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

Appeal of L.S. Ruben

(FRA—Locomotive Engineer Certification Case)

FRA Docket No. EQAL 2007-66

ADMINISTRATOR'S FINAL DECISION ON APPEAL

INTRODUCTION

For the reasons set forth below, I affirm the finding of the Federal Railroad Administration (FRA) Locomotive Engineer Review Board (LERB) dismissing Mr. L.S. Ruben's (Ruben or Petitioner) petition for review of the revocation of his locomotive engineer certification by the Northeastern Illinois Regional Commuter Railroad (Metra). I agree with the LERB that Ruben did not file a timely petition.

STANDARD FOR REVIEW

"A party aggrieved by a Board decision to deny a petition as untimely may file an appeal with the Administrator." 49 C.F.R. §§ 240.403(e) and 240.411(f). However, the regulations governing direct appeals from decisions of the LERB do not enunciate the standard of review. Administrative practice suggests that the standard of review in appeals of this type for issues of fact is a "substantial evidence" standard. See, e.g, Hinson v. Nat'l Transp. Safety Bd., 57 F.3d 1144, 1150 (D.C. Cir. 1995); Whitmore v. AFIA Worldwide Ins., 837 F.2d 513, 515 (D.C. Cir.

1988). Under this standard, the Administrator is limited to determining if the LERB's findings of fact are supported by "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion, taking into account whatever in the record fairly detracts from its weight." Lindsay v. Nat'l Transp. Safety Bd., 47 F.3d 1209, 1213 (D.C.Cir.1995). The "substantial evidence" standard requires more than a scintilla of evidence, but can be satisfied by something less than a preponderance of the evidence. FPL Energy Maine Hydro LLC v. F.E.R.C., 287 F.3d 1151, 1160 (D.C. Cir. 2002). The standard of review for issues of law is *de novo.* Janka v. Dept of Transp., et al, 925 F.2d 1147, 1149 (9th Cir. 1991).This standard requires an independent determination of the matter at stake. Id.

SYNOPSIS OF THE FACTS AND PROCEDURAL HISTORY

On May 2, 2007, Metra notified Ruben of the revocation of his locomotive engineer certification. On September 1, 2007,[1] Ruben submitted a petition for review to the LERB appealing the revocation of his locomotive engineer certification. Any petition to the LERB was due 120 days after the date Ruben was notified of the revocation, making his petition to the LERB actually due August 30, 2007. On November 2, 2007, Metra responded to the petition. On July 24, 2008, the LERB dismissed Ruben's petition for failure to file a timely petition. Ruben was advised by the LERB that should he wish to appeal the LERB's decision his option was to file an appeal to the Administrator under 49 CFR § 240.411. On August 9, 2008, Ruben

[1] Though the postmarked envelope allegedly showing that Ruben's Petition was filed September 1, 2007 is not part of the record presented me, it is uncontested by either party that the Petition was filed on this date. The September 1st filing was dated August 26, 2007; Ruben did not explain why the Petition was late, nor did he explain why it was dated August 26, 2007 but not mailed until five days later.

filed a "Request for Administrator's Hearing." The FRA docket clerk initially accepted the August 9th filing as a request for hearing before the FRA's Administrative Hearing Officer. Sometime later, upon realizing the misunderstanding created by the title of the filing, Ruben's request was correctly docketed as an appeal to the Administrator under 49 C.F.R. § 240.411. Because Ruben had not served his appeal on the other parties, those parties were given an additional twenty-five days to file a response to the appeal. The FRA and Metra filed a timely joint response.

LEGAL ISSUES TO BE DECIDED

The sole legal issue to be decided is whether Ruben has met the test for "excusable neglect" with respect to his failure to file his petition within the 120 days allocated by 49 C.F.R. § 240.403(d). The available remedies for this appeal are to remand it back to the LERB for a decision on the merits of the decertification or to affirm the LERB's decision, dismissing the petition. 49 C.F.R. § 411(f). For the reasons set forth below, I affirm the LERB's dismissal of Ruben's petition.

