

**NO RULES:  
THE GRIEVERS' GUIDE  
FOR INVESTIGATIONS**

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## **NO RULES - THE GRIEVERS' GUIDE FOR INVESTIGATIONS**

### **ABSTRACT**

Most union representatives do not understand the investigation process. Most think the primary purpose is to convince the **railroad** that the charged employee is not guilty. Wrong! The real purpose is to convince the arbitrator.

Most representatives have heard that the investigation must be fair and impartial, but do not realize the significance of these words. Many think the presiding officer or superintendent decides what is a fair and impartial manner. Wrong again! It is the decision of the arbitrator.

In order for the arbitrator to make an informed decision, he must have all the facts relevant to the charge. It is the representative=s job to get all of the facts in the record for the arbitrator=s review. The trick is to know how to get these facts in the record! Believe it or not, it can be done and the way to do it is to understand there are No Rules!

The purpose of this manual is to provide the representative with practical advice as to both preparation and knowledge of the procedural and substantive aspects of an investigation so he can get facts in the record. Preparation and knowledge are critical to avoid intimidation and to provide proper representation. The information contained herein explains what to do and how to do it.

However, this manual is not intended to supplant any labor agreements, interpretations of labor agreements, advice or instructions of your General Chairperson, and/or of the

International Union.<sup>1</sup> Hopefully, this information will help alleviate some of the intimidation and pressure rail management places on the representative and will educate the representative how to win.

## **I OVERVIEW OF AN INVESTIGATION**

Management's perspective is very different from that of the representative. Management conducts the investigation only as a prerequisite of discipline, not to exonerate the charged employee. For the representative, the investigation is the last bastion between employment and unemployment for the charged employee. However, in the final analysis, the investigation is supposed to serve both sides to develop all relevant facts so the arbitrator can determine if the charged employee violated the rules and was afforded a fair and impartial investigation.

### **A. Management's Perspective.**

Management can usually make a strong case against any employee for a rule violation. There are thousands of rules employees are required to obey every minute they are on duty. But contrary to popular belief, investigations are generally called only when there has been an accident or injury. Management simply has neither the time nor the resources to hold investigations for every rule violation.

When charges<sup>1</sup> are actually levied, the representative must realize that management has already decided the charged employee is guilty. The representative should not labor under

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<sup>1</sup> See UTU Grievance Handling by Rail Local Chairpersons, United Transportation Union PR Series No. 10 (Rev. 1989). This handbook is generally available from the UTU International Union and is an excellent source of information.

the naive impression that the superintendent or trainmaster will be convinced during the course of the investigation that the charged employee is innocent. Probably less than one percent of all investigations result in no discipline at the superintendent=s level. Even if the evidence is overwhelmingly in favor of the charged employee, management will usually assess demerits or deferred days in order to avoid paying the charged employee's lost time.

Thus, from management's perspective, the investigation is a nuisance. It is a procedure, imposed by the labor agreement, management must comport with to assess its predetermined discipline.

B. The Representative's Perspective.

For the representative, the procedure should be viewed as an opportunity to develop a written record of all the favorable and relevant facts for appellate review by an arbitrator. It is not the time to play Perry Mason or to air an unrelated personal vendetta with management. It is simply a chance to make a concise written record of the facts and evidence that vindicates the charged employee, for the benefit of the arbitrator.

Throughout the investigation, the representative must conduct himself as if he were speaking **directly to the arbitrator**; not management. The representative should ask questions, make statements, and make objections that will convince an arbitrator, not the railroad, that the charged employee either did not violate the rule or that there were mitigating circumstances that justify the violation.

In order to prepare a defense, the representative must know before the investigation what the railroad knows. To exonerate the charged employee, the representative must review all the documents in the railroad's possession relating to the case, prior to the investigation, so he will know the strengths and weaknesses of the railroad's case, as well as how the railroad will attempt to make a case against the charged employee. Failure to do so means the charged employee will lose.

Thus, for the representative, the idea is simple: make a concise written record for review by an arbitrator. Get **everything** in the transcript that will convince the arbitrator that the charged employee should not be disciplined.<sup>2</sup>

C. Commonality of Interest.

Both management and the representative have a commonality of interest to develop the facts and make a record to support their respective positions. Management will develop only those facts that support its contention that the charged employee is guilty. For the representative, the task will be the opposite and much more difficult. Of the two, management's job is much easier.

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<sup>2</sup> Once a decision is made to hold an investigation, both the representative and the charged employee should avoid admitting guilt if possible. Such admissions defeat the entire purpose of the process, unless there are substantial mitigating reasons to explain the violation, or the violation is technical or minor.

Management has enormous control over the development of the facts of an alleged rule violation. It has possession of written records, crew dispatcher's records, train orders, track warrants, recorded phone calls, personal injury reports, photographs, and claim agent reports. Management has the staff available to interview employees who witnessed the alleged violation. Management has the ability and will intimidate employee witnesses to prevent them from testifying<sup>3</sup> favorably for the charged employee.<sup>4</sup>

The representative will normally be confronted at the investigation by a company witness (trainmaster, road foreman) who will testify exactly as the superintendent wants. The officer will only testify as to those facts which prove the charged employee violated the rule. The testimony will undoubtedly be lopsided in favor of management's position, and skillfully developed by a presiding officer who will use leading<sup>5</sup> questions as necessary to make management's case. Be prepared for the company witness to enter company records (crew dispatcher, train dispatcher records, event recorder tapes, etc.) as evidence to support management's position. Do not be surprised by the lopsided manner in which the proceedings are conducted. The representative **cannot** stop management from putting on its case.

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<sup>3</sup> The word "testify," as used throughout this manual, refers to witnesses' answers during the investigation. However, no one is sworn to tell the truth at an investigation and thus the term does not take on its usual legal connotation for investigational purposes.

<sup>4</sup> But see 45 U.S.C. ' 60 as applied to personal injury investigation. Page 65 *supra*.

<sup>5</sup> A leading question is one that suggests an answer: "Isn't it true that the conductor told you it was his fault?"

The representative's job is to develop facts that vindicate the charged employee and that show bias and prejudice of the carrier=s witnesses. However, the task is usually much more difficult because the representative does not have the resources of management. But remember, the charged employee has the right to develop all the facts that will vindicate the charged employee.<sup>6</sup> This includes extraneous evidence if it will help make the arbitrator aware of all of the favorable facts of the case.

## **II PREPARING FOR THE INVESTIGATION.**

The single most important key to winning an investigation is preparation. The representative must be prepared. In order to be prepared, the representative must develop a defense.

### **A. Develop a Defense**

The charged employee has a right to present any defense, including an allegation that the discipline was a pretext for discrimination, provided that such allegation is relevant to the events resulting in claimant=s discipline.<sup>7</sup> Thus, the representative has the right to present any defense so long as it is relevant. If the charged employee is accused of excessive absences, then a relevant defense would be how much other similarly situated employees lay off.

The representative must know what the railroad knows about the case. The representative must write and insist that the railroad produce copies of all documents in its

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<sup>6</sup> See First Division Awards 5301, 14776, and 20071.

<sup>7</sup> See First Division Award 23821, John B. LaRocce, Chairman

possession relevant to the charges, well in advance of the investigation so that they may be reviewed by the representative and the charged employee. The representative must also prepare the charged employee by explaining the process and how to answer hard questions.

The railroad has thousands of **broad** operating and safety rules. Thus, when charges are levied, the railroad will be able to argue that the accident or incident was, in fact, a violation of one of its rules. Because the railroad=s rules are vague and overbroad, it is easy to argue that the employee=s conduct is colorably in violation of one of the rules. Thus, the representative=s obligation is to develop a defense which justifies a violation of the rule. In other words, the representative should develop a theme or reason why the employee should not be disciplined, instead of only trying to pick apart the railroad=s case against the charged employee.

B. Request Documents from the Railroad

Secondly, the representative must review any and all documents the railroad has generated prior to the investigation. For example, if there is a derailment, the trainmaster will investigate and file a report; the maintenance of way employees will make reports of their repairs and possible causes of the derailment; event recorders and hot-box detector tapes will be reviewed. A claim agent may make reports, take statements, and take photographs. There will undoubtedly be e-mail communications between various officers of the company regarding the matter. There may be drafts of charge letters that were not used. There may be communications between an involved yardmaster and car man that may be helpful. There may be memos or letters from the superintendent to the trainmaster recommending or not

recommending charges. The representative should write the railroad at least two weeks in advance of the investigation and demand the railroad produce documents the representative deems relevant and important **prior** to the investigation.

The following is a sample request for documents that could be used in a case of alleged insubordination for failing to depart the terminal due to an unsafe condition of the engines:

*Dear Mr. Charging Officer:*

*In connection with the charges of Mr. Charged Engineer, it is necessary that you produce the following documents and/or make them available for my inspection at least five days prior to the investigation so that I may prepare an adequate defense for Mr. Charged Engineer as follows:*

- (1) All transcriptions and/or all tapes of any and all conversations between Mr. Charged Engineer and the involved Trainmaster and/or Yardmaster and/or any other employees of the railroad on the morning that the incident took place.*
- (2) Copies of all statements and/or reports completed by any witness to the incident or any witnesses who overheard the conversations between Mr. Charged Engineer, the Trainmaster, and/or Yardmaster.*
- (3) A copy of all reports made by the Trainmaster and/or the Superintendent or any other officer who participated in the incident or investigated the incident.*
- (4) A copy of all incident reports, accident reports, and/or reports made to any governmental agency regarding the incident made the basis of this investigation.*
- (5) A copy of the schematic diagram of the locomotive involved in the incident made the basis of this investigation which clearly depicts the control stand, the train brake handles, air gauges, amp gauges, speedometer, and general overall engineer's control stand.*

- (6) *A copy of the event recorder of each locomotive in the consist for a 24-hour period prior to and after the incident made the basis of this investigation.*
- (7) *Copies of all previous complaints regarding the operation of locomotives such as the one involved in the incident made the basis of this investigation operating in a reverse direction for a one-year period prior to the incident.*
- (8) *A copy of Mr. Charged Engineer's personnel record.*

*In addition, we request that you make available at the investigation, Engineer Jones and Foreman White. These individuals were working Yard Job 402 at Englewood Yard on the morning of the incident and overheard the conversations between the charged employee and the Yardmaster and Trainmaster. They are in a position to testify that the engineer did not refuse to depart the terminal.*

*It is necessary that you produce the requested documents and produce the witnesses for questioning at the investigation so that Mr. Charged Engineer can receive a full, fair, and impartial investigation. You are reminded that it is the obligation of the railroad that procedures be employed to make sure that Mr. Charged Engineer receives a full, fair, and **objective** hearing designed to elicit **all** of the facts surrounding the charges that someone other than the railroad can decide whether the facts of the record support the charges.*

In a personal injury case, the following is an example of a letter requesting necessary documents:

*Dear Mr. Charging Officer:*

*We are in receipt of your charge letter to our member, Mr. Joe Smith. Please accept this as our request that you produce the following documents at least five (5) days in advance of the investigation, so that I may inspect the documents and prepare an adequate defense for Mr. Smith:*

1. *A copy of all documents which indicate when the involved switch made the basis of this investigation was first installed, and any documents indicating any repair or maintenance of the switch since its installation;*

2. *A copy of any and all photographs taken of the switch involved in the incident made the basis of this investigation by the claim agent, or any other person, since Mr. Smith's injury;*
3. *A copy of Mr. Smith's accident report and statement that he has given to the claim agent with respect to the injury made the basis of this investigation;*
4. *A copy of all safety rules that you contend Mr. Smith violated in connection with the incident made the basis of this investigation;*
5. *A copy of any prior complaints regarding the operation of the switch made the basis of this investigation for a three year period prior to Mr. Smith's injury;*
6. *A copy of Mr. Smith's personnel file;*
7. *A copy of all documents indicating all repairs made to the switch after the injury made the basis of this investigation;*
8. *A copy of any statement and any accident reports completed by any other employee regarding the injury made the basis of this investigation; and*
9. *A copy of all notes and reports made by the investigating officer regarding the injury made the basis of this investigation.*

Once the documents are obtained and thoroughly reviewed, it may be necessary to interview employees who are mentioned in the documents or employees who prepared the documents to determine if the documents are correct. The documents may, in part, exonerate the charged employee or at least give a helpful explanation as to why the employee acted in the manner in which he did. Furthermore, the documents may show bias or prejudice on the part of the carrier officers. The representative may discover that the superintendent recommended the employee be charged or disciplined prior to the charges being issued, or the superintendent may have recommended that the employee not be charged or disciplined.

Knowing what the railroad knows allows the representative to prepare a defense. It gives the representative insight as to how the railroad will present its case at the investigation. Without documents, the representative will simply not be prepared to defend the charged employee. Without reviewing the documents, the representative simply sits at the investigation and lets the railroad make its case against the charged employee.

C. Prepare the Charged Employee

The representative must meet and prepare the charged employee for the investigation. Once a defense has been determined and the documents have been reviewed, the representative must counsel with the charged employee so that he understands what the defense is. The representative must explain the types of questions he will be asked by the presiding officer and how to properly respond. He must also cover the questions he will ask and the response.

This is a very difficult and time-consuming task, but the charged employee will probably be the most important witness at the investigation. This is the person the arbitrator wants to hear from the most. The arbitrator will want to know who the person is and his version of the events.

In conclusion, preparation for the investigation is the most important single aspect. Lawyers prepare for months before they actually go to trial, and while investigations are not trials and are not governed by any particular rules of trial law, the representative should expect to spend hours preparing for the investigation. If the representative's preparation only

amounts to meeting the charged employee thirty minutes before the investigation, the case is over.

### **III. OPENING THE INVESTIGATION.**

For the inexperienced, the opening of an investigation is usually an intimidating event. Possibly for the first time in his railroad career, the representative will be face-to-face with his own supervisors. For the first time, the representative is in a position of authority, or at least on an equal footing with the supervisor. To effectively use his authority, the representative cannot afford to be caught off guard by the preliminaries.

#### **A. Reading the Charge Letter.**

The investigation usually begins after the charged employee, his representative, the witnesses, and the presiding officer have gathered in a room. The carrier will transcribe or tape the entire proceeding and consequently a clerk or transcriber may also be present.<sup>8</sup>

With all present, the presiding officer will open the investigation by reading the actual charge letter into the transcript. Requests for postponements, witnesses, documents, and the granting or denying of such requests, are usually read into the transcript. This serves to apprise the arbitrator of the actual charges and of all requests for documents and witnesses. There is no need to object to this procedure as it is simply informational.

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<sup>8</sup> Some investigations are electronically recorded and not transcribed during the proceeding. These are more difficult as one may not remember what was previously asked.

B. Qualifying the Witnesses.

The second step is normally referred to as qualifying the witness. The presiding officer usually asks the charged employee and each witness such questions as:

- 4 Name;
- 5 Address;
- 6 Occupation;
- 7 Dates of service and length of time engaged in current occupation;
- 8 Whether or not the charged employee has received **proper notice**;
- 9 Whether or not the charged employee has been notified of his opportunity to have a representative and witnesses appear on his behalf;
- 10 Who the charged employee desires to be his representative;
- 11 Whether or not the charged employee has a copy of the applicable rules;
- 12 Whether or not the charged employee has passed the required examinations for his position of employment;
10. Whether or not the charged employee desires any witnesses; and
11. Whether or not the charged employee is ready to **proceed**.

Except for questions five, six and eleven, no objections are necessary. However, if the charge letter is vague or improper, the charged employee should respond "No, @ or that the arbitrator will decide if he has received proper notice. If the charged employee admits that he has received proper notice of the investigation, the union may not later argue the charge letter was improper.<sup>9</sup>

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<sup>9</sup> It is very difficult to quantify a charge letter that is so vague that it would allow an arbitrator to remove

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discipline because of the vagueness of the charge. It is very common today for the railroad to charge an employee who is injured on duty. Quite often the charge reads something to the effect: "You are charged in connection with an injury that occurred on January 1, 1997, while you were aligning Switch 123 and may be in violation of Rule L (which is the general safety rule)." This type of charge letter is probably specific enough and an arbitrator is not likely to find that it is vague enough to reverse discipline.

However, remember that such a charge letter does not allow the railroad to talk about or bring up facts relevant to some other violation and the investigation should be limited to the incident involving an injury that occurred while aligning Switch 123.

Also, if the charge letter says something to the effect: "You are charged with a violation of Rule 123," or language that plainly indicates the employee did violate a rule, then the argument is that the wording of the charge confirms the railroad has predetermined the individual did violate the rule and the charged employee cannot receive a full, fair and impartial investigation. Remember, that's basically the situation in every case. However, when the railroad makes a mistake and explicitly states that the employee actually did violate the rule, then there is a very strong argument and a very good chance the discipline will be overturned on appeal.

