


**NO RULES
THE TOP TEN TIPS
THE TOP TEN TIPS**

**STEVE YOUNG
DESIGNATED LEGAL COUNSEL**


INVESTIGATION PURPOSE

- A fact finding procedure
- To develop all of the facts relative to the charge
- Not just those helpful to the railroad
 - FDA 24833




NOT A TRIAL

- Investigations are not a trial
- No rules of evidence
- No rules of procedure
- No rules for objections



NOT A TRIAL

- No rules for examination
 - Direct
 - Cross
- Railroad will never admit fault
- No confession of innocence




A FUNDAMENTAL AGREEMENT

Employees will not be disciplined without a fair and impartial investigation

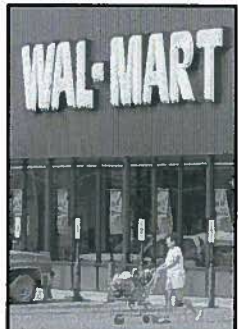
This is a great privilege!

Only a few have it!




AT WILL EMPLOYMENT

- Most states have “at will” employment.
- Employers may terminate employment without cause
- Employees have no recourse
- No investigation




No Rules – Practice Tip One

- **FIND OUT WHAT HAPPENED**
- Meet with the accused
- Find out what happened
- What are the charges
- Don't accept weak answers
- Make your member come clean



No Rules – Practice Tip One

- Find out what happened
- The accused is single parent
- Has the kids every other weekend
- Lays off to take care of kids
- Third offense




No Rules – Practice Tip One




No Rules – Practice Tip One

- Find out what happened
- Don't be afraid to interrogate the accused
- They must come clean
- You must know the truth!
- You can defend the truth




No Rules – Practice Tip One

- This is a WEAK case
- Single parent is no defense
- Laying off to be with kids - no defense
- Can't find help – no defense
- I told the superintendent my kids come first – no defense
- Lying about gambling – death knell




No Rules – Practice Tip One




No Rules – Practice Tip One

- Explain to your member:
 - He will be disciplined
 - The case will be arbitrated
 - It will take many months to get the case heard
 - The outcome is uncertain
 - The decision is final and binding
 - Negotiate with the RR




No Rules – Practice Tip Two

- Prepare the accused to testify
- The testimony of the accused is THE most important part of the case
- Arbitrator wants to know :
 - Did you do it
 - If so, why




No Rules – Practice Tip Two

- Prepare the accused for the hearing
- What are the charges
- What are your defenses
- Practice over and over with the accused
- Get them ready!




No Rules – Practice Tip Two




No Rules – Practice Tip Three

- **GET THE EVIDENCE**
- What do you need?
- What is out there?
- What can you get from the accused
- What can you get online
- Write the railroad and ask for documents




No Rules – Practice Tip Three

- **GET THE EVIDENCE**
- Divorce decree
- Layoff history
 - Prior to divorce
 - After divorce
- Earning history
 - Prior to divorce
 - After divorce




No Rules – Practice Tip Three

- **GET THE EVIDENCE**
- Engine video
- Medical records
- Accident reports
- Railroad report of accident
- Railroad report of repair
- Crew member statements




No Rules – Practice Tip Three

- Production of documents now recognized by US Government:
- Conductor certification:
 - Shall provide copy of written information and list of witnesses the railroad will present at the hearing
 - Prior to or at beginning
 - Entitled to recess
- 49 CFR 242.407




No Rules – Practice Tip Four

- GET IT INTO EVIDENCE BY OFFER OF PROOF
- Simply objecting does not tell the arbitrator the significance of the document
- The arbitrator will not admit documents at the hearing




No Rules – Practice Tip Four



No Rules – Practice Tip Four


- GET IT INTO EVIDENCE BY OFFER OF PROOF
- We don't know what the video shows
- How does it exonerate the accused?
- How is it relevant?



OFFER OF PROOF

- Make an offer of proof:
- State on the record:
 - What the evidence is
 - How it will help your case

Employee charged for stealing time
 EE argues it was a time claim
 Asks carrier to bring TK
 Explains what TK would say




Although the Timeskeeper was not called by the Carrier as a witness requested by the Organization, Appellants' representative made an offer of proof on the record that if the Timeskeeper had been called to testify, he would have said that many employees indicated they didn't see the Appellants' and their work clothes have been stolen because of an ongoing dispute between the Carrier and the Organization.