DISCUSSION

The 120-day filing period can be excused only if: (1) a request for extension is filed before the expiration of the 120 days; or (2) the failure to timely file was the result of excusable neglect. 49 C.F.R. § 240.403(d). Ruben did not request an extension before the end of the 120-day filing period. He did not articulate why this would have been impossible for him. Rather, Ruben argues only that financial hardship was the cause of him not filing his petition by the deadline. The regulation itself does not define the term "excusable neglect." However, the

regulation's legislative history sheds some light on the provision by stating that the concept is modeled on rule 6(b) of the Federal Rules of Civil Procedure and providing that: "the mere assertion of excusable neglect unsupported by facts is insufficient. Excusable neglect requires a demonstration of good faith on the part of the party seeking an extension of time and some reasonable basis for noncompliance within the time specified in the rules."[2] With regard to determining whether a party's neglect of a deadline is excusable, the U.S. Supreme Court has held:

> [T]he determination is at bottom an equitable one, taking account of all relevant circumstances surrounding the party's omission. These include ... the danger of prejudice to the debtor, the length of the delay and its potential impact on judicial proceedings, the reason for the delay, including whether it was within the reasonable control of the movant, and whether the movant acted in good faith. Pioneer Inv. Servs. Co. v. Brunswick Associates Ltd. P'ship, 507 U.S. 380, 395 (1993) (internal citations omitted).

Ruben has not demonstrated "excusable neglect." In his appeal, Ruben stated only that he did not file a timely petition due to the financial hardship created by the month-long revocation of his certification (and concurrent suspension). See Appellant's Request for Administrator's Hearing, pgs. 1-2; Metra's Notice of Discipline, pg. 2 (Appellant's period of revocation was April 6, 2007 to May 5, 2007). Ruben did not explain the specifics of his financial situation and how the month-long revocation, which occurred several months before his petition was actually due, may have prevented the timely construction then mailing of his petition. It seems that given the import of the situation, finding the means to copy and mail three copies of the petition within the generous 120-day filing period was within

[2] 64 FR 60966, 60983 (November 8, 1999).

Ruben's reasonable control. Moreover, Ruben still had another option available to him—requesting an extension within the 120-day timeframe—which he choose not to do.

Though Petitioner made no argument with regard to his period of lateness being a minimal two days and not causing prejudice or impact on the proceedings, I believe it worthwhile to discuss. Procedural rules including deadlines exist for a purpose. See, e.g., Raymond v. Ameritech Corp., 442 F.3d 600, 606-607 (7th Cir. 2006)(quoting Geiger v. Allen, 850 F.2d 330, 331 (7th Cir.1988)) (noting that the overriding principle with regard to strictly holding parties to deadlines involves the "court's ability to mitigate the scourge of litigation delays by setting deadlines" [and] 'to force parties and their attorneys to be diligent in prosecuting their causes of action.'"). To allow the parties to flout such deadlines would create a situation where timely appeals would be compromised. It also disrespects the process itself, which is designed to be equitable to all sides. Petitioner only stated without specifics that the financial hardship created by the temporary revocation of his certificate caused him to mail his petition two days after the regulatory deadline. However, allowing even short periods of lateness for unspecified financial hardship when there are options available to petitioners, such as requesting extensions under 49 C.F.R. § 240.403(d)(1), would potentially open the floodgates for late filing. This is true especially given that every locomotive engineer having his or her certificate revoked may have some kind of financial hardship, at least temporarily. The regulation gave Petitioner clear notice of the deadline. Petitioner missed the deadline, and the reasons for doing so were within his control.

CONCLUSION

For the reasons stated above, I affirm the LERB's decision, dismissing Ruben's petition. My decision constitutes the final action of the FRA in this matter, pursuant to 49 C.F.R. § 240.411(f).

Dated: 9/17/09

Karen J. Rae[2]
FRA Deputy Administrator

[2] FRA Administrator, Joseph C. Szabo, recused himself from making this decision because he is personally acquainted with the Petitioner.

CERTIFICATE OF MAILING
FRA DOCKET NO. EQAL-2007-66

The undersigned hereby certifies that the foregoing document, Administrator's Final Decision on Appeal has been mailed to all parties named below via certified U.S. Mail, return receipt requested, except where noted, as hand delivered.

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