

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

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**Appeal of L.R. Smith**

**(FRA—Locomotive Engineer Certification Case)**

**FRA Docket No. EQAL 2006-38**

**DOT Docket No. FRA-2007-0015**

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**ADMINISTRATOR'S FINAL DECISION ON APPEAL**

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**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.R. Smith's (Smith) petition for review of the alleged revocation of Smith's locomotive engineer certification. I agree with the LERB that Smith did not file a timely and complete petition when he failed to respond to the LERB's repeated requests for additional information necessary to process his 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 for 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. AFLA 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*. This standard requires an independent determination of the matter at stake. Janka v. Dep't of Transp. v. Nat'l Transp. Safety Bd., 925 F.2d 1147, 1149 (9th Cir. 1991).

#### SYNOPSIS OF THE FACTS AND PROCEDURAL HISTORY

On June 6, 2006, Smith submitted a petition for review to the LERB stating that he believed Union Pacific revoked his Class I engineer certification without an opportunity for a hearing. On July 20, 2006, Union Pacific responded to the petition indicating that the petition was not properly before the LERB because Union Pacific had not revoked Smith's certificate. On three separate occasions following receipt of Smith's petition, the FRA, through its LERB counsel or docket clerk, contacted Smith (and/or his representative Mr. Charles R. Rightnowar) requesting additional information—specifically any Substance Abuse Professional (SAP) Reports or other information documenting the railroad's decisions, including any notification of suspension, denial of certification or recertification.<sup>1</sup> Smith has not disputed receiving these requests. Nonetheless,

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<sup>1</sup> The SAP reports were essential to the LERB's analysis because Smith's alleged decertification involved Smith's allegedly testing positive on random a drug and alcohol test, his subsequent conditional employment, and then alleged non compliance with that conditional employment.

no additional information was received from Smith in response to the LERB's requests, and on October 19, 2007, the LERB dismissed Smith's petition for failure to file the petition properly with sufficient information upon which to proceed. On November 9, 2007, Smith filed a request for a hearing with the FRA's Administrative Hearing Officer (AHO), which was dismissed for lack of jurisdiction on September 8, 2008. On October 9, 2008, Smith filed this appeal to the Administrator.<sup>2</sup>

Significantly, despite having the opportunity to do so at the LERB stage, in his hearing request to the AHO, and in his appeal, Smith did not provide an explanation for why he did not provide the additional requested information to the LERB. Nonetheless, wishing to provide Smith a fair process, on January 7, 2009, then Acting Administrator, Clifford C. Eby, issued a Show Cause Order, giving Smith yet another chance to provide the necessary information.

Specifically, Acting Administrator Eby ordered:

Smith to: 1) show good cause why he did not submit the SAP reports or other documents in his possession when requested to do so by the LERB; and 2) submit the SAP Reports or other documents in his possession or obtainable by him to me and the LERB. Failure to provide a sufficient explanation of excusable neglect and the required documents will result in dismissal of Smith's appeal.

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See Union Pacific's Response to the Appeal, October 22, 2008. Union Pacific has maintained that Smith's certification was never revoked; but only suspended due to the positive drug and alcohol test and failure to comply with the conditional employment agreement. Id.

<sup>2</sup> Smith filed this appeal under 49 C.F.R. § 240.411, that is an appeal from the decision of the hearing officer; however, I interpret Smith's failure to file the requested documents within the generous time frame(s) set by the LERB as an untimely filing under 49 C.F.R. § 240.403(e) because it resulted in Smith's failure to file a completed petition in a timely manner. Decisions of the LERB that result in dismissals for untimely filings are heard as direct appeals to the Administrator under 49 C.F.R. § 240.403(e).

Smith was given twenty (20) days to respond to the order. The FRA and Union Pacific were afforded an additional twenty (20) days following receipt of Smith's response to submit their replies. On January 27, 2009, Smith filed a response to the Show Cause Order. On March 3, 2009,<sup>3</sup> the FRA replied.