Generally, due process does not require the notice to specify a specific rule the claimant allegedly violated. See Award 9, PLB 1849, T.H. O'Brien, Chairman.

Question six is very important. If witnesses have been requested, the charged employee must insist that they be present. If the charged employee fails to insist that the witnesses be present, he may waive the right to later argue that he did not receive a fair and impartial investigation. Of course, the representative may object as well and state that the charged employee will not receive a fair and impartial investigation without the requested witnesses and insist on their presence. It does no good to demand witnesses (or documents) only to have the charged employee say or imply they are not necessary.

Question eleven is also treacherous. If witnesses and documents have been requested but not produced, the charged employee and the representative must object to the carrier's failure to timely produce the witnesses and documents. Failure to do so waives this procedural right! If the railroad does not produce all requested documents in advance of the investigation, or all the requested witnesses, the representative must state they are not ready to proceed until they have had ample time to review the documents and the witnesses are present.

The presiding officer may ask if a postponement is desired. The best response is an agreement to postpone. However, if a postponement is not desired (because of added expense to the charged employee or the representative), request on the record that the railroad pay the lost time of the representative and the charged employee, since it has needlessly wasted their time. If the Carrier refuses to pay, hopefully, the arbitrator will understand that the offer of postponement is not sincere.

C. Opening Statement.

After the witnesses are qualified, **all** witnesses (not the charged employee) should be excused from the proceeding. **The representative must insist that everyone except the charged employee and the presiding officer be excused from the room prior to making his opening statement.** If the opening statement is made with the company witnesses present, their testimony may change in such a manner as to conflict and destroy the representative's theory espoused during the opening statement. The charged employee cannot receive a fair and impartial investigation if all of the witnesses are allowed to hear the representative's opening statement and theories of defense, or the testimony of other witnesses.<sup>10</sup> The legal system has a provision commonly referred to as "the rule" which allows the lawyers to have all witnesses removed from the courtroom while other witnesses testify.<sup>11</sup>

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<sup>10</sup> The exclusion of all witnesses will not prevent the presiding officer from telling the carrier witnesses, during the first break, what the Union's theory of defense is. Further, once a carrier witness has testified, he may tell another carrier witness what he said. If the representative suspects either scenario, then he should ask the witness if he has talked to the presiding officer about the case since the investigation began. If he admits that he has, then call the presiding officer as a witness. If one suspects this type of conduct, at least raise this issue for the arbitrator:

Q. Mr. Witness, didn't you just talk to the presiding officer right after I gave my opening statement?

Q. Isn't it true that he coached you as to what our defense would be?

Even if denied, make a statement and inform the arbitrator they were talking during the break and coached as to the Union's defense.

<sup>11</sup> See, Federal Rule of Civil Procedure 615:

"At the request of a party, the court shall order witnesses excluded so that they cannot hear the testimony of other witnesses." Remember that most arbitrators are lawyers and will probably rely on legal evidentiary rules to decide procedural due process issues.

The representative should then make a clear and concise opening statement. The statement should inform the arbitrator of the nature of the case and why the charged employee should not be disciplined.

The representative's opening statement should also object to any procedural errors. For example, if the charge letter is vague and he is unable to adequately prepare a defense, object to the vagueness of the charge. If the representative has requested witnesses or documents that the carrier does not provide, he should object on the grounds that the charged employee will not receive a fair and impartial investigation.<sup>12</sup>

In the above referenced insubordination case, the representative should have requested that the carrier produce other employees who the representative believes would testify that the engine was unsafe to work. If the carrier does not produce them, the representative must make a detailed opening statement as to what each requested witness would testify to. Remember, if the carrier refuses to produce a requested witness, the representative's recitation of what the witness would say gets the same information before the arbitrator, just as if the witness said it!

In our hypothetical case of insubordination, the following is an example of an opening

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<sup>12</sup> The objection should state in general terms what the witnesses had knowledge of. This gives the representative an excellent opportunity to tell the arbitrator the key points that the witnesses would have made. The representative's recitation of the witness's testimony may be better than the actual witness!

statement.<sup>13</sup>

*STATEMENT BY MR. REPRESENTATIVE*

*The charged employee, Mr. Engineer, has been charged with insubordination. The facts of this case will clearly show that Mr. Engineer was not insubordinate, but rather he simply requested that the engines be turned before he departed the terminal in order that the cab of the locomotive would be headed in the forward direction. Because the lead locomotive was not headed in the direction of movement, Mr. Engineer felt the engine would create an unsafe condition for himself, his crew members and the general public.*

*Further, the facts will show that there was ample time to turn the locomotives. Mr. Engineer went on duty at 2:45 a.m. The engines were not made available to him until 3:40 a.m. His request for turning was made at approximately 4:05 a.m. and his train was not ready to depart until approximately 5:00 a.m. Turning facilities were available at the initial terminal and the engines could have been turned in approximately 15 to 20 minutes.*

*Mr. Engineer never refused to depart the terminal; he simply requested that the unsafe condition be corrected prior to departing the terminal. Therefore, he was not insubordinate.*

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<sup>13</sup> It is certainly permissible to write the statement out prior to the investigation, read from the writing at the hearing, and/or enter the writing as an exhibit.

*However, in the alternative, if those who review this transcript feel that Mr. Engineer's conduct amounted to technical insubordination, we believe that he had a right to refuse to depart the terminal pursuant to 49 U.S.C. ' 20109<sup>14</sup> (1996) which basically mandates that an employee has a right to refuse to perform an unsafe task without threat of disciplinary retaliation so long as that unsafe condition poses an imminent threat of serious bodily injury or death. We believe the facts will show that operating the engine with the long nose forward did present an imminent threat of serious bodily injury or death because the control stand was positioned in such a manner so that Mr. Engineer was unable to look forward and at the same time view the controls of the locomotive. Thus, it was virtually impossible for him to simultaneously view the air gauges, amp meter, safety alerter, speedometer, and the roadside*

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<sup>14</sup> ' 20109 (1996). Protection and rights of employees.

(a) A common carrier by railroad engaged in interstate or foreign commerce may not discharge or in any manner discriminate against any employee because such employee, whether acting in his own behalf or in a representative capacity, has--

(1) filed any complaint or instituted or caused to be instituted any proceeding under or related to the enforcement of the Federal railroad safety laws; or

(2) testified or is about to testify in any such proceeding.

(b)(1) A common carrier by railroad engaged in interstate or foreign commerce may not discharge or in any manner discriminate against any employee for refusing to work when confronted by a hazardous condition related to the performance of the employee's duties, if--

(i) the condition presents an imminent danger of death or serious injury; and

(ii) there is insufficient time, due to the urgency of the situation, to eliminate the danger through resort to regular statutory channels; and

(A) the refusal is made in good faith and no reasonable alternative to such refusal is available to the employee;

(B) the hazardous condition is of such a nature that a reasonable person, under the circumstances then confronting the employee, would conclude that--

(C) the employee where possible, has notified his employer of his apprehension of such hazardous condition and of his intention not to perform further work unless such condition is corrected immediately.

(2) The provisions of this subsection shall not apply to security personnel employed by a railroad to protect persons and property transported by such railroad.

(c)(1) Any dispute, grievance, or claim arising under this section shall be subject to resolution in accordance with the procedures set forth in section 3 of the Railway Labor Act (45 U.S.C. 153) [45 USCS ' 153].

(2) In any proceeding with respect to which a dispute, grievance, or claim arising under this section is brought for resolution before the Adjustment Board (or any division or delegate thereof) of any other board of adjustment created under section 3 of the Railway Labor Act (45 U.S.C. 153), such dispute, grievance, or claim shall be expedited by such Board or other board and be resolved within 180 days after its filing. If the violation of subsection (a) or (b) is a form of discrimination other than discharge, suspension, or any other discrimination with respect to pay, and no other remedy is available under this subsection, the Adjustment Board (or any division or delegate thereof) or any other board of adjustment created under section 3 of the Railway Labor Act [45 USCS ' 153] may award the aggrieved employee reasonable damages, including punitive damages, not to exceed \$20,000.

*track and signals ahead. Such conditions could result in a serious derailment or crossing accident which is certainly an imminent threat of serious bodily injury or death to himself, his crew, and the general public.*

*Thus, we believe that Mr. Engineer was not insubordinate because he did not refuse to depart the terminal; but in the alternative, we believe he had the right to demand the engines be turned because of the unsafe condition imposed by the direction in which the locomotive was headed. For those reasons, we request that Mr. Engineer be immediately reinstated with pay for all time lost.*

The representative or charged employee should be allowed to make a statement or objection **at any time** and say whatever they feel is relevant to their defense of the case.<sup>15</sup>

Remember, there are really **no rules that prevent such a statement!** The presiding officer may interrupt and tell him to stop because the statement is not relevant to the charge. If so, simply make another statement and state that the presiding officer has tried to stop the representative from giving a statement and the charged employee is therefore being denied a fair and impartial investigation.<sup>16</sup> If the presiding officer refuses to allow a statement or a portion of a statement, write a letter to the Superintendent at the conclusion, stating what the witness would have said or what the documents would have shown, and demand the letter be made a part of the record.

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<sup>15</sup> The terms Astatement@ and Aobjection@ are used interchangeably throughout this manual. They really have the same meaning and purpose. It is not necessary for the representative to use the term Aobjection@ to object. Remember, there are no rules and the representative merely to tell the arbitrator the nature of the complaint.

<sup>16</sup> Remember that the charged employee has the right to develop all material facts relative to the charge. See First Division Award 10348:

"The purpose of the investigation is to develop all material facts to the charges....He [management] should use sound discretion in seeing that the rights of the employee are fully protected."

The following is an example of such a letter.

*Dear Mr. Superintendent:*

*An investigation was held July 20, 1998 for Engineer Smith. During the investigation I attempted to make a statement on the record to explain why Mr. Smith was not guilty of insubordination. The presiding officer refused to allow me to make a statement. This of course denied Mr. Smith a full, fair and impartial investigation, as all relevant material facts will not be developed.*

*Had I been allowed to make a statement I would have said the following:*

*"Mr. Smith was not guilty of insubordination because he did not refuse to work the locomotive. Mr. Smith believed that the condition of the locomotive was unsafe and he was simply attempting to get the company to turn the locomotive before he departed the initial terminal. It has been the practice and policy of the company in the past to turn locomotives at the initial terminal upon request of the operating locomotive engineer. Numerous engineers in the past have made similar requests and these requests have been complied with without any charges of insubordination being levied against the requesting engineer. In fact, it has never been the practice in my twenty years of railroading experience for the railroad to deny an engineer the right to have his locomotive turned especially when the engine was headed in the wrong direction. In this case, the engine was designed to operate long nose forward but was headed in a direction requiring the engineer to operate it short nose forward. This created a very unsafe condition which certainly warranted the engineer's request of turning the engine."*

*Please attach this letter which includes the statement that was denied to the transcript of the investigation so the arbitrator may review what I was denied the right to say in defense of charged engineer Smith. Please confirm in writing to the undersigned that this letter has been attached to the transcript of this investigation as requested.*

*Very truly yours,*

*Local Chairman*

*cc: General Chairman  
Charged Employee*

Does the railroad have to make the letter a part of the transcript? Of course not! But, at least the General Chairman can request the statement be considered by the arbitrator. The General Chairman can request the arbitrator to allow the letter and its contents be made a part of the record. At a minimum, the arbitrator must read the letter to make a decision. Regardless of whether the arbitrator makes the letter a part of the record becomes moot, because he knows its contents! Thus, the representative's mission is accomplished.

Simply being aware of what to expect at the beginning of the investigation and realizing that there really are no rules will prevent an inexperienced representative from being intimidated and stifled by the procedure. The representative should develop a theme, state the theme in his opening statement, and follow the theme throughout the proceedings. Do not leave out facts that are helpful to the charged employee.

#### **IV. BODY OF THE INVESTIGATION.**

Once the witnesses are qualified and the opening statement is made, the actual questioning of the witnesses begins. Both the presiding officer and the charged employee and/or his representative have the right to question the witnesses. This is actually where most of the proof of the facts is made. Again, both parties have different roles and different perspectives, and the questioning of carrier witnesses and employee witnesses should be approached differently.

##### **A. Questioning the Company Witness.**

The burden of proof lies with the carrier, but there are no rules that determine what the

standard is.<sup>17</sup> Thus, to make its case, the presiding officer must prove through questioning of the witnesses that the charged employee violated the rules for which he is charged.

Typically, the presiding officer will call as the first witness the carrier officer who investigated the accident or injury. Normally this person did not witness the incident under investigation, but has made an after-the-fact investigation. Thus, the proof made through this person is not firsthand but circumstantial. Circumstantial evidence can be sufficient to warrant the death penalty and it can certainly justify discipline in the rail industry.

Since the witness does not have firsthand knowledge, his testimony will contain hearsay.<sup>18</sup> Hearsay is a statement, other than the one made by the claimant, while testifying at the trial or hearing, offered to prove the truth of the matter asserted. What the witness says, that somebody told him, is hearsay. Because there are no rules, hearsay evidence is admissible at an investigation. Thus, the company witness could testify that an actual witness to the accident told him that the charged employee was at fault. The representative and other witnesses may also testify as to what someone said.

The representative should also expect the testimony of carrier witnesses to be very limited in the sense that it will be geared toward a particular rule violation. It will not be geared to include relevant information that might help explain why the charged employee

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<sup>17</sup> See First Division Awards 456, 493, 1093, 16537, 16751. Although the burden of proof is upon the Carrier to establish the employee's guilt, the awards do not state what the Carrier's burden of proof actually is. For example, in the legal system, the plaintiff in a personal injury case must prove by a "preponderance of the evidence." Preponderance of the evidence is generally thought to be just a little more than fifty-fifty. In a criminal case, the state must prove that the accused was guilty beyond a reasonable doubt, which is the highest standard in the legal system. Practically speaking, the standard is whatever the arbitrator feels the standard should be.

violated the rule. In our hypothetical case of insubordination, the carrier witness may testify that the charged employee **refused** to depart the terminal, which alone, might amount to insubordination. The presiding officer will not ask, and the witness will not volunteer, relevant information as to why the charged employee did not depart; i.e., the engine was headed with the long nose forward and the controls were to his back creating an unsafe condition.

Thus, it is the representative's job to develop those facts which mitigate and explain the technical violation.<sup>18</sup> When the representative attempts to develop these facts, he will undoubtedly encounter an objection from the presiding officer. The presiding officer will attempt to narrow the focus of the investigation and keep such information out of the record. Normally, he will simply tell the representative such questions will not be allowed because they do not relate to the charges set forth in the charge letter.

If the representative encounters such tactics, he must respond with an objection and a statement. His objection must state that the charged employee is being denied a fair and impartial investigation because the presiding officer is not allowing him to develop all the relevant facts.<sup>19</sup> After the objection, the representative should continue with a statement and explain to the arbitrator what the proposed questions would develop if he were allowed to continue:

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<sup>18</sup> It is not necessary to make vindicating proof or helpful proof through the company officer. In fact the witness will probably not say anything to vindicate the charged employee. The representative may decide not to ask any questions other than those that show bias and make all proof through other witnesses. See p. 5 *infra*.

<sup>19</sup> See First Division Award 10348.

Let the record reflect that if I were allowed to continue with this line of questioning, the record would reflect that the witness knew of several reasons why the charged employee did not depart the terminal and those reasons were as follows:

1. The engine was turned incorrectly.
2. The engineer felt that operating the engine backwards was a terribly unsafe condition for himself, his crew members, and the public because he was not in a position to simultaneously look forward and safely view the locomotive controls, including the air gauge, amp meter, safety alerter, and the speedometer.

Because management is in control of the investigation, the representative cannot **force** the presiding officer to allow him to ask questions or make statements. But the representative should demand to do both, and if the presiding officer refuses, he should write a letter to the superintendent (at the conclusion) explaining what the proof would have been, and demand the letter be made a part of the record.<sup>20</sup>

The representative should also expect that the carrier witness and the superintendent and/or the presiding officer have discussed the case prior to the investigation. Thus, the carrier witness should be questioned extensively about his prior conversations with those individuals. If he admits to such conversations, ask what was said and discussed.