Award 26 & 27 PLB 6422 March 29, 2004
 Ms. Helen Witt


No Rules – Practice Tip Four

- GET IT INTO EVIDENCE BY OFFER OF PROOF
- We know what the video shows
- How it exonerates the accused
- How it is relevant




No Rules – Practice Tip Four

- LC wants to enter a photo
- Request is denied
- He does not explain:
 - What it shows
 - How it helps the case
 - How it is relevant
- Arbitrator will not consider




No Rules – Practice Tip Four

- GET IT INTO EVIDENCE BY OFFER OF PROOF
- The arbitrator will not consider the request because the Local Chairman did not explain how the document is relevant



No Rules – Practice Tip Four

- LC wants to enter a photo
- Request is denied
- He explains:
 - What it shows
 - How it helps the case
 - How it is relevant
- Arbitrator will consider




No Rules – Practice Tip Four



No Rules – Practice Tip Four

- GET IT INTO EVIDENCE BY OFFER OF PROOF
- Offer the document
 - If entered – it's in evidence
- If denied
 - Object with explanation
 - Describe relevance
- If denied to speak
 - Write letter – offer of proof



Mr. Ted Jones, Superintendent
 Union Pacific Railroad Company
 1312 Railroad Drive
 Santa Fe, Texas 77016

Re: Charges against Mr. Tully Goodrum

WRITTEN OFFER OF PROOF


Dear Mr. Jones:

Today we had the investigation hearing for Mr. Goodrum. I attempted to enter into evidence a photograph which was taken the day of the accident by a computer. The picture showed that the driver on the involved rail car was much lower than the car it was coupled to and in fact so low that it was in violation of the FRA regulations. The low height of the driver caused the train to come uncoupled and that caused the injury to Mr. Goodrum. This explains the run in that caused the injury to Mr. Goodrum and exonerates him of the charges.

Prior to the hearing I requested a copy of the engine video from the rear locomotive. It is our understanding the rear engine video was turned on at the time of the accident and obviously this would show the violent run in and impact that caused the injury to Mr. Goodrum. I have not given a copy of the video to put into evidence. We feel this was withheld because it shows a violent run in and impact and explains why Mr. Goodrum was injured.

Both of these documents are relevant and exonerate Mr. Goodrum and should have been produced and entered into the transcript of the hearing. I again request that both be included as exhibits to the transcript of the hearing.


Please advise.

Sincerely,

 Troy Johnson, Chairman
 General Committee of Adjustment

cc: Mr. Troy Johnson, Chairman
 General Committee of Adjustment


No Rules – Practice Tip Five

- GET IT IN THE RECORD
- All evidence must be in the record
- If it is not in the record, it does not count
- Arbitrator will not consider




No Rules – Practice Tip Six

- PROTECT YOUR WITNESS
- Don't let the presiding officer badger
- Protect the right answer
- Make a speaking objection




No Rules – Practice Tip Six

- PROTECT YOUR WITNESS – Wrong way!




No Rules – Practice Tip Six

- PROTECT YOUR WITNESS
- Don't just sit there and let him change his right answer
- Say something




No Rules – Practice Tip Seven

- DON'T ASK THE COMPANY WITNESS QUESTIONS
- They never help the case
- The more you ask the worse it gets
- Make your case through the accused




No Rules – Practice Tip Seven

- DON'T ASK THE COMPANY WITNESS QUESTIONS
- The direct exam is not bad
- LC cross proves:
 - They know the policy
 - 3rd time to be charged
 - Not good worker
 - Policy is evenly enforced




No Rules – Practice Tip Seven

- MAKE GOOD PROOF THROUGH THE ACCUSED
- Q. Did you know the policy?
 - A. No
- Q. Is the policy written?
 - A. No
- Q. Has the company ever explained the policy to you?
 - A. No
- Q. Is the policy enforced evenly?
 - No




No Rules – Practice Tip Seven

- DON'T ASK THE COMPANY WITNESS QUESTIONS
- The right way
- No Questions
- Member may not like it?