### LEGAL ISSUES TO BE DECIDED

The threshold legal issue is whether Smith filed a timely appeal. However, the ultimate legal issues on appeal are: 1) whether Smith has met the test for "excusable neglect" with respect to his failure to respond to the LERB's requests for more information on his petition for review to the LERB and 2) whether Smith has demonstrated any relevant factual issues upon which the LERB relied that are not supported by substantial evidence.<sup>4</sup> The only available remedies for this appeal are to remand it back to the LERB for a decision on the merits of the alleged 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 Smith's petition.

### DISCUSSION

#### *Timeliness of the Appeal*

Appeals to the Administrator must be filed within 35 days after the issuance of the

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<sup>3</sup> FRA asserts that it did not receive Smith's reply until February 11, 2009.

<sup>4</sup> In Smith's Response to the Show Cause Order, he also appears to be appealing his discharge from Union Pacific Railroad. However, the FRA has jurisdiction only to hear appeals from revocations or denials of locomotive engineer certifications. 49 C.F.R. § 240.5(d). In any case, this decision only addresses whether or not the LERB's decision to dismiss Smith's petition was proper. See 49 C.F.R. §§ 403(e) and 411(f). It does not address the substantive issues related to Smith's alleged certification revocation, as these have not been decided by the LERB (or AHO).

decision being appealed. 49 C.F.R. § 240.411(a). Pursuant to 49 C.F.R. § 240.7, “filing” means the date the mailing was complete. Smith filed this appeal on October 9, 2008—only 31 days after the administrative hearing officer dismissed his request for a hearing on September 8, 2008.

Thus, his appeal is timely.<sup>5</sup>

**Excusable Neglect and Substantial Evidence**

In the January 9, 2009, Show Cause Order, Smith was ordered to: 1) show good cause why he did not submit the Substance Abuse Professional (SAP) reports or other documents in his possession when requested to do so by the LERB; and 2) submit the SAP Reports or other documents in his possession or obtainable by him to the then Acting Administrator and the LERB. See Show Cause Order, at 3. Smith did neither. Smith was also warned that failure to provide a sufficient explanation of excusable neglect and the required documents would result in dismissal of his appeal. Id.

Good cause for failing to comply with an order constitutes “excusable neglect.” 49 C.F.R. § 240.403(d)(2). “Excusable neglect” is not defined in the regulation. However, the regulatory 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 at the very least a demonstration of good faith on the part of the party and some reasonable basis for noncompliance within the time

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<sup>5</sup> Strictly speaking, Smith should have appealed the decision of the LERB on October 19, 2007 directly to the Administrator, making his October 9, 2008 appeal very untimely. However, as I have decided to accept the appeal from the hearing officer’s decision as one directly from the LERB under 49 C.F.R. § 240.403(e), I also must accept this appeal as timely. In addition, 49 C.F.R. § 240.403(e) is not clearly implicated where failure to supply requested documents to complete one’s petition occurs.

specified in the rules.” 64 FR 60966, 60983 (November 8, 1999); see also Pioneer Inv. Servs. Co. v. Brunswick Associates Ltd. P’ship, 507 U.S. 380, 395 (1993) (finding the determination of “excusable neglect” “an equitable one, taking account of all relevant circumstances surrounding the party’s omission. These include ... the danger of prejudice ..., 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.”) (internal citations omitted). Smith has not demonstrated “excusable neglect” in his explanation as to why the requested documents have repeatedly not been submitted by him; rather, Smith seems more to be willfully refusing to submit them as a kind of protest against the process and his responsibility for it.

Specifically, Smith states that he “had ‘good cause’ not to submit the SAP reports—he did not have them, is not required to seek them, and [Union Pacific] was better positioned to provide them.” Smith’s Response to Show Cause Order, at 4. Smith also makes the argument that Union Pacific had the responsibility to provide them. Id. I find none of these arguments persuasive. First, it was the responsibility of Smith, the petitioner, not Union Pacific to correctly file all of the necessary documents to process his Petition for Review from the alleged decertification. See 49 C.F.R. § 240.403 (emphasis added) (“Petition requirements. (a) To obtain review of a railroad’s decision to deny certification, deny recertification, or revoke certification, *a person* shall file a petition for review that complies with this section.”). Moreover, as the FRA pointed out in its Reply to the Show Cause Order, at 5, the railroad is not a mandatory party before the LERB; instead, it may choose whether or not to submit any information it deems pertinent. See 49 C.F.R.