By way of example ask the following:

1. Who have you discussed the case with?
2. Did you talk to the superintendent?

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<sup>20</sup> *Supra.*

3. Why was that necessary?
4. When were the discussions held?
5. How long were the discussions?
6. Who was present during the discussions?
7. What was said by all parties during the discussions?
8. Did the superintendent tell you that he thought the charged employee was guilty?
9. Did you tell the superintendent you believe the charged employee was guilty?
10. Did anyone present during the discussions say that the charged employee was guilty?
11. Did anyone say that the charged employee was not guilty?
12. Was the charged employee contacted prior to these discussions?
13. Did the superintendent instruct you to conduct an investigation of this matter?
14. Why did you make an investigation?
15. Upon whose request did you make an investigation?
16. Did you discuss the incident with the superintendent during your investigation? If so, why? What was said?
17. When did you begin your investigation?
18. When did you complete it?
19. Who assisted you in the investigation?
20. Did you make a written report? If so, ask that it be produced (if it's helpful, make it an exhibit).
21. Did you witness any part of the accident or alleged violation?
22. What instruments did you use to make the measurements? Did anyone witness your

measurements? If so, who?

23. Did you discuss the results of your investigation with the superintendent, presiding officer, or any other carrier officer at any time prior to this investigation? If so, why and what was said?
24. Who did you interview while making your investigation?
25. Did the superintendent tell you what rules to charge the employee with?
26. Who made the decision to charge the employee with the rule violations set forth in the charge letter?
27. When was the decision made to charge the charged employee?

These types of questions should be asked to show the arbitrator that a meeting or discussion was held prior to the employee being charged and that the superintendent had a hand in the charging and/or investigation process. Such conduct on the part of the company shows the bias of the witness as well as that of the company in its failure to provide the charged employee with a full, fair and impartial investigation.

The charged employee cannot receive due process and a fair review of the facts developed at the investigation if the superintendent has indicated or implied **before** the investigation that the charged employee is guilty. The superintendent has a duty to carefully review the transcript of the investigation before assessing discipline. Numerous awards have held that the claimant was denied due process if the transcript was not properly reviewed **before** a decision was rendered.<sup>21</sup> For example, if the investigation is held on June 1, 1999 in

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<sup>21</sup> See Awards 74, 79, 88 and 90 of PLB 4897, Union Pacific RR v. UTU

Omaha, Nebraska, and the superintendent in Kansas City, Kansas assesses discipline on June 1, 1999, the transcript was not previously reviewed and the discipline should be removed.<sup>22</sup>

If the witness admits to having a discussion with other management officials, request that the presiding officer make those persons available for questioning prior to the close of the investigation. If the request is denied (and in all probability it will be), object that the charged employee is not receiving a fair and impartial investigation because he is being denied the right to confront the accusers and that all material facts are not being developed.

If the requested officers are produced, question them extensively as to the nature of when, where, and why the discussion about the case came about. Such questions should be directed to develop the scenario that the superintendent had already decided before the formal investigation was completed that the charged employee was going to be disciplined. Again, if the presiding officer does not allow such questioning, an objection and statement should be made to inform the arbitrator of what the questions would have established and the rationale for the questions.

It is improper and a denial of due process for the presiding officer to testify or comment on the evidence adduced at the investigation.

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<sup>22</sup> See Award 73, PCB 5912, F.T. Lynch, Chairman  
Bias and prejudice helps convince the arbitrator that the witness may not be relating the whole truth and may be another quiver in the quill to establish the charged employee was denied a fair and impartial investigation. See First Division Awards 11820, 14351, 14469, 15512, and 20168.

It is incumbent upon the carrier officer conducting the investigation to elicit all relevant information that favorable to the claimant, as well as adverse. In order to determine that an investigation is indeed conducted in a fair and impartial manner. The hearing officer must further refrain from commenting on the evidence adduced at the investigation.<sup>23</sup>

**Do not ask the carrier witness if the charged employee is guilty or if the charged employee violated the rules with which he is charged!** Such questions only allow the witness to further prove the railroad's case against the charged employee. Besides, the presiding officer will probably ask the same questions anyway. Remember the **company witness** does not have to admit that the charged employee is not guilty to win the case! Exonerating testimony from other witnesses can be just as good. Do not be foolish enough to think the company witness will feel sorry for the charged employee and say he is not guilty! To do so would cost the witness his job!

**B**     Questioning the Charged Employee.

The presiding officer will attempt to narrow the focus of the inquiry of the charged employee. The inquiry will be directed to prove the charged employee violated a rule. The presiding officer will question the charged employee before the representative. The representative should make notes of what is asked by the presiding officer and be prepared to ask questions that develop vindicating facts and/or mitigating facts that explain why the employee did what he did.

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<sup>23</sup> Award 9, PLB 1849, T.H. O'Brien, Chairman

**The representative must prepare the charged employee so as to avoid fatal pitfalls and yet develop all relevant facts surrounding the charge which tend to mitigate or exonerate.**

The following are typical questions which normally are asked by the presiding officer:

1. State in your own words what happened.

The witness should state in a short, concise manner what happened. Prepare the witness to prevent him from elaborating. Elaboration only allows for more questions and the possibility of admitting incriminating evidence. Have the witness write out an answer for this question and keep it to 3-5 sentences.

2. Did you violate Rule AX@ and/or in your opinion who was responsible?

The charged employee should not admit guilt.<sup>24</sup> If it is clear that the employee violated the rule and there is absolutely no way to avoid such an admission, the charged employee must qualify the admission with the reasons for the violation. Remember, however, if the person violated the rule without some valid and justifiable reason, the charged employee's chances of winning at arbitration are virtually nil.

3. Has the investigation been conducted in a fair and impartial manner?

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<sup>24</sup> If the charged employee did in fact violate the rule and there is no excuse for the violation, then the arbitrator is undoubtedly going to find the employee in violation of the operating rule. If that is the situation, there is no need to have an investigation except that an investigation preserves the right to appeal the severity of a discipline. For example, if the charged employee is guilty of violating Rule G (failed urine test), the Superintendent has told you he intends to discharge the employee for the violation, and the charged employee admits he violated Rule G, the only reason to have the investigation is to preserve the right of appeal. If the Superintendent refuses to reinstate the employee, the arbitrator could find that while the employee was guilty of violating Rule G, the violation does not warrant a permanent dismissal and he could reinstate the employee. On the other hand, if the investigation is not held and the employee simply waives investigation, the union may not be able to appeal the severity of the discipline. Thus, the employee may never be able to return to work.

This is a grossly unfair question and is simply a trap for the unwary. Inform the charged employee to respond either: **"No, or AI will let the arbitrator decide."** A "yes" response, in all probability, waives any procedural error on appeal. Remember, this is not a decision for the charged employee, but rather one for the arbitrator.

Do not advise the charged employee to refuse to answer a question. Such tactics could warrant an additional charge for insubordination. Further, the arbitrator will undoubtedly believe the witness is hiding something. Do not advise the employee to plead the Fifth Amendment in lieu of answering the question.<sup>25</sup> The Fifth Amendment does not apply to the employer/employee relationship.

If the question is one that calls for an answer that the charged employee is not prepared for, object as soon as the presiding officer completes the question. Either state the objection in such a manner as to alert the witness how to respond, or object and then ask for a recess and coach the witness how to respond.

Be prepared for an overbearing presiding officer who will badger and harass the charged employee. Be prepared to object to such conduct. If the charged employee gives a

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<sup>25</sup> See First Division Award 23821, John B. LaRocco, Chairman

It is not proper for the charged employee to refuse to answer a question based on the Fifth Amendment of the United States Constitution, which generally means that an accused in a criminal proceeding has the right not to incriminate himself.

Amendment V: Nor shall (any person) be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law."

good answer and the presiding officer re-asks the same question, object before the witness answers:

P.O.: Were you watching where you were stepping when you tripped and fell on the brake shoe?

C.E.: Yes, I was watching carefully.

P.O. Now, come on, how can you say you were watching where you were stepping when you tripped and fell?

Rep. Objection. The witness has answered your question. He has told you that he was watching carefully. Don't ask him the same question just because you don't like his answer.

The objection will alert the witness not to cave in and change his answer. It will hopefully deter the presiding officer from badgering the witness. If the presiding officer re-asks the question or instructs the witness to answer, then re-urge the objection. Hopefully, the end result will be that the witness does not change his answer!

The representative should also introduce the charged employee to the arbitrator, by asking:

- 1) How long has he worked on the railroad?
- 2) What jobs has he done on the railroad?
- 3) Has he ever been disciplined for this offense before? (if favorable)
- 4) Is he married? How long? If he has children? How many?
- 5) Community affairs and activities, etc., church,
- 6) Prior discipline (if favorable).

This line of questioning gives the arbitrator some insight of the type of person his decision will affect. Direct the questions so that the employee's **good qualities** are affirmatively presented to the arbitrator.

Thus, the questioning of the charged employee has a broader focus than the carrier witness. The representative should meet with the charged employee prior to the investigation and go over the entire process of the investigation. Educate him as to what his role will be and how important it is to establish all relevant facts incident to the charge that help his case.

Educate him as to the proper response to the questions discussed above. This is the representative's friendly witness and the representative should know what he will say beforehand. His testimony is just as credible as a carrier witness and the arbitrator will want to hear his story. Use it advantageously!

## **V. CLOSING THE INVESTIGATION.**

After all of the witnesses have been questioned by both parties, the representative should make a closing statement. This is simply a chance for the representative to restate the theme of the case and to briefly summarize the favorable evidence. It should closely follow the opening statement except that it should include a brief summary of the testimony and evidence, including live testimony and documents, that supports the theme. It is also a time to briefly re-urge and summarize previous objections that show that the charged employee was not afforded a fair and impartial investigation.

## **VI. PROCEDURAL ISSUES.**

### **A. No Rules.**

There are no procedural rules of investigation due process that are truly enforceable **during** the investigation. Normally, the only procedural rule mentioned in a labor agreement is that the investigation will be held in a "fair and impartial manner." But what does that mean? It probably means that both the railroad and the representative can do whatever they want to make their respective cases.

For example, some representatives believe they have an absolute right to produce evidence to vindicate the charged employee. But what if the presiding officer refuses to allow the representative to introduce documents as evidentiary exhibits? Representatives generally believe the charged employee has the right to face and question the accuser. However, what can a representative do if the presiding officer limits the amount and/or types of questions the representative or the charged employee can ask the accuser?

Normally, the representative thinks the railroad has the duty to produce all relevant documents and witnesses. What if the railroad refuses to produce requested documents and witnesses? What can the representative actually do?

It is true that the charged employee does have the right to a fair and impartial investigation, and all awards require the railroad to hold a fair and impartial investigation. However, there are no rules that clearly define what constitutes a fair and impartial investigation.<sup>26</sup> What constitutes a fair and impartial investigation probably means whatever

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<sup>26</sup> The rules that have been enumerated in prior awards do not have stare decisis value; i.e., prior awards do not have to be followed.

the arbitrator who hears the case believes constitutes fair and impartial. This will obviously vary from arbitrator to arbitrator.

Therefore, do not be surprised if the presiding officer does not call all the requested witnesses, does not produce or allow the introduction of evidentiary documents, refuses to allow statements, or refuses to allow a witness to be fully questioned. However, if the presiding officer employs such tactics, the representative should be prepared to object on the record explaining **what the documents would have proven**, if admitted, **what the denied questions and answers would have established** if they had been allowed to proceed, or **what unproduced witnesses would have said**.

For example, if the railroad refuses to produce a requested witness, then the representative should object on the record explaining what the witness would have said if allowed to testify:

The presiding officer has refused to make Conductor Jones available at this investigation. Had Conductor Jones been allowed to testify at this investigation, he would have testified that the engineer never refused to depart the terminal. He would have also testified that the engines were unsafe to operate in a reverse position because the engineer could not safely simultaneously see the controls and see ahead of the train.<sup>27</sup>

Although this information is purely hearsay, as nobody knows what the witness would have actually said, the information is now before the arbitrator. He will read it in the transcript, and at a bare minimum, he will undoubtedly consider what the witness would have said. The

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<sup>27</sup> If the presiding officer refuses to allow the union representative to make a statement, then write a letter to the superintendent stating what the witness would have said or what the refused document would have proven, re-urge objections, and request the letter be attached to the transcript.

arbitrator may give this information just as much credibility as direct testimony from the witness. Further, the arbitrator will hopefully hold that the carrier's refusal to produce the witness denied the charged employee due process.

A recent case in point on this issue is Award 26, PLB 6432 rendered by Ms. Helen Witt. In that case the representative requested that the railroad make the timekeeper available as a witness. The railroad refused. The representative objected to the timekeeper not being available and **stated on the record what the timekeeper would have said if he had been allowed to testify.** On this issue Ms. Witt held:

*Although the Timekeeper was not called by the Carrier as a witness requested by the Organization, Appellants' representative made and offer of proof on the record that if the Timekeeper had been called to testify, he would have said that many employees submitted time claims like Appellants' and that such claims have been denied because of an ongoing dispute between the Carrier and the Organization.*

The case was sustained in part on this procedural issue and the claimant was reinstated, after being fired for over a year with pay for some of his time lost.

There are no rules of evidence or procedure in the labor agreements applicable to an investigation. The Awards which discuss these matters have no stare decisis value, as each discipline case rests on its own merits irrespective of other prior cases. Thus, the representative must remember there are no rules of procedure. He must be bold enough to present any and all evidence he deems helpful to convince the arbitrator that the charged employee should not be disciplined.

B. The Right to Produce Evidence.

Although there are no rules, the charged employee has a right under any theory of due process, or fair and impartial, to produce all material evidence relevant to the charges. First Division Award 24833, rendered by Referee Rodney Dennis September 9, 1997, clearly enunciates this standard:

Given that disciplinary procedures of the Railway Labor Act are primarily under the control of management, it is imperative that the carrier employ **procedures** to make sure that each employee receives a full, and **objective** hearing designed to elicit **all** of the **facts** surrounding the charges so that someone **other than the hearing officer** can decide whether the facts of record support the charges.

Thus, the railroad has a duty and should produce all employee witnesses that have knowledge of relevant facts as well as all relevant documents, including pictures taken by claim agents, accident reports, statements of injured employees and all witnesses, event recorder tapes, dispatcher records, centralized traffic control tapes, interlocking tapes, hot box detector tapes, tape recordings between crews and dispatchers, inspection reports completed by trainmasters, and any prior complaints regarding the involved equipment or area. Naturally, management does not want to be bothered with the time and expense of producing witnesses or documents. It will usually provide a very limited number of witnesses and documents.<sup>28</sup>

Quite often an incident will involve a situation where a witness is not actually an employee of the railroad. For example, carryall drivers and hotel employees are sometimes

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<sup>28</sup> The railroad should pay lost time for all requested witnesses who are employees of the carrier, who attend the investigation. If the requested witness is a non-railroad employee, the carrier usually does not have an obligation to pay the witness= lost time and expenses.

witnesses to an incident and their testimony may be critical to the case. Typically, the railroad will not make these “non-railroad” employees available on the grounds that the person is not an employee of the railroad and thus the railroad cannot force them to attend the investigation.

This argument is actually not accurate as contract carryall drivers and hotel employees are agents of the railroad. The railroads contract with carryall providers and hotel providers to provide a service for the railroad, transportation and lodging and thus those persons are “agents” of the railroad. While they are not technically paid by the railroad for their services they are in fact under the control of the railroad. For example, if the railroad request that a carryall driver be terminated because he or she is an unsafe driver, the person is promptly terminated. Thus, if the railroad demands the driver be available for an investigation, the contract carryall company will have that person attend.

A recent favorable award on this subject is Award 4, PLB 6760 written by Ms. Danielle Hargrove. In this case one of the issues was whether the accused used profanity while riding in a contract carryall. The representative requested the railroad make the driver present at the investigation. The railroad refused arguing it had no subpoena power and “there was simply no reason to have the cab driver present.” Ms. Hargrove held that the driver was a witness directly subject to the influence and control of the Carrier as a contract employee. Further, she held the railroad should have made an attempt to have the witness attend the investigation;

*“This Board does not why this witness was not asked to attend the investigation. The Carrier’s unwillingness to ask the witness to attend is an abuse of discretion that contributes to the appearance that the hearing and investigation was less than fair and impartial.”*

This line of reasoning applies to any potential witness that is under the influence and control of the railroad.

A second and related issue is whether the representative has a right of discovery that gives him the right to force the railroad to produce requested relevant documents prior to the investigation. Generally, there are no agreements which provide for a right of “discovery” prior to the investigation. However the railroad does have a duty to develop all of the facts, both favorable and harmful, at the investigation. Thus, the railroad should have a duty to respond to a request from a representative and produce relevant documents prior to an investigation.