No Rules – Practice Tip Seven

- DON'T ASK THE COMPANY WITNESS QUESTIONS
- Direct not bad
 - Lined derail
 - Didn't appear hurt
- LC Proves
 - It was the accused in video
 - Deraill is heavy
 - TM has medical training
 - Accused was not hurt



No Rules – Practice Tip Eight

- THE FRIENDLY WITNESS
- Don't call a co-worker as a witness
- Get a statement
- Enter the statement


Statement of Engineer Bill Jones

My name is Bill Jones. I have been employed by Union Pacific for thirty nine years as a locomotive engineer. On May 2, 2011 while working as an engineer on a train operating from Sparks, Nevada to Phoenix, Texas. Mr. Adams was assigned to me that day as a scheduled conductor. As we were coming into Austin, Texas our train unexpectedly came into and the train went into emergency. Seconds later the rear end of our train ran into the engine several feet back. The impact knocked Mr. Adams out of the conductor's seat. Shortly after we stopped, he began to complain of low back and neck pain.

We reported the injury right away to the dispatcher and an ambulance was called. He was taken to a local hospital. He certainly appeared to have back and neck pain as he got off the engine.


We got out the car that same unoccupied at Austin. While in the process of making the car out a camera was sitting who inspected the car. He told us that the car has a defective drawbar that was the last and that was the reason the train came out of control and ran into our engine.

I am voluntarily making this statement to document the events of Mr. Adams' injury as I know them.




No Rules – Practice Tip Nine

- MAKE IT VISUAL
- Use pictures
- Show a drawbar
 - Similar



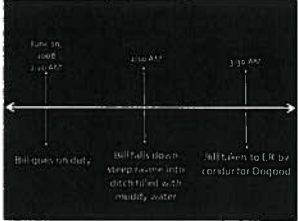
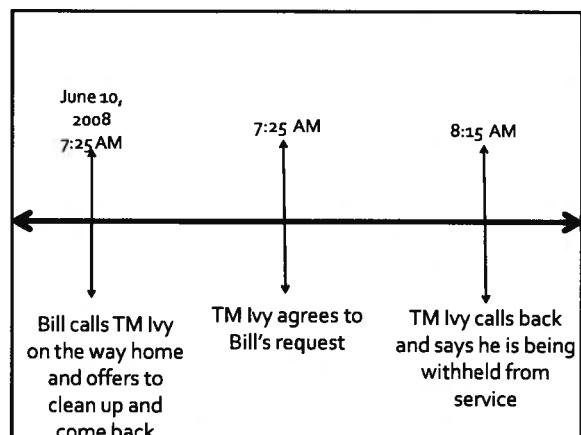
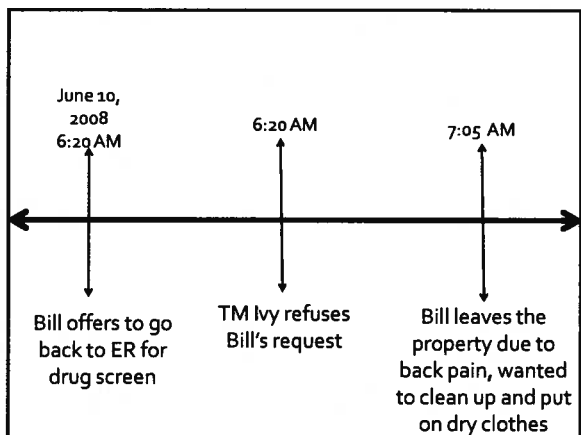
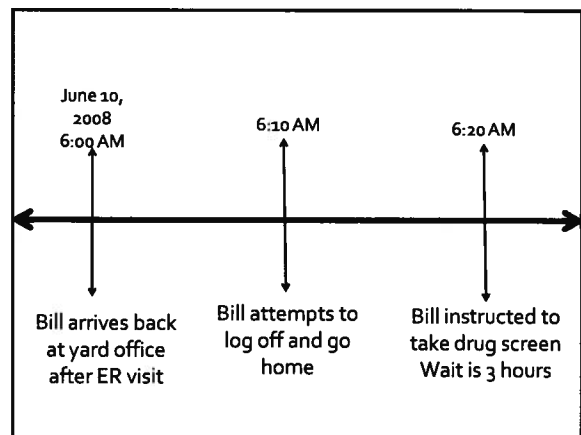
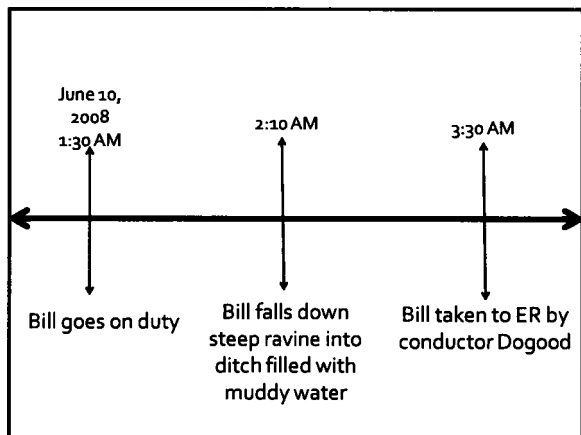
No Rules – Practice Tip Nine