§§ 240.405(a) and (c).<sup>6</sup> In addition, the LERB did not ask Union Pacific for the information. The LERB, through its counsel, asked Smith for the information three times—and allowed him nearly one year to produce the information. See LERB October 19, 2007 Dismissal Letter (the first verbal request was made to Smith’s representative on November 16, 2006).

Significantly, despite these clear requests and Smith’s apparent belief—even during the pendency of his petition before the LERB—that he should not have to file the requested documents, he did not file an objection or explanation to the LERB at the time the information was requested. As has been previously enunciated in Appeal of Thomas T. Wells, Jr.,<sup>7</sup> 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. Moreover, Federal Rule of Evidence 103 states:

Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and (1) Objection.—In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection...”

The reason for requiring objections at the adjudicatory level is logical; the nature of the error must be called to the attention of the reviewer of fact, in this case the LERB, “so as

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<sup>6</sup> 49 C.F.R. §§240.405(a) and (c) read together show that the railroad’s participation is not mandatory. Section 240.405(c) gives the railroad 60 days to respond to a petition. However, Section 240.405(a) states: “the LERB will render a decision on this petition within 180 days from the date that the railroad’s response is received or from the date upon which the railroad’s response period has lapsed pursuant to paragraph (c) of this section.” (emphasis added). In other words, the LERB will decide a petition with or without the railroad’s response. *Cf.* 49 C.F.R. §240.409(p) (“The petitioner before the Locomotive Engineer Review Board, the railroad involved in taking the certification action, and FRA shall be parties at the hearing.”) (emphasis added). Thus, although a respondent railroad is not a required party at the petition stage, the regulations make clear that the railroad is a mandatory party at the hearing stage, should the petition reach that stage.

<sup>7</sup> Docket No. 99-96 (DOT Docket # FRA 2000-7596), April 17, 2001, at 2.

to alert [it] to the proper course of action and enable opposing counsel to take proper corrective measures.” Federal Rules of Evidence 103 (Advisory Notes); see also Emenaker v. Peake, 551 F.3d 1332, 1337 (Fed Cir. 2008) (appeal from administrative decision denying veteran’s benefits noting that “with limited exceptions, appellate courts do not consider issues that were not raised in the tribunal from which the appeal is taken.”). In the instant appeal, Smith did not alert the LERB to his objection or the reasons for the objection. Had he done so for legitimate reasons, the LERB could very well have chosen to ask Union Pacific for the documents or decide the petition without the documents.

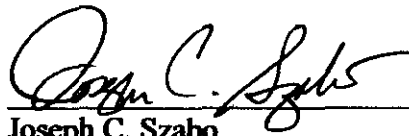
Perhaps most disturbing of all is Smith’s blatant disregard of the order of my predecessor requiring Smith to produce the documents. The Order to Show Cause ordered Smith to “submit the SAP Reports or other documents in his possession or obtainable by him” to the Administrator and the LERB. Smith never stated he could not obtain the documents or even that he had tried and failed. Rather, Smith stated that he could get the documents but should not have to because Union Pacific could produce them. Smith’s Response to Show Cause Order, at 4.

#### CONCLUSION

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

Dated: \_\_\_\_\_

6/30/09

  
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Joseph C. Szabo  
FRA Administrator



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The undersigned hereby certifies that the foregoing document, Administrator's Final Decision on Appeal, has been delivered to all parties named below via U.S. Mail.

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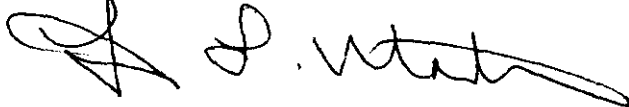
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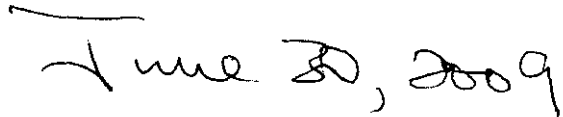
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