A recent case on this matter is Award 2, PLB 6365 written by the Honorable Charles Fishbach held that the railroad had a duty to produce requested documents:

*The deliberate withholding of requested documents and information until the hearing that is relevant to the matter at issue, may, in certain circumstances, provide sufficient grounds for exclusion...such discovery should be permitted where the Carrier’s tapes, transcript and other documents that are germane and of critical importance to the charged employee...to arbitrarily withhold documentary and other written evidence until the investigation is held...is palpably unreasonable.*

This is excellent award upholds the right of the accused to request relevant documents and requires the railroad to produce relevant documents prior to the investigation. Many

awards hold that there is no right of “discovery” prior to a hearing.<sup>29</sup> These decisions are based upon the legal premise that there is no rule of discovery in investigation proceedings as there are in civil lawsuits. However, the representative must remember that his request is not based on a legal right of discovery, but rather a right to develop all of the relevant facts of a case, both for and against the railroad.

The representative **must write** the railroad well in advance of the investigation and request the railroad produce all relevant witnesses and documents necessary to develop the facts that are material and helpful to the charged employee.<sup>30</sup> This means the representative should state specifically who the witnesses are and give a brief description of what their expected knowledge will be. The request for documents should specifically state what documents are needed and a brief statement of why the documents are relevant.

In order to establish procedural due process error for failure to produce requested documents, the claimant must establish, or at least suggest, how the documents are relevant to his defense. For example, if the claimant requests the train dispatcher notes, in a case of allegedly running a red block, he must establish what the notes would prove that would make a difference in his defense. A general unsubstantiated assertion of relevancy is generally insufficient to establish that the requested document(s) was essential to compiling a complete factual record.<sup>31</sup>

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<sup>29</sup> See Award 7, PLB 6602, UTU v. Norfolk Southern.

<sup>30</sup> Use certified mail. Certified mail eliminates the argument that the railroad did not get the request.

<sup>31</sup> See First Division Award 23281, Jacob Sidenberg, Chairman

This is really not for the railroad's benefit but for the benefit of the arbitrator. If the letter explains why the witnesses and documents are important and necessary, and the railroad refuses to produce either, then the arbitrator has a wonderful opportunity to rule that the investigation was not held in a fair and impartial manner. However, without a written request for witnesses and documents, the railroad can simply argue that it did not know the witnesses or documents were relevant. If a timely request is not made, the arbitrator will be hard pressed to rule that the charged employee was denied due process. Do not take a chance on this critical aspect of the case. Write a certified letter to the superintendent well in advance of the investigation.

Below is a sample letter. However, each case is different and the types of documents will vary for each case:

*Dear Mr. Charging Officer:*

*In connection with the charges of Mr. Charged Engineer, it is necessary that you produce the following documents and/or make them available for my inspection at least five days prior to the investigation so that I may prepare an adequate defense as follows:*

- (1) All transcriptions and/or all tapes of any and all conversations between Mr. Charged Engineer and the involved Trainmaster and/or Yardmaster and/or any other employees of the railroad on the morning that the incident took place.*
- (2) Copies of all statements and/or reports completed by any witness to the incident or any witnesses who overheard the conversations between Mr. Charged Engineer, the Trainmaster, and/or Yardmaster.*

- (3) *A copy of all reports made by the Trainmaster and/or the Superintendent or any other officer who participated in the incident or investigated the incident.*
- (4) *A copy of all incident reports, accident reports, and/or reports made to any governmental agency regarding the incident made the basis of this investigation.*
- (5) *A copy of all e-mail communications between any employee or officer involved in this case.*
- (6) *A copy of the schematic diagram of the locomotive involved in the incident made the basis of this investigation which clearly depicts the control stand, the train brake handles, air gauges, amp gauges, speedometer, and general overall engineer's control stand.*
- (7) *A copy of the event recorder of each locomotive in the consist for a 24-hour period prior to and after the incident made the basis of this investigation.*
- (8) *Copies of all previous complaints regarding the operation of locomotives such as the one involved in the incident made the basis of this investigation operating in a reverse direction for a one-year period prior to the incident.*
- (9) *A copy of Mr. Charged Engineer's personnel record.*

*In addition, we request that you make available at the investigation, Engineer Jones and Foreman White. These individuals were working Yard Job 402 at Englewood Yard on the morning of the incident and overheard the conversations between the charged employee and the Yardmaster and Trainmaster. They are in a position to testify as to what they overheard and what was said in those radio communications.*

*It is necessary that you produce the requested documents and produce the witnesses for questioning at the investigation so that Mr. Charged Engineer can receive a full, fair, and impartial investigation. You are reminded that it is the obligation of the railroad that procedures be employed to make sure that Mr. Charged Engineer receives a full, fair, and **objective** hearing designed to*

*elicit all of the facts surrounding the charges that someone other than the railroad can decide whether the facts of the record support the charges.*

The written request should be admitted into the record as Exhibit One at the investigation. Any responses that the railroad sends should be Exhibit Two. If the railroad does not respond or refuses to produce the requested witnesses or documents, object at the beginning of the investigation and re-urge that the witnesses and documents be made available prior to going forward with the investigation. In other words, make sure that the arbitrator knows that you have requested witnesses and documents, that the witnesses and documents are important for the reasons specified and that the railroad is not producing witnesses and documents and are thus denying the charged employee a fair and impartial investigation.

There are several important factors an arbitrator will normally consider in determining whether the railroad should produce a requested witness or document:

1. Was the absent witness or document directly or indirectly subject to the influence or control of the railroad, either through an employment, contractual, or other relationship?
2. Was a reasonable attempt made to secure the presence of the absent witness or document, notwithstanding lack of the Carrier=s actual control or influence?
3. What was the actual reason for the witness=s non-appearance?
4. Was the information to be provided by the absent witness or document not only relevant, but material?
5. Was the relevant information about which the absent witness or document would provide, reasonably available from any other source?
6. Did the complaining party have a reasonable opportunity to respond to the evidence, such as an ex-parte statement written by the absent

witness, by some other means other than cross-examination or impeachment of the absent witness?

By way of example, Arbitrator Don Hayes applied these guidelines and held that it was not a denial of due process for the carrier to produce a statement in lieu of live testimony from an officer that accused an engineer of running 49 m.p.h. in a 35 m.p.h. zone.<sup>32</sup>

Conversely, Arbitrator Jacob Sidenberg held the claimant=s due process rights were denied when the engineer to whom he allegedly failed to call out a signal, was not called as a witness: If the crux of the offense was failure to formally call a signal, then the trial record . . . should reflect the testimony of the person to whom the signal call was given in the testimony as to when and what the engineer heard from the claimant and what he saw. The engineer=s testimony constitutes such a basic and essential element in the fact finding process, that this testimony cannot be waived by the failure of the claimant, on his own initiative to introduce it.<sup>33</sup>

There are two alternatives the representative should consider if it is known or anticipated that the carrier will not produce the requested witnesses or documents. The first is to ask the witnesses to attend without charge or make an agreement with regard to the cost

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<sup>32</sup> See Award 98, SBA 955, Dan B. Hayes, Chairman.

<sup>33</sup> See First Division Award 23821, Jacob Sidenberg, Chairman. Also, see Award 3082 SBA 235, F.J. Lynch, Chairman

of attendance. The second is to request the witness make a written statement of his knowledge of the incident and enter the statement as an exhibit in the transcript.<sup>34</sup>

A written statement may not carry as much credibility with the arbitrator as live testimony, but it is a good alternative and will hopefully provide credence to the charged employee's position. It has virtually no cost and could carry substantial weight with the arbitrator, if the railroad refuses to produce the witnesses.

Conversely, if the carrier attempts to submit a written statement in lieu of producing the live witness, the representative should object. Remember, the carrier is in full control of the investigation as well as its own employees, and it has the ability to produce whomever it wishes. The basis of the objection is that the charged employee cannot confront the witness who made the statement, cannot cross-examine the statement, and the charged employee is being denied a fair and impartial investigation because the carrier has not fulfilled its obligation to develop all material facts relevant to the charge.<sup>35</sup> The carrier has control of the process and the authority to mandate attendance of employee witnesses. Should a company witness be unavailable (due to illness, etc.), the investigation should be postponed until such time as the person is available.

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34 Be sure and have the permission of the witness to use the statement as evidence before submitting it as evidence.

35 But there are many awards to the contrary: Award 98, SBA 955, Dan Hayes, Chairman, rendered February 16, 1986, "Arbitrators generally recognize that the failure of the employer to produce a witness, electing to introduce such evidence through ex-parte statements does not necessarily violate the hearsay rule and/or

C. What the Arbitrator May Consider.

The charged employee and/or the representative must use the transcript of the investigation as their only vehicle to get the facts of the case before the arbitrator. Information not contained in the transcript will probably not be considered by the arbitrator.<sup>36</sup> The First Division has generally held that the scope of review is limited to the facts developed at the investigation and contained in the transcript.<sup>37</sup> Thus, it is imperative that all known and relevant information be made a part of the transcript prior to the close of the investigation. If not, it is very likely it will not be considered.<sup>38</sup>

However, the controlling factor is the Board Agreement. Normally, an agreement is made between the General Chairman and Labor Relations, which establishes the rules of arbitration for the case. Some board agreements provide that: A New or additional evidence may be submitted, so long as both parties are made aware of the evidence (in writing) at least fifteen days before the oral hearing. @ Such a provision would hopefully allow the General

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represent a per se denial of due process. @

<sup>36</sup> An exception to this rule is evidence the presiding officer refused to introduce that was followed by verbal objection and letters of protest at the conclusion.

For similar decisions, see Award 65, SBA 955, David Brown, Neutral Member; Award 1, PLB 1009, Jacob Sidenberg, Neutral Member; and Award 2, PLB 717, John Criswell, Neutral Member.

<sup>37</sup> See First Division Awards 15745, 16301, 17903, and 19394.

<sup>38</sup> Information that is not known or that reasonably could not have been known at the time of the investigation should be submitted in writing to the General Chairman as soon as it becomes known. Thereafter, it should be presented to the arbitrator and hopefully he will consider it. Some Board agreements allow additional information not previously considered during property handling to be presented to the board so long as the opposing party is made aware of the additional information within 15 days of the hearing.

Chairman to get excluded evidence before the arbitration. However, the railroad would argue the evidence is not new or additional.

Most board agreements do not contain such language. Many prohibit the arbitrator from considering new evidence and many do not address the issue. These agreements will normally preclude the arbitrator from considering evidence that was not presented and/or made a record of during the investigation.

Do not take a chance and leave out relevant information. Although the transcript should be short and concise, it should include all helpful relevant information known at the time of the investigation.

D. The Right to Select a Representative.

The charged employee is generally bound by the terms of the applicable labor agreement as to whom he can choose to be his representative. Normally, the labor agreement will provide that the charged employee may either select the local chairperson or another employee of his craft and/or on his seniority district to be his representative.

The charged employee generally does not have the right to be represented by a lawyer at the investigation, unless the labor agreement specifically provides for such representation.<sup>39</sup> Should there be any question about who could serve as the representative,

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<sup>39</sup> 45 U.S.C. ' 152, Roberts v. Thompson, 107 F.Supp. 775 (D. Ark. 1952); D'Amico v. Pennsylvania R. Co., 191 F.Supp. 160 (S.D. N.Y. 1961).

A charged employee does not have a due process right to counsel at an investigation hearing as 45 U.S.C. ' 151 et seq. (Railway Labor Act) does not contain any provision that ensures charged employees the right to counsel at an investigation. Salcedo v. Norfolk & W. R. Co., 572 F.Supp. 286, aff'd 723 F.2d 911 (6th Cir. 1983). Furthermore, an employee does not have a right under the Railway Labor Act to have a co-worker present during an investigatory interview which the employee reasonably believes might result in disciplinary action

the labor agreement and the General Chairperson should be consulted.

E. The Charge Letter.

A question often arises as to whether the charge letter is sufficiently specific to properly apprise the charged employee of the charges against him. If notice does not apprise the employee of the charges, he is not able to prepare an adequate defense.

Most arbitrators have held that the notice is sufficient if it generally apprizes the employee of the nature of the offense proffered against him. It is not necessary that the notice cite a specific rule number, but it must apprise of the nature of a rule violation and date of the alleged violation. If there is any doubt as to whether the notice has properly apprized the employee of the charges, an objection should be made at the beginning of the investigation that the charged employee has not been able to prepare an adequate defense due to the inadequacy of the notice.

The notice must also afford the employee ample time to secure representation and to prepare a defense prior to the investigation. Ample time could range from seventy-two hours to a month, depending on the complexity of the charges and the number of witnesses. If there is any doubt as to whether the notice provides ample time, the representative should make a written request for a postponement.

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since the Railway Labor Act does not contain a provision, as does the National Labor Relations Act, concerning the employee's right to engage in other concerted activity for the purpose of mutual aid or protection. Johnson v. Express One Int'l, Inc., 944 F.2d 247 (5th Cir. 1991). Section 8(a)(1) of the National Labor Relations Act provides that an employee is entitled to have a union representative present at any investigatory interview by the employer that the employee reasonably believes might result in disciplinary action. The employer's refusal of a request for such representation would violate ' 8(a)(1) of the National Labor Relations Act. N.L.R.B. v. J.Weingarten, Inc., 420 U.S. 251 (1975).

F. Substantive v. Procedural.

An inexperienced representative may feel compelled to make numerous procedural objections during the investigation due to his belief that an arbitrator will overturn assessed discipline due to procedural errors. Objections should be timely made during the proceeding for procedural error (failing to call witnesses or not allowing certain questions to be asked, etc.). However, arbitrators are much more concerned with the substantive issues.<sup>40</sup>

Remember, however, that virtually all arbitrators have held that the representative must make a timely objection or the objection is waived. For example, if the charge letter is vague, an objection must be made at the beginning of the investigation or it is waived. The basis of the objection is that the representative was not able to adequately prepare a defense. Failure to object at the beginning would indicate the representative had adequately prepared. Objections for failure to call witnesses or produce documents must be made prior to the close of the investigation or they are waived.

The representative should err on the side of caution and raise an objection if he is unsure if an objection is warranted. Conversely, frivolous objections only clutter the record and make the representative appear inadequate, such as objecting to the qualification of witnesses.

Arbitrators are generally more concerned with whether or not the employee committed the alleged rule violations and if so, what if any, mitigating factors contributed to the

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<sup>40</sup> S. Young, Arbitration of Minor Disputes in the Rail Industry (1990).

violation. Thus, the primary focus of the investigation should be to develop the substantive facts and issues.

G. Waiver Considerations.

In virtually every case, once the employee is charged, the railroad superintendent or his representative will either suggest or be amenable to a meeting with the local chairman to discuss a waiver of the formal investigation in return for some agreed-to amount of discipline. There is certainly nothing wrong with the local chairman attending such a meeting and, in fact, a meeting of this type can be very helpful.

Quite often during the meeting, the local chairman will learn what information the railroad has to support its charges. Secondly, the local chairman may learn the amount of discipline the railroad intends to assess.

In a non-personal injury case, it may be a good idea to waive the investigation for an agreed-to amount of discipline so long as the charged employee is agreeable. However, once the employee waives the formal investigation and accepts discipline, the employee cannot thereafter file an appeal in an attempt to have an arbitrator overturn the assessed discipline. Generally, in order to preserve the right of appeal, it is necessary to actually hold the formal investigation. However, if an employee waives an investigation and is discharged, it is possible to appeal the discipline itself on the basis that the discipline assessed is harsh and excessive. Of course, under those circumstances it would be much better to have an investigation to make proof that the charged employee was not guilty or to mitigate the rule violation.

**It is not advisable to waive the investigation and accept agreed-to discipline in a personal injury investigation without the charged employee and/or the local chairman seeking advice from designated counsel.** A waiver and acceptance of discipline in a personal injury investigation may severely damage the employee's right to recover under the Federal Employers' Liability Act for his injuries. Obviously, acceptance of discipline for being unsafe will later be used at trial against the charged employee.

There are also ethical considerations with respect to a pre-investigation meeting with the superintendent:

1. Are the superintendent's statements admissible at the investigation?
2. Does the representative and/or the charged employee have the right to tape the meeting without the permission of the superintendent or his representative in order to use the comments made at the meeting admissible?

As there are really no admissibility rules for investigations, it would certainly be permissible for the local chairman or the charged employee to repeat at the investigation what was said during the meeting. Further, under both Texas and Federal law, a person may ordinarily tape record a conversation if at least one party to the conversation consents; the other participant in the conversation need not be advised of the taping.<sup>41</sup> For example, it is legal to tape one's own telephone conversation with another without telling the other

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<sup>41</sup> 18 U.S.C. ' 2511(2)(d); Tex. Code. Crim. Proc. Ann., art. 18.20, sec. 17(a)(4) (Vernon 1986).

person.<sup>42</sup> It is, however, illegal for one person to secretly record the conversations of other persons.<sup>43</sup>

Remember if the superintendent, or his representative, are recorded without their permission and then used at the investigation, the repercussions in other areas could be severe. Even repeating what was said in the meeting without permission could result in the superintendent refusing to have such pre-investigation conferences in the future with the local chairman, which could potentially seriously damage the local chairman's ability to effectively assist other members. Such decisions are certainly left to the discretion of the local chairperson. However, if the local chairman intends to use information discovered at such a meeting, the local chairman should, in all probability, inform the superintendent of his intent to use the information prior to divulging such information. Also, remember that the superintendent could, in the same way, use whatever the local chairperson or the charged employee says in a similar manner or make a recording.