- MAKE IT VISUAL
- Use pictures
- Show a cab seat – Same or similar




No Rules – Practice Tip Nine

- MAKE IT VISUAL
- Make a timeline
- Put the events in chronological order
- Make it simple to understand


No Rules – Practice Tip Nine

- MAKE IT VISUAL
- Arbitrators like visual
- They don't know the RR
- Don't know what it looks like




TIP TEN - PUT IT ALL IN CLOSING

- Set out the helpful facts
- Argue from those facts
- TM said it was not a hard impact:
 - He was not on the train
 - He did not see IT
 - He did not hear IT
 - There is no way for him to know the severity of the impact



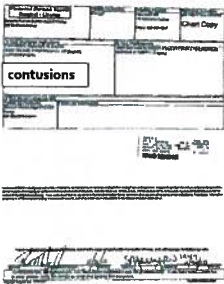
TIP TEN - PUT IT ALL IN CLOSING

- If it is not in closing and you need it use it anyway!
- You forgot to ask the TM if:
 - He was not on the train
 - He did not see the train start
 - He did not hear the start up slack
 - There is no way for him to know the severity of start up
- But he said on direct he was in the yard office –
 - ARGUE –
 - DIDN'T SEE
 - DIDN'T KNOW



TIP TEN - PUT IT ALL IN CLOSING

- ER shows a contusion
- Contusion caused by impact
 - Say that in closing
- Even if medical records are denied admission:
 - SAY IT IN CLOSING
 - Had the medical records been admitted, they show a contusion to the shoulder area which was caused by the startup impact



TOP TEN TIPS OF NO RULES

1. Find out what happened
2. Prepare the accused to testify
3. Get the evidence
4. Know how to make an offer of proof
5. Get it into evidence
6. Protect the accused
7. Don't question the company witness
8. Don't call a friendly witness
9. Make it visual
10. Get it all in the closing


NO RULES

THE BASICS

THE BASICS?


INVESTIGATION 101 RIGHT TO FACE ACCUSER

- Carrier cannot rely on a statement from the accuser
- Carrier cannot rely the testimony of another for that of the accuser
 - FDA 12379
 - Spencer 1948




INVESTIGATION 101 RIGHT TO FACE ACCUSER

- The charged has the right to cross examine
- EE can use witness statement




INVESTIGATION 101 THE RECORD

- Classic example
- Tape recording of a conversation is played during investigation
- The recording is not attached as an exhibit
- The tape is not transcribed




INVESTIGATION 101 THE RECORD

- Recording exonerates the charged
- Tape not considered by the arbitrator
- Not in the record
- FDA 26410
 - Barry Simon 2007




INVESTIGATION 101 THE RECORD

- Arbitration is an appellate procedure
- Arbitration is not "de novo" review
- Arbitration is not a new trial or hearing
 - FDA 26526
 - Brian Clauss 2007



INVESTIGATION 101 THE DECISION

- Carrier must read the transcript before rendering decision
- Transcription date must be on transcript
 - FDA 25987, 24874
 - Ann Kenis 2004



RESEARCH

- <http://www.nmb.gov/>
- Great web site to search arbitration awards



**NO RULES
THE TOP TEN TIPS
THE TOP TEN TIPS**

**STEVE YOUNG
DESIGNATED LEGAL COUNSEL
www.tavorminayoung.com**

www.tavorminayoung.com