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

Appeal of Thomas T. Wells, Jr.

(FRA—Locomotive Engineer Certification Case)

Docket No. EQAL 99-96
(DOT Docket # FRA 2000-7564)

THE ADMINISTRATOR'S FINAL DECISION

INTRODUCTION

Petitioner, Thomas T. Wells, Jr. ("Wells"), 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 Wells' hearing request, based upon lack of jurisdiction. The AHO found that, pursuant the Administrator's Final Decision in Bourgeois, FRA Dkt. No. EQAL No. 97-79 (September 16, 1999), he had no authority to review the decision of the Locomotive Engineer Review Board ("LERB") denying Wells' petition. The LERB denied the petition because it found it to be late.

The FRA filed a response to Wells' notice of appeal. The Union Pacific Railroad Company ("UP") filed a separate reply to the notice of appeal, and Wells filed a reply to FRA's response.

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.

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.[5]

SYNOPSIS OF THE FACTS

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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).

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

On June 4, 1999, Wells, a locomotive engineer, was decertified by his employer, UP, for one month 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). Wells filed a petition for review before the LERB, which petition was received by the LERB on December 13, 1999. The LERB denied Wells' petition, finding that it was filed untimely, in violation of 49 C.F.R. § 240.403(d). Wells filed a request for an administrative hearing before the AHO. The AHO dismissed the hearing request on January 12, 2001, finding that pursuant to Bourgeois he had no authority to review the decision of the LERB denying Wells' petition.

LEGAL ISSUE TO BE DECIDED

The issue in this case is whether, as a matter of law, the AHO must have dismissed Wells' 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), Wells' petition was untimely. A subsidiary issue is whether the AHO's dismissal of Wells' hearing request was based upon substantial evidence, based upon the LERB's determination that Wells' petition was untimely.

DISCUSSION

Jurisdiction

As a matter of law, neither the LERB, the AHO, nor now the Administrator has jurisdiction to consider the merits of this case. As discussed in Bourgeois, 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 LERB found that Wells was required to have filed his petition with the LERB no later than December 1, 1999, but that the FRA did not receive the petition until December 13, 1999. The LERB noted that filing "means that a document to be filed . . . shall be deemed filed only upon receipt by the Docket Clerk," citing 49 C.F.R. § 240.7.

Wells did not introduce any evidence with respect to the date he filed his petition with the LERB. Rather Wells attacks the June 4, 1999, start date for the 180-day filing period by claiming, in his notice of appeal, that the UP introduced no evidence proving that Wells actually received the June 4, 1999, notice of revocation. Wells does not claim that he did not receive the June 4, 1999, notice of revocation. Instead, he claims that since proof of his receipt is not in the record, his 180-day filing period has been arbitrarily reduced, and the AHO erred in permitting less than a 180-day period for him to file his petition for review. Wells does not indicate when he received the notice or when the 180-day filing period should have expired.

At this stage in the proceedings, Wells must do more than rely upon such an argument. Since the AHO relied upon the factual findings of the LERB with respect to timeliness in dismissing the hearing request, Wells must show that the AHO's reliance upon those factual findings was not based upon substantial evidence. Wells has not met this burden of proof. Rather Wells implies that it is somebody else's burden to show that he was late by looking behind the existing record and proving when he received his decertification notice.

Based upon the record before it, as a matter of law, 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 the record shows that Wells failed to meet the 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.

Revival of Decertification

Wells claims that the LERB had no jurisdiction to take any action in this matter because the decertification action had been previously withdrawn by the UP and could not thereafter be revived. If the LERB had no jurisdiction, Wells argues, the AHO erred in approving the LERB's decision.

There is no evidence in the record that Wells brought this argument to the attention of the LERB or to the AHO. Wells is obligated to present legal arguments upon which he relies to the LERB and to the AHO, not now to the Administrator for the first time on appeal. As stated above, objections not presented to an administrative agency may not be made for the first time on appeal.[6] Wells was silent on the issue of revival of decertification before the LERB and the AHO, and may not now raise it. Accordingly, the objection is waived.

Service of Process

FRA questions whether I have jurisdiction over this matter, claiming that neither FRA's Trial Attorney nor I have been properly served, and noting that it is not clear whether UP was

[6] L.A. Trucker Truck Lines, supra note 5.

ever made aware of Wells' notice of appeal.

It is evident from the record that all parties–including UP–obtained actual notice of the appeal and had sufficient opportunity to file timely responses and replies. Accordingly, I find that I have jurisdiction, and the case may be decided.

Defects in service are not jurisdictional. Pursuant to the philosophy of Rule 61 of the Federal Rules of Civil Procedure, ". . . [I] must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties." The essential objective of service of process is to achieve actual notice,[7] and this appears to have been achieved here.

CONCLUSION

For the reasons stated above, 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: __[April 17, 2001]____

__[original signed by]_____
S. Mark Lindsey
Acting Deputy Administrator[8]

[7] Thomas v. Yonkers Police Dep't Transp. Unit, 147 F.R.D. 77, 79 (S.D.N.Y. 1993)

[8] Pursuant to 49 C.F.R. § 1.45(b), as implemented by the Federal Railroad Administration Organization Manual (FRA 1100.23C), I have the powers and duties of the Administrator, including those set forth in 49 C.F.R. § 240.411. Pursuant to my memorandum of March 12, 2001, I have appointed Michael T. Haley to serve as FRA's Acting Chief Counsel.