## **VII. THE PERSONAL INJURY INVESTIGATION**

The most prevalent investigation today is the personal injury investigation. It is the policy of Union Pacific and BNSF to charge any employee who turns in an accident report.

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<sup>42</sup> In California, however, it is illegal for a person to secretly record any conversation, even one in which he or she participates. Cal. Penal Code, sec. 629.38 et seq. (West 1996).

<sup>43</sup> Collins v. Collins, 904 S.W.2d 792 (Tex. App.-Houston [14th District] 1995), writ denied per curiam, 923 S.W.2d 569 (Texas 1996); but see, Simpson v. Simpson, 490 F.2d 803 (5th Cir.), cert. denied, 419 U.S. 897 (1974), holding that it is not a violation of the federal wiretap statute for a spouse to secretly record conversations by the other spouse that take place over the telephone in the marital home.

The railroad=s hidden agenda for charging the injured employee is to intimidate and to make its case to defeat any potential F.E.L.A. claim the injured employee might later bring.

The railroad does this by attempting to have the charged employee admit that the injury was his fault, and not the railroad's fault. Such an admission made during an investigation may be used against the injured employee at trial as an admission by party opponent.<sup>44</sup>

To recover against the railroad for a personal injury, the injured employee must prove that the railroad was negligent in causing his injury. Further, to avoid a deduction of monetary damages, the employee must show that he did not contribute to his injury (contributory negligence). If the injured employee admits during the investigation that the railroad was not at fault in causing his injury, in all probability his F.E.L.A. claim is destroyed. If he admits that he and the railroad were equally at fault, then at best his F.E.L.A. claim may be only worth half its true value. Furthermore, such admissions will surely result in discipline that an arbitrator will be hard pressed to overturn.

A Preparing for the Personal Injury Investigation.

How should the representative approach the personal injury investigation? Very much like any other investigation, but, in addition, the charged employee must be prepared to answer the following questions:

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<sup>44</sup> F.R.C.P. 801(d)(2).

"Admission by Party Opponent. The statement is offered against a party and is (A) the party's own statement in either an individual or a representative capacity."

1. What did the railroad do wrong?

The charged employee must give a clear answer as to what the railroad did wrong to cause his injury. For example, if the employee tripped over a brake shoe in a walkway then the charged employee should state the railroad failed to provide a safe walkway because there was an obstruction, i.e., the brakeshoe. If the employee was injured while aligning a switch he must be prepared to state exactly what was wrong with the switch, i.e., it hung up, or it was out of alignment or adjustment.

If the employee was injured as a result of the actions of a co-employee he must be prepared to state what the co-employee did that caused his injury. For example, if another assignment shoved blindly into the injured employee's engine the injured employee must state that the crew failed to have someone riding the point. This is often a very difficult area and it is critical to get legal advice from designated legal counsel in preparing the charged employee to respond to this answer prior to the investigation.

2. What did you (charged employee) do wrong?

The charged employee must state unequivocally he did nothing wrong. This is sometimes very difficult for an employee because most injured employees have been brainwashed by the railroad's propaganda to believe that if they are injured it must be their fault. Furthermore, quite often, the injured employee does have some fault. Thus, it is critical to get legal advice from designated legal counsel in preparing the charged employee to respond to this answer prior to the investigation.

3. Who do you blame for your injury?

The charged employee must truthfully say he blames the railroad.

4. What could have been done differently to avoid the injury?

The charged employee should truthfully state unequivocally that the railroad failed to provide him with a safe work place. The charged employee should be specific in exactly what the railroad did wrong, i.e., failed to provide a safe walkway, failed to properly protect a shoving movement, etc. Again, this the representative should consult designated legal counsel to properly prepare the charged employee how to respond prior to the investigation.

The representative should also make a written request to the railroad for the production of documents relevant to the injury. While the railroad may not have a legal obligation to produce the documents, they certainly have a duty to produce the documents if the investigation is to be held in a fair and impartial manner. The following is a sample letter that the representative may wish to use as a production guide for personal injury involving a defective switch:

*Dear Mr. Charging Officer:*

*We are in receipt of your charge letter to our member, Mr. Joe Smith. Please accept this as our request that you produce the following documents at least five (5) days in advance of the investigation, so that I may inspect the documents and prepare an adequate defense for Mr. Smith:*

- 1. A copy of all documents which indicate when the involved switch made the basis of this investigation was first installed, and any documents indicating any repair or maintenance of the switch since its installation;*

2. *A copy of any and all photographs taken of the switch involved in the incident made the basis of this investigation by the claim agent, or any other person, since Mr. Smith's injury;*
3. *A copy of Mr. Smith's accident report and statement that he has given to the claim agent with respect to the injury made the basis of this investigation;*
4. *A copy of all safety rules that you contend Mr. Smith violated in connection with the incident made the basis of this investigation;*
5. *A copy of any prior complaints regarding the operation of the switch made the basis of this investigation for a three year period prior to Mr. Smith's injury;*
6. *A copy of Mr. Smith's personnel file;*
7. *A copy of all documents indicating all repairs made to the switch after the injury made the basis of this investigation;*
8. *A copy of any statement and any accident reports completed by any other employee regarding the injury made the basis of this investigation; and*
9. *A copy of all notes and reports made by the investigating officer regarding the injury made the basis of this investigation.*

Be sure to send the letter certified mail. If the railroad does not produce the documents, argue strenuously that the railroad has not provided a fair and impartial investigation. Unless such documents are produced, the charged employee has not been provided with a level playing field.

It is absolutely essential that the representative has a copy of the accident report and the charged employee's statement prior to the investigation, to ensure consistency. If the employee has completed an accident report prior to the investigation blaming himself for the

injury and testifies at the investigation that he was not at fault, the railroad will then charge him for falsifying the accident report. The same is true with statements. Inconsistent testimony at the investigation may result in additional charges for giving false information to the company or falsifying accident reports. Furthermore, reliance on the charged employee's memory as to what was written or said is not satisfactory. The accident report and statement must be carefully scrutinized and the investigation testimony must be consistent.

This may be a huge problem if the charged employee has already admitted fault. The only safe thing to do is to get the documents before the investigation and contact designated counsel.

To exonerate the employee and to prevent damage to the employee's potential F.E.L.A. claim, the employee must be able to truthfully state a reasonable theory or theories of liability as to what the railroad did wrong and that the charged employee was not at fault. This may seem like an impossible task at first blush, because often it appears as though the railroad was not at fault, due to the many rules that favor the railroad.<sup>45</sup> In almost every case, the injury may appear to be at least partially the employee's fault. Before deciding it is hopeless, call designated legal counsel. This is the time to seek out legal advice for your member as to what the railroad did wrong or how the railroad was at fault in causing the injury. **Failure to get the right advice before the investigation may destroy your member's right to a F.E.L.A. recovery.**

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<sup>45</sup> Don't overexert; don't lift heavy objects; know the equipment is safe before using.

What may seem like a case where the railroad has no fault may be a violation of the Code of Federal Regulations or an Occupational Safety and Health Administration violation which, according to the law, could make the railroad absolutely at fault. For example, while walking on the track shoulder to inspect his train, a brakeman slips and falls and injures his back. The railroad would probably charge the employee for being unsafe and not keeping a proper lookout. The railroad would argue that the employee was totally at fault because he was simply clumsy or just not paying attention.

But what if the reason for walking on the track ballast was due to weeds and vegetation growing close to the track? The vegetation may be a violation of the Code of Federal Regulations, specifically 49 C.F.R. ' 213.37:

Vegetation on railroad property which is on or immediately adjacent to roadbed must be controlled so that it does not - a) become a fire hazard to track-carrying structures; b) obstruct visibility of railroad signs and signals; c) interfere with railroad employees performing normal trackside duties; d) prevent proper functioning of signal and communication lines; or e) prevent railroad employees from visually inspecting moving equipment from their normal duty stations.

A violation of the Code of Federal Regulations, if proven, constitutes negligence per se as to the railroad and would nullify any contributory negligence of the injured employee.<sup>46</sup>

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<sup>46</sup> See, 45 U.S.C. ' 53 and 45 U.S.C. ' 54(a).

" ' 54a. Regulation, standard, or requirement under chapter 201 of title 49, United States Code, deemed to be statute under sections 3 and 4.

"A regulation, standard, or requirement in force, prescribed by the Secretary of Transportation under chapter 201 of title 49, United States Code [49 USCS ' ' 20101 et seq.], or by a State agency that is participating in investigative and surveillance activities under section 20105 of title 49, is deemed to be a statute under sections 3 and 4 of this Act [ 45 USCS ' ' 53, 54].

Armed with the law, the representative should prepare the charged employee to say that the railroad was at fault because it violated the appropriate CFRs; i.e., the vegetation should have been cut or poisoned to eliminate the obstruction. Further, the employee did nothing wrong as he was just doing his job under the circumstances. But, without consulting designated legal counsel prior to the investigation, to determine if any laws were violated, the case could be lost.

B. The Accident Report.

When an employee is injured, an accident report must be completed. All railroads have a rule which requires the injured employee and any crew member to complete an accident report. For example, Union Pacific Rule 4004 requires:

All cases of personal injury, while on duty, or on company property, must be reported to proper authority on prescribed form.

Thus, when an employee is injured or even believes he is injured, an accident report must be completed as soon as possible.

Of course, employees do not want to be injured and do not want to fill out accident reports. They know that the completion of an accident report will normally bring about charges of some rule violation and for sure will bring about a confrontation with management about the injury. Quite often the employee will be told to wait and see if he is truly hurt, or the officer may suggest or instruct the employee not to turn in an accident report. This type of conduct has brought on a new law which came into effect January 1, 1997, which prohibits such harassment and intimidation. 49 C.F.R. ' 225.33 states in pertinent part:

Each railroad shall adopt...a policy statement declaring the railroad's commitment to complete and accurate reporting of all accidents, incidents, injuries, and occupational illnesses arising from the operation of the railroad, to full compliance with the letter and spirit of FRA's accident reporting regulations, and to the principle, and absolute terms, that harassment or intimidation of any person that is calculated to discourage or prevent such person from receiving proper medical treatment or from reporting such accident, incident, injury, or illness will not be permitted or tolerated and will result in some stated disciplinary action against any employee, supervisor, manager, or officer of the railroad committing such harassment or intimidation.

This provision clearly makes it a violation of the law for an officer of the company to try to prevent an employee from reporting an injury or completing an accident report. For example, should a trainmaster tell the injured employee he is going to be disciplined if he turns in an accident report, that certainly is a violation of the law. If the officer tells the employee to wait until later to turn in an accident report to see if he's injured, that, too, would constitute a violation of the law. Possibly even charging an employee simply because he turns in an accident report constitutes violations of the law. The law is written very broadly in an attempt to cover all such acts of harassment and intimidation for an employee who attempts to report an accident, incident, injury, or illness. Such violations should be reported, verbally or in writing, to the FRA immediately by the employee or his representative.

Should the railroad intimidate or harass in violation of this law and the employee is subsequently charged, the violation of the law should be made a part of the investigation. The representative should certainly call the management person who intimidated or harassed the employee as a witness at the investigation. He should make proof that the officer violated the above-stated law in an attempt to prove to the arbitrator that the employee really did not

violate any rules and that the investigation is nothing more than harassment and/or an attempt to penalize the employee simply because he was hurt.

One of the most common charges today is failure of the employee to "timely" complete the accident report. Most often, the charges result from the employee's failure to know that his injuries were serious at the time they occurred. For example, an employee might feel a slight pop or pull in his back while attempting to align a switch. The employee might think that the problem is simply a pulled muscle and that two aspirin will solve the problem. If the employee informs his supervisor of the problem, the supervisor might say something to the effect, "If you're hurt fill out an accident report; if you're not hurt, don't fill one out." Such a response will probably cause the employee to not complete an accident report at that time.

Possibly the next day the employee is in pain and realizes that the problem is more than just a pulled muscle and thus decides to complete an accident report. Thereafter, the railroad will probably charge the employee for failure to timely report his injury. This is one of the most bogus charges on the railroad. Doctors, claim agents, and superintendents all know that it is very common for a person to feel a pop or pull and not know the significance of the injury until 24 to 48 hours afterwards. They know it is often impossible for an employee to know if he's truly injured at the time the incident occurs.

Most arbitrators know this as well. Thus, if the employee simply reports the incident to a trusted crew member or to some management person at the time of the incident and thereafter completes an accident report when the significance of the injury manifests itself,

any discipline assessed will probably not be upheld. In such circumstances, most arbitrators are not going to uphold discipline for failure to fill out an accident report immediately after the incident.<sup>47</sup>

In these cases, it may be very helpful to enter the medical records of the employee. Often, medical records will indicate that the charged employee's failure to immediately recognize the significance of his injury is normal and/or consistent with his injury. A second and better suggestion is to have the doctor testify or write a letter stating that the charged employee's late reporting is acceptable, normal and/or consistent with his symptoms.

The accident report of all railroads has been carefully prepared and it is a trap for the unwary. The injured employee must carefully complete the accident report so he does not improperly incriminate himself.

For example, Union Pacific form 52032 asks three very tricky questions.

Question No. 12 states:

Did equipment, tools, cause or contribute to the cause of the accident? Yes No If yes, provide complete details.

Virtually every accident on the railroad involves the use of equipment or tools, such as locomotives, cars, switches, signals, vehicles, brake shoes, air hoses, knuckles, drawbars, seats, sanders, and/or cab lights. If the equipment or tools in any way caused or contributed to the cause of the accident, then the employee must check yes to the question. For example,

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<sup>47</sup> Award 44, United Transportation Union v. CSX Transportation, Inc., rendered February 27, 1997, Chairman Robert O. Harris.

if the employee is injured because a pin lift lever would not open the knuckle properly and the employee states no to Question 12, then that person is probably precluded from later saying that the cause of the accident was a defective pin lift lever. Thus, the employee should check "yes" to Question 12 unless he is absolutely certain that no equipment or tools caused or contributed to the cause of the accident.

Question 13 states:

Did working conditions cause or contribute to the cause of the accident? Yes No  
If yes, provide complete details.

If the accident happened at work, the answer to this question should be "yes." Working conditions will almost always cause or contribute to the cause of the accident, in some form or fashion. If an employee is injured at work, then working conditions probably caused or contributed to the accident. Thus, if an employee is injured at work, he should probably check "yes" to Question 13 and explain what working conditions did cause or contribute to the cause of the accident.

Question 14 states:

Did other persons cause or contribute to the cause of the accident? Yes No  
If yes, provide complete details.

This is the trickiest question of the three. It means, did someone other than the injured employee cause or contribute to the cause of the accident. **If the injured employee checks "no", that in essence means the injured employee is admitting that the entire cause of the accident was himself.** Checking "no" to that question may totally exonerate the railroad.

In virtually every case, some other person will cause or contribute to the cause of the

accident; such as, the maintenance-of-way employees who did not oil or adjust the switch, the roundhouse forces who did not make sure that the cab lights were working or that the cab floors were clean, or the carryall driver who failed to control speed, or a co-worker who failed to give an appropriate signal. All of these constitute persons other than the injured employee who caused or contributed to the cause of the accident. Thus, the injured employee as well as the crew members should be very careful in completing the accident report<sup>48</sup>.

The accident report is also of critical importance to the representative. The representative must obtain and review the report of the charged employee and crew members in order to prepare an adequate defense for the charged employee. If the reports seem to incriminate the charged employee, the representative should contact designated counsel to discuss the matter before the investigation.

C. Employee's Statement.

When an employee is injured, the claim agent will usually insist that the injured employee give a recorded statement. The injured employee is not required to give a statement, either recorded or written, as it is by definition a "voluntary statement." Thus, if the injured employee tells the claim agent he does not want to give a statement, it is not voluntary and the claim agent will not force the injured person to give a statement.

If the injured employee does give a statement, it is imperative that the representative review the statement and the accident report prior to the investigation. The charged

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<sup>48</sup> See Appendix A for an example of the wrong and right way to complete an accident report.

employee's testimony at the investigation must be consistent with the statement and accident report.

