

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

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Appeal of Richard Dominic Ruggiero  
(FRA—Locomotive Engineer Certification Case)  
Docket No. EQAL 2004-63

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THE ADMINISTRATOR’S FINAL DECISION

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INTRODUCTION

Petitioner, Richard Dominic Ruggiero (“Ruggiero”), represented by Michael D. Twombly, General Chairman, Brotherhood of Locomotive Engineers and Trainmen, appealed directly to the Administrator of the Federal Railroad Administration (“FRA”), under the provisions of 49 CFR § 240.403(e), from a decision of the Locomotive Engineer Review Board (“LERB”) denying Ruggiero’s petition for relief as untimely.

No responsive pleading has been filed to the appeal.

STANDARD FOR REVIEW

The regulations governing direct appeals from decisions of the LERB denying petitions as untimely (49 CFR §§ 240.403(e) and 240.411(f)) do not enunciate the standard for review; however, administrative practice suggests that the scope of review is limited to determining if the LERB’s findings of fact are supported by substantial evidence. In other words, a review must be made to determine whether the LERB relied upon such evidence in the record as a reasonable mind might accept as adequate to support the factual findings made.<sup>1</sup> But in making

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<sup>1</sup> Edgar v. Shalala, 859 F.Supp. 521, 524 (D. Kansas 1994).

this review, the Administrator's discretion is not to be substituted for that of the LERB in evaluating the evidence.<sup>2</sup> And the possibility of drawing two inconsistent factual conclusions from the evidence does not necessarily indicate that the LERB's findings are not supported by substantial evidence.<sup>3</sup> Issues of law are to be considered de novo, requiring an independent determination of the matter at stake.<sup>4</sup>

### SYNOPSIS OF THE FACTS AND PROCEDURAL HISTORY

Petitioner's locomotive engineer certification was revoked for a period of three years by the Canadian Pacific Railway Company, effective June 14, 2004, because of his refusal to submit to random drug and alcohol testing.

Ruggiero filed a petition for review with the LERB, received by FRA December 10, 2004. The LERB found that Ruggiero filed his petition after the regulatory deadline set forth in 49 CFR § 240.403(d) and found no evidence of "excusable neglect." Accordingly, on July 7, 2005, the LERB denied Ruggiero's petition for review.

Ruggiero filed a direct appeal to the Administrator from the LERB's decision, which appeal was dated July 14, 2005, postmarked July 16, 2005, and marked as received by FRA on July 26, 2005.<sup>5</sup>

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<sup>2</sup> Talbot v. Heckler, 814 F.2d 1456, 1461 (10th Cir. 1987).

<sup>3</sup> 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).

<sup>4</sup> Janka v. Department of Transportation, National Transportation Safety Board, 925 F.2d 1147, 1149 (9th Cir. 1991).

<sup>5</sup> The envelope containing the appeal indicates that a return receipt was completed by FRA, which may bear an earlier date than the date marked on the document.

### LEGAL ISSUES TO BE DECIDED

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

The intermediate issue on appeal is whether, pursuant to the standard for review, the LERB properly determined that Ruggiero's petition for review was untimely filed.

The final issue on appeal is whether Ruggiero has met the test for "excusable neglect" with respect to the untimely filing of his petition for review to the LERB.

### DISCUSSION

#### Timeliness of the Appeal

Appeals to the Administrator must be filed within 35 days after the issuance of the decision being appealed.<sup>6</sup> 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 LERB issued its decision on July 7, 2005. Petitioner's appeal was dated July 14, 2005, and postmarked in Andover, MA, on July 16, 2005. The appeal was marked received by the FRA's Executive Secretariat on July 26, 2005, and, as mentioned above (footnote 5), a return receipt was completed by FRA, possibly before the indicated date of receipt. It is clear that under any set of facts, the petitioner has met the filing deadline, since the latest date involved is only 19 days after the date of the LERB's decision. The appeal was timely filed.

#### Untimely Filing of the Petition for Review to the LERB

The LERB found the petition for review to be untimely filed, based upon what appear to be uncontroverted facts with respect to the posting, receipt, and processing of the document. The

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<sup>6</sup> 49 CFR § 240.411(a).

LERB found that, pursuant to 49 CFR § 240.7, the petition for review had to be postmarked by October 12, 2004, in order to meet the deadline for filing, being 120 days after the date of revocation. The LERB found that the petition for review was postmarked on December 8, 2004, a fact which appears to be supported by the docket clerk's entry on the file copy of the petition for review.

The LERB's determination that the petition for review was untimely filed is supported by substantial evidence in the record and was properly determined pursuant to the standard for review. Furthermore, the LERB's determination with respect to the untimely filing of the petition for review is not opposed by the petitioner on appeal; rather it is admitted in the pleading.

#### Excusable Neglect

The LERB found that the petitioner did not offer any explanation for the delay in filing the petition for review. On appeal, the petitioner attempts to clarify the absence of an excuse by stating: "the reason that no explanation for the delay in filing the petition was offered was because; [sic] I did not realize that I was over on time limits when I filed the petition." Essentially, in supporting a claim of excusable neglect, the petitioner has offered no explanation on appeal beyond simple ignorance of the filing requirement.

In order for the LERB to exercise its discretion to not deny a petition which has been untimely filed, there must be cause shown and the LERB must find that the failure to file was the result of excusable neglect.<sup>7</sup>

The regulation itself does not define the term. But the legislative history sheds some

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<sup>7</sup> 49 CFR § 240.403(d)(2).

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.”<sup>8</sup> Petitioner’s explanation on appeal does not constitute a reasonable explanation for non-compliance.

While the concept of excusable neglect is not limited to those circumstances where the failure to timely file is due to circumstances beyond control of the filer;<sup>9</sup> nevertheless, counsel’s misapplication of clear and unambiguous procedural rules cannot excuse failure to file timely and will not constitute excusable neglect.<sup>10</sup>

In Pioneer, the court sets forth the test for making an equitable determination with respect to excusable neglect, namely: (1) the danger of prejudice to the non-moving party, (2) the length of the delay and its potential impact on the proceedings, (3) the reason for the delay, including whether it was within the reasonable control of the movant, and (4) whether the movant acted in good faith.<sup>11</sup> But the determination of fault in the delay remains the most important single factor in determining whether the neglect is excusable.<sup>12</sup>

In this case, the third factor enunciated in Pioneer is deemed to be the most important

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<sup>8</sup> 64 FR 60966, 60983 (November 8, 1999).

<sup>9</sup> Pioneer Investment Services Co. v. Brunswick Associates Limited Partnership, 507 U.S. 380, 391 (1993).

<sup>10</sup> United States v. Torres, 372 F.3d 1159, 1163 (10<sup>th</sup> Cir. 2004).

<sup>11</sup> Pioneer, at 395.

<sup>12</sup> Torres, at 1163.

factor in determining whether there has been excusable neglect. And it is this factor against which the petitioner's explanation for untimely filing is least compelling. A simple misunderstanding of the rules, particularly where the legislative history of the regulation suggests that there be some reasonable basis for noncompliance, cannot constitute excusable neglect.

The petitioner's failure to understand the clear requirements in the regulation for filing a petition for review does not constitute excusable neglect. The petitioner has not demonstrated on appeal that he qualifies for the exception in the regulation, and the LERB correctly determined that no exception should be granted.

#### CONCLUSION

For the reasons stated above, the petitioner's appeal is denied. My decision constitutes the final action of the FRA in this matter, pursuant to 49 CFR § 240.411(f).

Dated: [November 25, 2005]

[original signed by]  
Joseph H. Boardman  
Administrator