimely.

DISCUSSION

Standing

The AHO dismissed Bourgeois' petition, finding that he lacked standing under 49 C.F.R. § 249.407(a). The AHO reasoned that Bourgeois was not "adversely affected" by the LERB's decision, as required by the regulation, because the LERB abstained from passing on the merits of any substantive assertions made by Bourgeois and, rather, denied the petition as untimely. FRA supports the position of the AHO, and, with respect to this appeal, argues that Bourgeois

⁵ The AHO issued a Corrected Order of Dismissal on April 21, 1999, correcting the identity of the petitioner in the decision and modifying the date of the Order for purposes of calculating time under 49 C.F.R. §§ 240.409(u)(4) and 240.411(a).

⁶ 49 C.F.R. 249.407(a) provides: "If adversely affected by the [LERB] decision, . . . the petitioner . . . shall have a right to an administrative proceeding . . ."

was not an “aggrieved” party, pursuant to 49 C.F.R. § 411(a), able to articulate a “present and immediate” injury in fact or at a minimum “a looming unavoidable threat of injury” as a result of the AHO’s decision. FRA’s Reply, at 6.

I disagree. Standing is a threshold issue which speaks to whether the petitioner or the appellant is within the “zone of interest” designed to be protected by a particular statute or regulation. “The ‘zone of interest’ test is a guide for deciding whether . . . a particular plaintiff should be heard to complain of a particular agency action.” (Emphasis added.)⁷ I believe Bourgeois is intended to be the kind of petitioner or appellant envisioned by the two regulations governing administrative proceedings before the AHO and appeals to the Administrator to be entitled to relief. If Bourgeois is not a party “adversely affected” or “aggrieved” by the decisions of the LERB and the AHO, it is difficult to envision who would be.

The AHO and FRA argue that the LERB’s and the AHO’s findings that they had no jurisdiction in the matter—because of late filing—negates Bourgeois’ standing. But, contrary to these arguments, decisions were actually rendered by the LERB and the AHO. The LERB labels its determination as a “decision” and “denies the petition” because of late filing. LERB Decision, at 1. Similarly, the AHO issued an “Order of Dismissal” dismissing Bourgeois’ hearing request. AHO Order, at 6. This is exactly the kind of final agency action which is envisioned by the respective regulations speaking to parties “adversely affected” or “aggrieved” by decisions of the LERB and the AHO. Bourgeois’ injury can hardly be considered to be remote or speculative before these administrative bodies—he lost in each instance through final agency action.

⁷ Clarke v. Securities Industry Ass’n., 479 U.S. 388, 399, 107 S.Ct. 750, 757 (1987).

Bourgeois has standing under 49 C.F.R. § 249.407(a) and 49 C.F.R. § 249.411(a) to challenge the final actions of the LERB and the AHO.

Jurisdiction

Although Bourgeois has standing, neither the LERB, the AHO, nor now the Administrator has jurisdiction to consider the merits of this case. The petition requirements governing this case, 49 C.F.R. § 403(b)(6), are clear—a petition must “be filed in a timely manner.” Furthermore, 49 C.F.R. § 403(d) provides:

(d) A petition seeking review of a railroad’s decision to revoke certification in accordance with the procedures required by § 240.307 [Revocation of certification] filed with FRA more than 180 days after the date of the railroad’s revocation decision will be denied as untimely. (Emphasis added.)

The regulations, which have the force of law, do not allow any latitude on the part of FRA to either waive or ignore the filing provisions. Therefore, a petition which is filed untimely must be denied.

The record is essentially uncontroverted that Bourgeois filed his petition to the LERB seven days late. Bourgeois has made no cogent argument—either factual or legal—with respect to this issue.⁸ Therefore, the petition was untimely under the above-cited petition requirements, and the LERB had no choice but to deny the petition, which it did. Similarly, the AHO was bound by the same provisions and was obliged to dismiss the hearing request, which it did. The same jurisdictional requirements govern this appeal. Because Bourgeois failed to meet the

⁸ Bourgeois argues in his Notice of Appeal, at 2–3, that the manner in which the Engineer Certification Suspension/Revocation Notice was prepared and signed was improper, but he fails to demonstrate either that the Notice was, in fact, legally defective or that any defect, if it existed, was of such a nature that his own untimeliness in filing his petition to the LERB should be legally excused. With respect to his factual arguments, I defer to the findings of the LERB that the Notice constituted effective notice, as of the date indicated on the Notice, and that Bourgeois, in fact, signed it. I further find no legal basis for excusing Bourgeois’ late filing of his petition.

petition requirements in a timely manner, I have no jurisdiction to consider the merits of this case. The regulations unambiguously require denial of this appeal.

CONCLUSION

For the reasons stated above, the decision of the AHO is affirmed,⁹ 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).

[original signed by]

Jolene M. Molitoris
Administrator

Dated: [September 16, 1999]

⁹ 49 C.F.R. § 240.411(e) gives me the authority only to "affirm, reverse, alter or modify" the decision of the AHO. I affirm the AHO's decision with respect to dismissal of the hearing request; although, I reach this conclusion based upon lack of jurisdiction and not standing.