If the charged employee's statement and/or accident report indicate that the cause of the injury was a defective pin lift lever, the employee certainly would not want to testify at an investigation that the cause of the injury was slipping and falling in grease. If the charged employee advises the local chairman that either the statement or the accident report is incorrect with respect to what happened, then the local chairman should immediately contact designated counsel to determine how to proceed at the investigation.

If the charged employee's testimony is different or inconsistent from his statement and/or his accident report, his potential claim against the railroad is undoubtedly severely damaged, and the railroad could discipline the employee for fraud, lying, or conduct unbecoming to the railroad. Therefore, it is essential to make sure that the charged employee's investigation testimony is consistent with his statement and accident report. The charged employee is entitled, by law, to receive a copy of his statement from the railroad and it certainly should be reviewed prior to the investigation. If there are inconsistencies between the statement, the accident report, and what the planned investigation testimony will be, the local chairman should immediately contact designated counsel to determine the best way to proceed.

D. Questions Asked During a Statement.

The purpose of a recorded statement is to commit the injured employee to a set of facts and responsibility before the employee has an opportunity to discuss the matter with

counsel or before the person has an opportunity to fully realize what caused the injury. Once a statement is given, it is virtually impossible for the injured employee to recant what was said. For example, many believe that taking medication is a viable excuse to later change the contents of their statement. Not so! A jury would probably think that one who is able to agree to give a statement is coherent enough to truthfully state what happened.

The claim agent will undoubtedly ask the claimant three critical questions:

- 1) What do you think the railroad did wrong?
- 2) Is there anything the railroad could have done to prevent this injury?
- 3) Is there anything that you (the injured employee) could have done to prevent the injury?

If the injured employee states that the railroad did nothing wrong or the railroad could have done nothing to avoid the injury, then the railroad will probably be exonerated from all liability for his injury. The victim gets no money. Secondly, if the employee states that it was his fault then the railroad is probably exonerated. If the employees states the injury was just slightly his fault, then, even if the railroad is liable, his recovery is greatly reduced.

Obviously, the declarant should avoid saying that the railroad was not liable or that the injury was his fault. The declarant should be truthful, but the declarant may not be totally aware of all the causes or circumstances of the injury. For example, the declarant may think he caused his own injury because he was not properly positioned when he aligned a switch, only to later find out that the primary cause of the injury was that the switch was in disrepair or in violation of one or more federal regulations.

If a statement is to be given, it is critical that the injured employee be prepared. He should contact designated counsel for advice. The claim agent knows what he is doing, and the injured employee should know what he is doing. At any rate, the representative must obtain the statement prior to the investigation and know what the employee said before proceeding with the investigation.

E. Procedural matters - Retaliation 45 U.S.C. ' 60.

There is a very powerful law that may be used in conjunction with a personal injury investigation. The law actually prevents the railroad from retaliating against co-employees who wish to assist an injured employee:

Any contract, rule, regulation, or device whatsoever, the purpose, intent, or effect of which shall be to prevent employees of any common carrier from furnishing voluntarily information to a person in interest as to the facts incident to the injury or death of any employee, shall be void, and whoever, by threat, intimidation, order, rule, contract, regulation, or device whatsoever, shall attempt to prevent any person from furnishing voluntarily such information to a person in interest, or whoever discharges or otherwise disciplines or attempts to discipline any employee for furnishing thereof, be punished by a fine of not more than \$1,000 or imprisoned for not more that one year, or by both such fine and imprisonment, for each offense: Provided, that nothing herein contained shall be construed to void any contract, rule, or regulation with respect to any information contained in the files of the carrier, or other privileged or confidential reports.

The purpose of Section 60 is to eliminate the danger that railroad agents would prevent a worker from testifying, furnishing information, and/or completing an accident report.<sup>49</sup>

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<sup>49</sup> Gonzales v. Southern Pacific Transp. Co., 755 F.2d 1179 (5th Cir. 1985).

This law obviously prohibits a railroad from using **any device whatsoever** to prevent a fellow co-worker from voluntarily furnishing facts incident to the injury. This broad law prohibits the railroad from:

1. Restricting the questions or subject matter asked by the injured employee or his representative of an employee who wishes to furnish information.
2. Refusing to produce co-workers with knowledge of facts relating to the incident at the investigation. This means any co-worker who knows anything about the accident or injury, or any prior similar accidents or injuries, who volunteers to shed any light on the injury at hand.
3. Retaliating against co-workers who want to help and who voluntarily provide information.<sup>50</sup>

Further the law may:

1. Protect the representative as a party in interest and a co-employee with knowledge.
2. Allow the representative to introduce all supporting documents as evidence at the investigation.
3. Allow the representative to make statements and objections at any time throughout the investigation.
4. Require the railroad to produce requested relevant documents, such as statements previously given to claim agents, accident reports, event recorders, etc.

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<sup>50</sup> Identifying persons in photographs is considered providing facts incident and is therefore covered. Stark v. B.N., 538 F.Supp. 1061.

It is not a violation of Section 60 to charge an injured employee.<sup>51</sup> However, it is a violation of Section 60 to charge a co-employee who voluntarily provides facts incident to the injury or death of another employee. Furthermore, Section 60 is violated if the railroad uses subterfuge to charge an employee for a frivolously unrelated rule violation if the true purpose is retaliation for assisting. In such case, a temporary restraining order and injunction to prohibit the investigation is proper.<sup>52</sup>

F. How to Use the Law.

The law provides for a criminal penalty of a \$1,000 fine and imprisonment for those who violate the law. Should the railroad refuse to comply with the above-listed categories of Section 60, the representative must make rail management aware that he will be forced to contact the U.S. District Attorney and report it to be in violation of the law. Such a threat will certainly cause the Trainmaster or Superintendent much consternation.

For example, if the representative requests witnesses who have knowledge to attend the investigation and the railroad refuses their attendance, the representative could write the Charging Officer as follows:

*We have requested the railroad produce Engineer Smith at the investigation as he is a person with knowledge who wishes to voluntarily provide facts incident to the accident and injury of Mr. Charged Employee, but you have refused to make him available. Such action and conduct violates 45 U.S.C. ' 60 of the Federal Employers' Liability Act. Unless you agree to produce Engineer Smith, I will have no choice but to inform the United States District Attorney of*

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<sup>51</sup> Clarke v. Seaboard Coast Line Co., 332 F.Supp. 380.

<sup>52</sup> Hendley v. Central of G. R. Co., 609 F.2d 1146 (5th Cir. 1980)., reh.den. 614 F.2d 294; cert. den., 66 L.Ed. 822.

*your conduct and violation of the law.*

The same type of complaint could be orally stated during the investigation should witnesses not be produced, documents be refused, questions be restricted, etc. A violation of the law could also be a basis for an arbitrator's decision to vacate discipline. Thus, failure of the railroad to comply in any of the listed categories should be so stated as an objection and request, along with a reference to a violation of 45 U.S.C. ' 60.

### **VIII. PRACTICE TIPS.**

#### **A. What to Do - Absenteeism.**

Request the railroad produce the employee's personnel record. The personnel record should contain all prior notations of discipline or complaints regarding the employee's work habits. The personnel record is very helpful to determine whether or not this individual is one who has a bad or good work history.

Request in writing that the railroad produce work records of other similarly situated employees. For example, if the charged employee is a conductor on the ABC Seniority District then request the railroad produce the work records, call sheets and time slips of other conductors on the ABC Seniority District whom you believe have worked less than the charged employee. In order to win such a case it is necessary to prove to the arbitrator that the charged employee has worked about as much as other similarly situated employees.

If the charged employee has a valid medical reason for not working, then you must produce at the investigation evidence of the medical condition. Have the charged employee secure his medical records from his doctor and introduce the records as an exhibit in the

transcript of the investigation provided, of course, those records show that the doctor has advised the employee not to work. In such cases the best form of evidence is a letter from the doctor or actual testimony from the doctor at the investigation explaining what the medical condition is and why the doctor has recommended the employee not work for the period of time he is being held accountable.

B. What to Do if the Employee is Charged with Missing a Call.

The representative must develop some proof that the employee had a good reason for missing a call, i.e., such as the crew caller didn't call the right phone number or the crew caller didn't place the call or that the employee's pager was broken. Request that the railroad produce the call records for the day the employee allegedly missed the call. Ask that they produce the audio recording of the crew caller attempting to speak to this individual. If this is an isolated occurrence, then ask the railroad to produce the records of other employees who missed calls within the preceding year but have not been charged nor disciplined for missing the call. This, of course, would give the arbitrator some proof that the charged employee had been singled out. If the charged employee contends that his phone was out of order or that his pager was not working, there must be some proof from the phone company or pager company to back up his contention. Thus, the charged employee should communicate with the phone and/or pager company and get documentation, such as a letter explaining that the phone or pager was not working. Remember that simply because the employee's phone or pager was not working does not necessarily exonerate him of his

responsibility for being available. However, in all probability, the arbitrator would certainly think that was a justifiable excuse which would not warrant discipline.

If the employee has not been disciplined in the past for such an offense, then make that proof at the investigation. Ask the employee how many times he's missed a call, if he's ever been confronted by a company officer about missing a call or if he's ever been disciplined for missing a call.

C. Rule G.

If the employee is charged for alcohol or drug use which the railroad confirms by urine or blood test, the employee must have proof to contradict those tests. The employee must have proof from a toxicologist explaining why the urine or blood tests were wrong. For example, if the employee believes the test was positive because he had taken Nyquil prior to going on duty, there must be documentation, letters, a report from a bona fide toxicologist which states that the tests were not accurate. This alone may not win the case but it is a must in order to give the arbitrator some justification to find that the employee was not guilty. Toxicologists are available in all major cities for these kinds of things. If you don't know one, contact your designated legal counsel.

Of course, the best proof is a contradicting urine or blood test taken immediately after the positive test. Thus, if the employee is tested, he should immediately go to another facility and have a blood and urine test. If the second tests come back negative then they are excellent proof for the arbitrator.

Finally, there are a lot of FRA requirements regarding the chain of custody of the sample. Basically, the rules require that the sample not be tampered with between the time the sample is given and the time it is tested. If it is the employee's contention the chain of custody was broken, there must be some proof to warrant the allegation. For example, it is not sufficient for the employee to testify that he thinks the chain of custody was broken. There must be some proof from someone involved in the chain of custody such as the person taking the sample, or the person mailing the sample, or the person who tests the sample. If the representative or charged employee believes the chain of custody was broken, then request the railroad produce all of those records regarding the taking of the sample, the mailing of the sample, and the testing of the sample. Have the railroad produce any records which the representative believes would show that the chain of custody was broken. It would also be prudent to make a written request that the individuals involved in the chain of custody be called to testify. Of course, unless the proof is very, very strong do not expect these individuals to readily admit that they did not properly handle the samples.

Unless there is proof that the test was incorrect or improperly handled, the case cannot be made. If the test was positive and the only contrary proof is the employee's testimony that the test was incorrect, or that the sample was tampered with, or that the chain of custody was broken, discipline is not going to be overturned by the arbitrator.

D. What to do if the Employee is Charged with Being Unsafe.

The representative must develop proof that the real unsafe entity was the railroad and not the employee. One of the best ways to do this is to prove that the cause of the injury was the violation of some Federal safety law such as the Locomotive Inspection Act, the Safety Appliance Act, the Code of Federal Regulations or OSHA. Pursuant to the Federal Employers Liability Act, if the cause in whole or in part of an injured employee's injury is a violation of a Federal safety law, then that person's contributory negligence is not held against him. The same theory should hold true for investigations.

For example: an employee slips and falls in a puddle of liquid that has leaked from a trash can as he enters the shanty. OSHA regulations require that the railroad provide trash cans that do not leak. If the trash can leaks, OSHA law is violated and the employee should not be found to be unsafe. It was the railroad's failure to comply with the law and provide a leak-proof trash can that caused the injury. This is the type of proof that could exonerate the employee. Of course, it is imperative that the representative introduce the law as an exhibit at the investigation. The representative will have to educate the arbitrator as to what the law is and how it was in fact violated by the railroad in order for the arbitrator to find for the employee. Anytime an employee is charged in connection with an injury or being unsafe, the representative should contact designated legal counsel to determine whether a safety law was violated and how to proceed with the investigation.

E. May the Representative Testify?

Of course! In essence, when the local chairman makes a statement, he is testifying. But if the local chairman witnesses the incident under investigation, or if the local

Chairman overhears radio conversation, or has some other first hand-knowledge about the incident under investigation, he can certainly testify at the investigation regarding his knowledge. He may do that simply by making a statement regarding what he heard or observed, or he could tell the presiding officer he wants to testify and let the presiding officer question him about what he knows. The local chairman could simultaneously continue to be the charged employee's representative; there are no rules that would prohibit such conduct. Remember, at an investigation no one is under oath and the arbitrator may give just as much consideration to the representative's statement as he does to the responses given by a witness to questions propounded by the presiding officer.

F. May the Presiding Officer be Called as a Witness?

Of course! If the presiding officer has some first-hand knowledge of the incident regarding the charge such as witnessing the incident or overhearing some of the conversations directly involved in the incident he should not be the presiding officer. The presiding officer certainly cannot hold a fair and impartial investigation if he has first hand-knowledge of the events leading up to the charges. If the representative learns or strongly believes that the presiding officer does have first-hand knowledge of the incident, then the representative should ask him to testify. If the presiding officer does have first hand knowledge, in all probability the arbitrator will not believe that the charged employee was afforded a fair and impartial investigation.

The same principle applies if the presiding officer has discussed the matter under investigation with the superintendent, or received instructions from the superintendent, or any

of the involved investigating officers, prior to the formal investigation. It is the duty of the railroad to hold a fair and impartial investigation and if the presiding officer has been involved in the development of the case, or has first-hand knowledge of the incident under investigation, in all probability, the arbitrator will rule that the charged employee did not receive a fair and impartial investigation. Thus, the charging officer should be questioned by the representative as to any conversations or communications he has had with the presiding officer about the matter prior to the actual investigation. If the charging officer indicates that he has discussed the matter with the presiding officer prior to the investigation, then the representative should ask that the presiding officer testify. If he refuses, the employee does not receive a fair and impartial investigation. If he agrees to testify, he cannot thereafter continue to be the presiding officer if the employee is to be afforded a fair and impartial investigation.

Nothing prohibits the representative from simply asking the presiding officer on the record if he has first-hand knowledge of the incident or he has discussed the matter with the charging officer or the superintendent prior to the investigation. If he has, then the representative should demand that he be allowed to question the presiding officer fully about his involvement.

#### **IX. THE ARBITRATOR'S POWER TO DECIDE**

Rail arbitrators have a substantial amount of authority to fashion arbitral remedies. The arbitrator's broad authority is rooted in the Railway Labor Act and related statutes and protected by narrow judicial review. At the same time, arbitral authority can be limited by the

right of the parties to choose the arbitrator. This right, however, adds the unwanted element of uncertainty to the rail arbitral remedies process.

A. Evolution of Arbitral Power Pursuant to the Railway Labor Act.

Initially, the Railway Labor Act (RLA) only provided for voluntary arbitration. Later changes made arbitration mandatory and provided the arbitrator with broad discretion. Decisions of the United States Supreme Court, coupled with the latest amendments to the Act, have made awards of the rail arbitrator virtually untouchable.

1. The 1934 Amendments Mandate Broad Authority for the Rail Arbitrator

The 1926 Railway Labor Act is the oldest, continuous federal collective bargaining legislation in our nation's history.<sup>53</sup> Initially, the Act did provide for arbitration of unresolved disputes, but did not force the parties to arbitrate and failed to stipulate whether arbitration was to be national or local. The Act left this crucial decision to the parties who, in turn, could not agree.

The Act was then amended June 21, 1934 to include compulsory arbitration and the establishment of the National Railroad Adjustment Board (NRAB).<sup>54</sup> The NRAB was national in scope and was comprised of four divisions for the various crafts within the industry. All disputes which arose involving the application or interpretation of rates of pay and/or working condition were subject to resolution by a division of the NRAB.

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<sup>53</sup> Benjamin Aaron and others, The Railway Labor Act at Fifty, P. 3 (1977).

<sup>54</sup> 45 U.S.C. Sec. 143, First (h)(2)(i) (Supp 1985).

The 1934 amendments also provided that the awards of the NRAB were "final and binding on the parties."<sup>55</sup> Thus, once the NRAB rendered its award, the case was closed. The parties had their decision, win or lose. Therefore, the NRAB was the Supreme Court of the rail industry. In this system, the arbitrator had virtually unbridled authority to fashion remedies.

Further, the 1934 amendments were silent as to judicial review. There were no provisions which indicated what, if any, of the award was reviewable. However, the U.S. Supreme Court resolved this matter in 1959 holding that federal courts could not review the merits of an award in an appeal from adverse decision.<sup>56</sup> Thus, an unhappy party could not appeal to the courts for judicial relief for what was felt to be a wrong decision.

Rail arbitrators did not wait on the U. S. Supreme Court to determine the extent of their authority. In the early days of the NRAB, arbitrators made historic decisions, often punitive in nature, such as the basic day penalty.<sup>57</sup> This rule penalized a carrier by requiring it to pay the aggrieved employee a 100 mile penalty in addition to other earnings accrued, when a provision of the collective bargaining agreement was violated. The rule is punitive in nature due to the potential of a double recovery and is highly akin to the law of exemplary damages.

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<sup>55</sup> 45 U.S.C. Sec. 153, Section 3 First (m), 48 Stat 1191 (1934).

<sup>56</sup> Union Pacific Railroad v. Price, 360 U.S. 601 (1959).

<sup>57</sup> Aaron, Supra, FN 1, at 17.

Rail arbitrators also used their broad powers to create a rule of reinstatement without deduction for outside earnings. In egregious cases of wrongful discharge, arbitrators often reinstated the discharged employee with pay for all time lost, without mention of mitigation of damages. Thus, the discharged employee who obtained other employment while discharged, recovered all his lost rail earnings without a deduction for other earnings.<sup>58</sup> This concept is also punitive in nature and very foreign to the mitigation of damage rule that exists in our legal system.<sup>59</sup> Generally courts deduct outside earnings from any award of damages for one who has been wrongfully discharged.<sup>60</sup>

The early decisions of the NRAB probably reflect the confidence and protection the Act provided for arbitrators. The NRAB was the only tribunal for resolution of minor disputes and the arbitrator was the sole authority for making the determination. At that time, the parties did not have the flexibility to choose an arbitrator or the forum.<sup>61</sup> The NRAB was the only game in town and the early arbitrators were undoubtedly aware of the authority they derived from the law and the process.

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<sup>58</sup> See, First Division Award 10616, holding that the carrier would not be allowed to deduct outside earnings in a case of wrongful discharge. Also see First Division Awards 1058, 3611, 3612, 3756 and 4733.

<sup>59</sup> Douglas Laycock, Modern American Remedies, P:14 (1985).

<sup>60</sup> Id.

<sup>61</sup> Today, the parties can proceed before the NRAB or a local Public Law Board. They have the right to choose the arbitrator.

The 1934 amendments did provide a remote probability that the arbitrators' awards could be reviewed in enforcement actions. Section 3(p) of the amendments did provide for enforcement of awards in federal district courts.<sup>62</sup> However, Section 3(m) also made a distinction with regard to awards that contained monetary awards: "all awards are final and binding upon both parties to the dispute, except insofar as they contain a money award."<sup>63</sup>

Some courts did review awards of the NRAB under the guise that awards which were monetary in nature were not final and binding on the parties. In 1943, the Third Circuit held that Section 3(m) did not preclude consideration of the merits of an award by the reviewing court, because "there cannot be found...a (legislative) intention to invest them with the force of unappealable judicial decisions."<sup>64</sup> The 1943 Dahlberg decision was short lived and few awards were actually reviewed or overturned by the courts pursuant to Dahlberg.

In 1965, the U. S. Supreme Court, in the famous Gunther decision, reversed Dahlberg by applying a standard of review earlier announced in the Steelworkers Trilogy: the award is valid unless it is "wholly baseless and completely without reason."<sup>65</sup> Thus, Gunther held that the arbitrator's award should be upheld if there was any reasonable basis for the decision.<sup>66</sup>

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<sup>62</sup> 45 U.S.C. ' 153, Section 3 First (p), 48 Stat 1192 (1934).

<sup>63</sup> Id.

<sup>64</sup> Dahlberg v. Pittsburgh & Lake Erie Railroad Co., 138 F.2d 121, 126 (1943).

<sup>65</sup> Gunther v. San Diego & Eastern Arizona Railway Company, 382 U.S. 257, 259 (1965).

<sup>66</sup> The Court did state, however, that Section 3(m) of the Act did allow the courts to determine the size of a money award if the arbitrator sustained the claim for lost wages without specifying an amount. Id. at 259.

The Steelworkers Trilogy was a series of 3 decisions decided on the same day in 1960. The findings that emanated from the decisions were for the courts to take a "hands off" attitude toward the award of a rail arbitrator. The Court held that the merits of the arbitration award were irrelevant, as judicial review was narrowly limited to whether the award "draws its essence" from the collective bargaining agreement, i.e., whether the award was within the authority conferred upon the arbitrator by the collective bargaining agreement.<sup>67</sup> Thus, Gunther incorporated into the Railway Labor Act the very limited "essence test" of the Steelworkers trilogy. Its limited review is still the NRAB standard and is often referred to in Railway Labor Act cases.

## 2. The 1966 Amendments to the Act

In 1966, the Act was again amended to create local boards of adjustment, commonly referred to as Public Law Boards, which were necessary to help eliminate the lengthy backlog of the NRAB. The amendments also further limited judicial review.

Section 3(p) was amended whereby an award of the NRAB was, "conclusive on the parties." Further, courts were to enforce the award unless there was:

1. Failure of a division to comply with the requirements of the Act.
2. Failure of the award to conform or confine itself to matters within the scope of the division's jurisdiction.

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<sup>67</sup> United Steelworkers of America v. American Manufacturing Co., 363 U.S. 564 (1960); United Steelworkers of America v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960); United Steelworkers of America v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960).

3. Fraud or corruption by a member of the division making the award.<sup>68</sup>

Thus, the power of a district court to set aside an order was limited to very narrow grounds recently referred to as, "among the most narrowest in law."<sup>69</sup>

The first case to review the 1966 amendments arose in the Fifth Circuit.<sup>70</sup> The question to be resolved was double pay, i.e., punitive damages. Improperly displaced employees were awarded pay for time lost without deduction of wages earned during the period of improper displacement. The Court referred to the essence test to determine that the award was valid, because it was not "without foundation in reason or fact" and "it was rationally inferable, if not obviously drawn, from the letter and purpose of the collective bargaining agreement."<sup>71</sup> It held that since the NRAB "precedents provided the foundation in fact and law...the Board surely did not act so irrationally as to violate the jurisdiction in awarding penalty pay."<sup>72</sup>

### 3. The Current Standard of Review

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<sup>68</sup> 45 U.S.C. ' 153, Section 3 (First (p) & (8) 208 Stat 208 (1966)).

<sup>69</sup> English v. Burlington Northern R. Co., 18 F.3d 741, 743 (9th Cir. 1994).

<sup>70</sup> Brotherhood of Railroad Trainmen v. Central of Georgia Railway Co., 415 F.2d 403 (5th Cir. 1969).

<sup>71</sup> United Steelworkers of America v. American Manufacturing Co., 363 U.S. 564, 569 (1960).

<sup>72</sup> Central of Georgia, 415 F.2d at 407.

Judicial review is severely limited by the 1966 amendments and the decisions of the Supreme Court. However, the language of the standard is somewhat ambiguous and some appellate courts have expanded the standard of judicial review. The Eighth, Ninth and Tenth Circuits have clearly adhered to narrow principals of judicial review, while the Fourth, Fifth, and Seventh have expanded the standard.<sup>73</sup> Although there is a split, the difference is not one of standard of review, but rather an issue of mitigation of damages.<sup>74</sup> Hopefully, the split over this issue will be decided by the Supreme Court.

In spite of the split, the judicial standard of review for a rail arbitration award is "still, the narrowest in law."<sup>75</sup> Thus, rail arbitrators have vast authority to shape remedies without fear of court intervention. If the award complies with the essence test, i.e., not wholly without foundation in reason and fact, the courts will probably not interfere.<sup>76</sup>

In discipline cases, arbitrators may reinstate a wrongfully discharged employee and pay only a portion of (or no) lost wages. The arbitrator may reinstate a wrongfully discharged

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<sup>73</sup> William Green and Wiley Rutledge, The Federal Courts as Super-Arbitration Tribunals: Judicial Review of Non-Reviewable Railroad Labor Grievance Awards, 37 Labor Law Journal 387 (1986).

<sup>74</sup> Brotherhood of Railroad Signalmen v. Chicago, Milwaukee, St. Pal & Pacific Railroad Co., 444 F.2d 1270 (7th Cir. 1971).

<sup>75</sup> English, 18 F.3d at 743.

<sup>76</sup> Constitutional due process requirements do apply to proceeding of the NRAB or any public law board as they are governmental functions. Due process generally requires: (1) the Board be presented with a full statement of the facts and all supporting data bearing upon the disputes, and (2) the parties may be heard either in person, by counsel, or by other representatives...and the...Board shall give due notice (actual notice) of all hearings to the employee. English, F.3d at 744. Courts could overturn an award if due process was not afforded, but this requirement should not be the impetus to limit the arbitrator's power to fashion a remedy.

employee and retain jurisdiction over the employee for a period of time to insure that the employee is able to work. An arbitrator may award a wrongfully discharged employee interest on his lost wages and/or award lost wages and the value of lost fringe benefits.<sup>77</sup>

In a contract violation case, the arbitrator may award a basic day or one dollar as a penalty for a violation. If the case involves ongoing violations, the arbitrator could allow the Carrier a period of abatement to correct the violations and award damages only if the corrections are not completed after the abatement period. Thus, so far as the Act and the legal system are concerned, the arbitrator has broad general authority to fashion numerous remedies.

An example of the Court's deference to the authority of rail arbitrators is well stated

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<sup>77</sup> NLRA arbitrators have rendered such awards. Marvin Hall, Traditional and Innovative Remedies in Arbitration: Punitive Awards, Interest, and Conditional Remedies, 11 Whittier Law Review 617 (1989).

in the case of American Train Dispatchers Association v. Norfolk & Western Railway Company.<sup>78</sup> The labor agreement provided:

If the employee or his representative is not notified of the reasons for disallowance of his claim, the claim or grievance shall be allowed as presented.

A claim was filed by the ADTA because the Carrier was requiring the dispatchers to perform work outside the course and scope of their employment. The Carrier failed to timely deny the claims and admitted their failure in arbitration.

However, the arbitrator determined that the ADTA's claim should be sustained on procedural grounds because the Carrier did fail to timely deny the union's claims. However, the arbitrator refused to award monetary damages stating that "there was no substance showing on the property that any employee was deprived of work or harmed in any manner."<sup>79</sup>

The union petitioned the district court for relief pursuant to section 3 1st q of the Railway Labor Act. The Court denied relief stating:

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<sup>78</sup> The American Train Dispatcher Association v. Norfolk & Western Railway Co., No. 90 C 3564, 1991 U.S. Dist. Lexis 7017 (nd Illinois May 21, 1991).

<sup>79</sup> Id. at 208.

An arbitrator should use his informed judgement in an attempt to reach a fair solution of the problem beforehand. In reaching such a solution, the arbitrator's task does not end when he has reached a decision concerning the merits of a case; his informed judgment is especially necessary when it comes to formulating remedies.<sup>80</sup>

The decision is interesting in that the Court succinctly sums up the position of the Federal courts in such matters:

The question for a decision by a Federal court asked to set aside an arbitration award - whether the award is made under the Railway Labor Act, the Taft Hartley Act, or the United States Arbitration Act - is not whether the arbitrator or arbitrators erred in interpreting the contract; it is not whether they clearly erred in interpreting the contract; it is not whether they grossly erred in interpreting the contract; it is whether they interpreted the contract....if they did, their interpretation is conclusive....a party will not be heard to complain merely because the arbitrator's interpretation is a misinterpretation.... Once the Court is satisfied that they were interpreting the contract, judicial review is at an end, provided there is no fraud or corruption and the arbitrators have not ordered anyone to do an illegal act.<sup>81</sup>

The Court certainly confirms what Judge Posner previously stated:

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<sup>80</sup> Id. at 209.

<sup>81</sup> Id. at 211. The Court did remand the case back to the NRAB Third Division for another hearing because the arbitrator did not address the union's claim on the merits of the claim. The arbitrator merely denied the award of damages without addressing the merits of the case. Although the Court did remand the case for further review it did in fact, uphold the arbitrator's decision.+

The District Court...does not review the correctness of the arbitration award, even under a highly deferential standard, such as "clearly erroneous" or "clear abuse of discretion." All it asks...is whether the arbitrators did the job they were told to do - not whether they did it well, or correctly, or reasonable, but simply whether they did it.<sup>82</sup>

B. Expanded Arbitral Power Granted Pursuant to the Rail Safety Act.

Possibly in recognition of the broad arbitral authority previously granted by the Railway Labor Act, Congress granted even broader remedial powers, in certain instances, pursuant to the 1970 Rail Safety Act.<sup>83</sup> Section 20109 (1996) of the Act allows the arbitrator to award reasonable and/or punitive damages to an employee who has been discharged or discriminated against, in any manner, because he has:

- (1) Filed any complaint or instituted or caused to be instituted any proceedings under or related to the enforcement of the Federal Railroad Safety Laws; or
- (2) Testified or is about to testify in any such proceedings.
- (3) Or refused to work when his life was in imminent danger.<sup>84</sup>

Thus, in deciding a Section 20109 (1996) case, the arbitrator must first use broad discretion to determine if a complaint has been filed; if the acts complained of are a form of discrimination related to the complaints; and finally, what damages, if any, should be assessed.

1. What Constitutes a Complaint?

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<sup>82</sup> Brotherhood of Locomotive Engineers v. Atchison, T & S F Railway, 768 F. 2nd, 914, 921 (7th Cir. 1985).

<sup>83</sup> 45 U.S.C. '421 et.seq. (1988).

<sup>84</sup> 45 U.S.C. '441(a) (1988).

The Act does not distinguish nor define what a complaint is nor to whom it must be made. Thus, the arbitrator must decide these critical issues with virtually no guidance from the Act.

Must the complaint be in writing? Will a verbal complaint satisfy the requirement? Would a simple refusal to violate a safety law satisfy the complaint requirement? Each issue is left to the broad discretion of the arbitrator. To whom should the complaint be made? Will a complaint made to a fellow co-worker suffice or must it be made to a company officer? Does a complaint have to be made to an officer of the Federal Railroad Administration or will one made to an officer of the Occupational Safety & Health Administration suffice? These are more questions for the arbitrator to decide.

## 2. What Damages Should be Awarded?

Probably the most controversial question left for the arbitrator to decide is damages. What are reasonable damages?<sup>85</sup> What do those include? How much should be awarded? When should punitive damages be assessed? Again, each issue is left to the arbitrator's discretion.

Do reasonable damages include mental anguish, loss of consortium, or medical expenses for a damaged psyche? Should an employee who is "bird-dogged" for months prior

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<sup>85</sup> PLB 4462 - United Transportation Union v. Springfield Terminal Railroad Company, rendered January 24, 1995 Washington, D.C. Six million dollars awarded collectively to Springfield Terminal Railroad employees for: (1) confusion caused by the carrier regarding their seniority, and (2) for the stigma associated with engaging in an alleged unlawful strike. The STR had wrongfully alleged that an employee strike over unsafe work conditions pursuant to Section 20109 was illegal and that the employees had, in effect, resigned by participation.

to a discharge be awarded more damages than one who is not discharged? Should reasonable damages be awarded to an employee who is verbally assaulted and/or threatened with job loss simply because he filed a claim?

Finally how much money, if any, should be awarded? The arbitrator is the sole decision maker! Is \$10,000 or \$100,000 the appropriate remedy? The Act is silent. Should punitive damages be awarded? If so, what standard should be used and how much should be awarded?<sup>86</sup>

Each question raises huge issues for the rail arbitrator. Many are akin to the judicial system where a judge or jury decides such critical and controversial issues. Based on the history of the authority granted directly and indirectly by the RLA, Congress was undoubtedly satisfied that rail arbitrators were qualified to decide such issues.<sup>87</sup>

The decisions left to the rail arbitrator pursuant to Section 20109 (1996) are a further example of the broad authority available to the rail arbitrator to fashion remedies. The arbitrator must decide what constitutes a claim and how much in damages should be awarded for a violation. Further, the decision must be made with little guidance from the Act. The

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<sup>86</sup> PLB 4462 - In order to recover for punitive damages the carrier's conduct must be reckless, malicious or outrageous. This standard is not set forth by the statute.

<sup>87</sup> Antonio Mastrobuono & Diana G. Mastrobuono v. Shearson Lehman Hutton, No. 94-18, 1995 U.S. Lexis 1820 (U.S. Supreme Court March 6, 1995). The issue decided by this case was one of punitive damages. Although not a Railway Labor Act award, the agreement in this dispute did not mention the issue of punitive damages. The arbitration award of punitive damages was upheld primarily because the agreement did not preclude punitive damages. The findings are further evidence of the courts' proclivity to enforce the award of the arbitrator.

arbitrator must consider all relevant factors, as the answers to these questions are not found within the four corners of an agreement.

C. Limiting Influences on the Authority of the Rail Arbitrator.

In spite of the broad powers of the rail arbitrators, there are limits to their authority. One is the conservative view of some commentators that the arbitrator must decide the issue within the four corners of the agreement.<sup>88</sup> The second is the ability and flexibility of the parties to select the arbitrator. The ability to select the arbitrator not only limits his ability to fashion a remedy but also creates a problem the system was designed to overcome: uncertainty.

1. Rules of Contract Interpretation

a. The Four Corners Approach

For years the law of contracts has contained a doctrine, often referred to as the four corners approach.<sup>89</sup> This approach collides head on with the "policy view," which focuses on the effect the remedy will have on the agreement and/or the parties. Those who advocate the four corners approach are basically attempting to limit the broad powers of the rail arbitrator.

The four corners maxim begins with the premise that the parties have used language in a way that reasonable people normally do. The process of interpretation turns on what courts

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<sup>88</sup> Anthony V. Sinicropi, Remedies and Arbitration Decision Making: Responses to Change, 13 Labor Law Journal 546 (1991).

<sup>89</sup> Allen Farnsworth, Contracts, Sec. 7.11 (2 ed. 1990).

consider normal habits of the use of the language; habits that would be expected of reasonable persons in the circumstances of the parties.

However, this approach has no validity beyond its underlying assumption. Its use in judicial opinions is often more ceremonial, being decorative rather than persuasive rationalizations of decisions already reached on other grounds.<sup>90</sup> In reality, judicial decisions involving contract interpretations resemble a bouquet of rationalizations assembled together to form an opinion, but neatly classified as within the four corners.

b. The Policy Approach

Even the most revered authority in contract interpretation argues this maxim to be a rather hollow one.<sup>91</sup> Generally, Mr. Farnsworth writes that judicial contract interpretation takes into consideration a multitude of factors and not word meanings and grammar usage.<sup>92</sup> The same is undoubtedly true with rail arbitrators.

Rail arbitration proceedings are not governed by legal evidentiary rules. The arbitrator is the judge of the admissibility and relevance of evidence submitted in an arbitration proceeding. The arbitrator is not bound to hear all of the evidence tendered by the parties; however, he must give each of the parties to the dispute an adequate opportunity to present its evidence and arguments. A Federal Court should vacate an award only if the arbitrator's

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<sup>90</sup> K. Llewellyn, The Common Law Traditions - Deciding Appeals 521-535 (1960).

<sup>91</sup> Farnsworth, Supra on 28, sec. 7.11

<sup>92</sup> Id.

refusal to hear pertinent and material evidence prejudices the rights of the parties.<sup>93</sup> Thus, the rail arbitrator can conceivably consider any information he considers relevant. Armed with such information, it is actually foolish to think that the arbitrator would relegate himself to the narrow focus of the language of the contract.<sup>94</sup>

Today, rail arbitrators are faced with increasingly complex issues and complex labor agreements. Rail acquisitions, mergers, buyouts, drug testing, affirmative action, and two-tiered wage systems are but a smattering of the areas of coverage within today's collective bargaining agreement. These greater areas of potential controversy require greater expertise and overall knowledge of the industry and the interrelation of each subject. Today's arbitrator simply cannot focus on the language of a single paragraph and order a simplistic award such as claim denied or claim sustained.

In essence, most rail arbitrators have not allowed the limiting notions of the four corners approach to diminish their decisions. Clearly, policy was a factor with the inception of the NRAB and the basic day penalty. Those who advocate such a practice today may be only attempting to narrow the focus of the arbitrator to enhance the chances of a favorable award.

## 2. The Right to Choose the Arbitrator as a Limiting Factor.

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<sup>93</sup> Main Central Railroad, Co. & Portland Terminal Co. v. Brotherhood of Maintenance of Way Employees, 663 F. Sup. 425, 430, 436 (D Maine 1987).

<sup>94</sup> In fact, rail arbitrators most often do take into consideration numerous factors, including those not addressed by the parties. Rail arbitrators, as do judges and juries, often make a decision very quickly, after hearing little evidence, and later rationalize their decision in an acceptable manner. See S. Young, Arbitration of Minor Disputes in the Rail Industry: The Process and Decision (1990).

Rail arbitrators are not salaried employees. They are paid by the National Mediation Board, but only when they work. To work, the mediator must be chosen by the parties or appointed by the National Mediation Board.<sup>95</sup> The process of allowing the parties to choose creates substantial uncertainty, possibly to neither party's benefit.

Those who work the most are those who are routinely selected by the parties. Those who are routinely selected are those who are liked by the parties. Those who are liked are normally those who render awards that conform to industry norms.

In a routine discipline case, the arbitrator might reinstate the discharged employee, in order to placate the union, but limit back pay to a small percentage of the time actually discharged, to satisfy the carrier. In a contract dispute, an arbitrator might find a violation, in order to placate the union, but limit damages to one hour, instead of one day, to satisfy the carrier. Decisions of this type allow both parties to feel victorious and as such, they are more likely to agree to use that arbitrator in the future.

Such a practice may bring about some stability, but it restricts the ability of the arbitrator to fashion remedies. The monetary forces of self employment undoubtedly prevent some arbitrators from rendering new and innovative decisions, as such decisions might

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<sup>95</sup> 29 C.F.R. ' 1207.1 (1992). Within thirty (30) days from the date a written request is made by an employee representative upon a carrier, or by a carrier upon an employee representative, for the establishment of a Public Law Board, an agreement to establish such Board shall be made.... When the members of a Public Law Board...are unable within ten (10) days...to agree upon the selection of a neutral person, either member of the board may request the Mediation Board to appoint such neutral person and upon such report, the Mediation Board shall promptly made such appointment.

prevent the parties from agreeing to use the arbitrator in the future.<sup>96</sup>

Not only does the practice limit the remedy powers of the arbitrator, it creates uncertainty in the industry. Because the parties can choose, they normally will not agree to reuse an arbitrator who has rendered what they perceive as an unfavorable decision. Thus, a carrier may bar an arbitrator who awards a significant amount of wage loss or a union may bar an arbitrator who fails to award a full penalty day for a contract violation.

Failure to agree results in the appointment of an arbitrator by the NMB, which may be a different person for each successive board. While there are forces which create industry norms, each arbitrator is different and his perception and decision will probably be totally different than those of previous arbitrators in previously decided similar cases. The statute and limited judicial review mandates a final and binding award. Thus, even inconsistent awards will stand as final and binding. The end result is uncertainty. Neither party knows who the next arbitrator will be, if he will adhere to prior awards, or the extrinsic views he brings to the table.

In the business of rail arbitration, the Railway Labor Act and related statutes coupled with limited judicial review grant the arbitrator enormous authority to interpret the rules and fashion remedies. That authority is not limited by the rules of contract interpretation, but

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<sup>96</sup> See PLB 4462, supra FN 28. Three arbitrators, appointed by the National Mediation Board, as opposed to the parties, recently awarded an aggrieved union member over 6 million dollars in a Section 20109 case. Such an award is an unusually large monetary amount and is a first of its kind for a Section 20109 case. The arbitrators may have felt some security in knowing they had been selected by the NMB and not the parties, for a one time decision. They may also have felt protection as the award was a combined panel decision and not a single member award.

rather by the ability of the parties to pick and choose arbitrators. The end result is an uncertain atmosphere of dispute resolution created by a dichotomous relationship of virtually unbridled arbitral authority and the apprehensive use of it.

## **X. THE DUTY OF FAIR REPRESENTATION**

### **A. History of the Duty of Fair Representation.**

The Railway Labor Act assured rail unions legal personality and vested them with the right to negotiate and administer collective bargaining agreements. The basis for this power was to reduce industrial strife and restore mass purchasing power (during the depression); to promote a fair distribution of economic resources, and further self-government by employees. Under this statutory framework, rail unions and rail carriers enter into collective bargaining agreements.

In collective bargaining, individual employees obtain the benefits of the greater power of collective representation but must relinquish their individual contractual freedom to negotiate their own job conditions. The union's task is to accommodate the overlapping and competing demands of varied interest groups, surrendering or compromising some demands to achieve others.

The Railway Labor Act and rail labor agreements recognize one union to represent one craft. It is the right of that union to negotiate for the craft and to resolve grievances for the craft. This sometimes leads to conflicts between the union and the individual member who complains that the employer has violated his rights. The union may very well have a

different perspective than the individual employee it represents in a grievance matter. The union represents the majority of employees even while it is representing a single member in a grievance process. Thus, even during an individual's grievance procedure, the union's own credibility and its integrity as a bargaining agent in the interests of all of its members may be at stake.

Because of the power vested in the rail unions to represent an entire craft, the Supreme Court developed the duty of fair representation, a corollary to a union's exclusive statutory authority to represent all members of a designated craft. This exclusive authority:

includes a statutory obligation to serve the interests of all members without hostility or discrimination towards any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct.<sup>97</sup>

This duty, which applies to all employees in the bargaining union, whether members of the union or not, has been described by the court as being "akin to the duty owed by other fiduciaries to their beneficiaries."<sup>98</sup>

The first case enunciating the doctrine of the duty of fair representation was Steele v. Louisville & Nashville RR., 323 U.S. 192, 204 (1944). In that case, the court held that black employees had a right to challenge racially discriminatory collective bargaining agreements.<sup>99</sup>

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<sup>97</sup> Airline Pilots Ass'n v. O'Neill, 499 U.S. 65, 76 (1991).

<sup>98</sup> Airline Pilots Ass'n v. O'Neill, 499 U.S. at 74.

<sup>99</sup> Steele v. Louisville & Nashville RR., 323 U.S. 192, 204 (1944).

Since Steele, the Supreme Court has also applied the doctrine to the National Labor Relations Act.<sup>100</sup>

B. Purpose of the Duty of Fair Representation

The duty of fair representation attempts to balance the union's prerogatives with the rights of the individual members of the craft. The duty places some limits on the union's conduct, but it does not provide the individual craft member with an absolute right to have his grievance taken to arbitration.<sup>101</sup> The courts recognized that the collective bargaining system, of necessity, subordinates the interests of an individual employee to the collective interests of all employees. So long as the union is acting in good faith without discrimination, and is not arbitrary, the union may compromise a grievance of an individual member in the interest of the union as a whole, or may refuse to pursue grievances it deems to lack merit.<sup>102</sup> Thus, the purpose of the duty of fair representation is to ensure that the union representative acts in good faith (not arbitrarily) and without discrimination toward each individual member. However, it also provides the representative with broad discretion with respect to the handling of each individual's claim or grievance.

C. What Constitutes a Breach of the Duty of Fair Representation?

Generally, a union breaches its duty of fair representation only when its conduct towards a member of the collective bargaining unit is "arbitrary, discriminatory, or in

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<sup>100</sup> Ford Motor Co. v. Huffman, 345 U.S. 330 (1953).

<sup>101</sup> Vaca v. Sipes, 386 U.S. 171, 191 (1967).

<sup>102</sup> See, e.g., Griffin v. Airline Pilots Ass'n Int'l, 32 F.3d 1079, 1083 (7th Cir. 1994); Sipes, 386 U.S. at 191.

bad faith."<sup>103</sup> A breach of the duty of fair representation cannot be predicated solely on the fact that the collective bargaining agreement negotiated by the union prejudices a particular employee or group of employees, so long as it appears that the union negotiated the provision in question in good faith.<sup>104</sup>

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<sup>103</sup> Sipes, at 191.

<sup>104</sup> Bleier v. N.L.R.B., 457 F.2d 871 (3rd Cir. 1972).

The union need not take up every grievance or take every grievance to arbitration, nor must the union seek judicial review of an award unfavorable to the employee or judicial enforcement of a favorable award.<sup>105</sup> In all such cases, however, the union's decision not to act must be in good faith, i.e., not arbitrary, discriminatory, or in bad faith.

The duty of fair representation is breached where the union representative induces the employer to discriminate against the employee on the basis of race, citizenship, sex, or because the individual does not belong to the union.<sup>106</sup> Ordinary negligence by the union in handling grievances or other duties will not constitute a breach of the duty of fair representation.<sup>107</sup> However, gross negligence or reckless disregard of an employee's rights can be a breach of the duty of fair representation.<sup>108</sup> Thus, if the local chairman believes that the individual member's claim is not valid and does not handle the claim, or if the local chairman negligently fails to pursue a claim, there probably is no breach of the duty of fair representation.<sup>109</sup>

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<sup>105</sup> See, e.g., Camacho v. Ritz Carlton Water Tower, 786 F.2d 242 (7th Cir. 1986).

<sup>106</sup> N.L.R.B. v. International Longshoremen's Association, 49 F.2d 635 (5th Cir. 1974).

<sup>107</sup> Ruzick v. General Motors, 649 F.2d 1207 (6th Cir. 1981).

<sup>108</sup> Dutrisac v. Caterpillar Tractor Co., 749 F.2d 1270 (9th Cir. 1984).

<sup>109</sup> This would include a decision not to represent a charged member at an investigation. However, refusing to do so may subject the union to a lawsuit.

Even though there is no breach of the duty of fair representation, the individual member may still sue the union. Thus, the safest course is to handle the individual member's claim, even if it is believed that the claim is not valid. In case of doubt, always contact the Union's General Counsel.<sup>110</sup> There is a six-month statute of limitations applicable to a lawsuit for a breach of the duty of fair representation, which means the lawsuit must be filed within six months of the duty or it is forever barred. In some cases, it may be necessary for the individual member to exhaust all organic remedies under the union constitution before pursuing a lawsuit for the breach of the duty of fair representation.

D. Application of the Duty of Fair Representation to Investigation Proceedings.

The duty of fair representation obviously applies to a representative representing the charged employee, which means that the representative must act in complete good faith to exonerate the employee. This does not mean that the representative should be untruthful or conduct himself in a manner that brings disrepute on the union. It also means that once the investigation is concluded and discipline is assessed, the representative should timely appeal the discipline assessed to the member.

Quite often, the charged employee does not want the local chairman to be the representative. The charged employee may choose another individual of the craft or may wish to have a lawyer represent him at the investigation. The failure of the local chairman to

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<sup>110</sup> If an employee brings an unfair representation action based on wrongful discharge, damages must be apportioned between the employer and the union, with the union primarily liable for that portion of the employee's damages attributable to the union's breach of duty. Bowen v. United States Postal Service, 459 U.S. 212 (1983)(award of \$30,000 against the union upheld with the employer responsible for additional \$22,954 to make employee whole).

attend the investigation under such circumstances probably does not breach the duty of fair representation. However, the representative should confirm in writing with the charged employee that he does not wish the union or any of the union's representatives to be present for representation purposes at the investigation hearing. Furthermore, the representative should confirm in writing that the charged employee does not wish the union to appeal any discipline assessed as a result of the investigation. Failure to confirm the charged employee's desires in writing may later lead to confusion as to what the charged employee wanted to be done and could subject the union to liability. However, in all such cases, if there is any question, the representative should contact the general counsel of the union to determine how to proceed.

## **XI. CONCLUSION**

Preparation is the key to a successful investigation. Knowledge of what to expect and what to do is essential. Both preparation and knowledge will alleviate the always present intimidation factor and will prevent the presiding officer from "running over" the precious rights of the charged employee.

The representative must realize that his job is to develop a written record for later appellate review by an arbitrator. Understand that the railroad decided prior to the formal investigation that the charged employee would be disciplined. Thus, a clear, concise, written record must be made to prove to the arbitrator that the charged employee either did not commit the alleged violations or that there were justifiable reasons for the violation.

Being prepared means developing a defense and preparing an opening statement and a line of questions that presents the defense. It means deciding what documents and witnesses are necessary and making a written request for those documents and witnesses in advance of the investigation. It means meeting with the charged employee and witnesses prior to the investigation and informing him of what to expect and how to properly respond to damning questions. It means talking to witnesses and obtaining written statements.

Knowledge is the realization that there really are no procedural rules that can be enforced during the formal investigation. It also means knowing that the carrier has the burden of proof, that all material relevant facts should be developed, that the charged employee should be allowed to produce all relevant evidence, that all known relevant information must be in the investigation transcript, and that the charge letter must be specific enough to prepare a defense and to afford the charged employee ample time to secure a representative. Knowledge means being aware that most arbitrators are much more concerned with substantive issues as opposed to procedural objections.

The representative has an onerous burden to ensure that the transcript contains the evidence that will controvert the railroad's predetermined discipline. In order to accomplish this difficult task, the representative should boldly adhere to the principle of: **No Rules.**