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# Disciplinary Hearings Under the Railway Labor Act: A Survey of Adjustment Board Awards

*The National Railroad Adjustment Board is the "court of last resort" for grievants in the railroad industry. In this Article, Professor Kroner explains the working of the four Divisions of the Board, and presents a synthesis of their decisions over a 27-year period. In addition, the author places particular emphasis on the standards which have evolved for the disciplinary and discharge cases. He concludes that although there is an underlying insistence on fairness in the conduct of these hearings, three broad areas of reform in the rules of the Board remain: (1) The accused should be entitled to representation of his own choosing. (2) The hearing officer should not be allowed to be both judge and prosecutor. (3) The accused should be given access to all relevant material prior to the hearing.*

Jack L. Kroner\*

## INTRODUCTION

On July 16, 1949, railroad brakeman Price received a notice to appear at an investigation concerning an alleged infraction of company rules. The hearing was to be conducted by an assistant superintendent of the Union Pacific Railroad at 10 a.m. the following day. After postponements until 2:30 p.m. on July 18th, Price was still unable to obtain proper union representation. He failed to appear at the hearing. The proceeding was conducted in his absence

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and the testimony of carrier witnesses was recorded and transcribed. No evidence was presented on Price's behalf. On July 24th, Price was notified that he had been discharged. The union appealed Price's discharge through normal grievance channels but his plea for reinstatement and back pay was denied.<sup>1</sup> His claim was then submitted to the First Division of the National Railroad Adjustment Board. Approximately three years after the date of his discharge Price was notified that the Board had denied his claim.<sup>2</sup> Price's case is typical of the experience of thousands of employees whose rights are governed by contracts executed pursuant to the provisions of the Railway Labor Act.<sup>3</sup>

Fifty-six per cent of all collective bargaining agreements recently surveyed contain some provision for the handling of discharge cases.<sup>4</sup> Few require more than service of notice on the employee that discharge is imminent.<sup>5</sup> Only eleven per cent of the total provide for a hearing prior to discharge.<sup>6</sup> Where the discipline is less than discharge only nine per cent provide for a predisciplinary hearing.<sup>7</sup> Yet, virtually all railroad collective bargaining agreements provide for a predisciplinary hearing.<sup>8</sup> Some allow the company to act first and hold the hearing later upon demand by the

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1. The facts are taken from *Price v. Union Pac. R.R.*, 255 F.2d 663 (9th Cir. 1958). Apparently the carrier was agreeable to having Price back on a leniency basis, but the union was adamant in seeking reinstatement with back pay. *Id.* at 665.

2. *Ibid.*

3. 48 Stat. 1185 (1934), as amended, 45 U.S.C. §§ 151-60 (1952).

4. 2 BNA COLLECTIVE BARGAINING NEGOTIATIONS AND CONTRACTS 40:3 (1961). See also PHELPS, DISCIPLINE AND DISCHARGE IN THE UNIONIZED FIRM 20-33 (1959); SLICHTER, HEALY & LIVERNASH, THE IMPACT OF COLLECTIVE BARGAINING ON MANAGEMENT 627 (1960).

5. 2 BNA COLLECTIVE BARGAINING NEGOTIATIONS AND CONTRACTS 40:3 (1961).

6. *Ibid.*

7. *Id.* at 40:6

8. No accurate statistics are available as to the presence of this requirement in particular agreements. However, based on Board awards the hearing requirement appears to be omnipresent. See, e.g., 1st Div. Awards 15149 (1952), 14798 (1951), 2397 (1937); 2d Div. Awards 686 (1942), 476 (1940), 267 (1938); 3d Div. Award 3857 (1948); 4th Div. Award 254 (1944). [National Railroad Adjustment Board decisions are cited by division, award number, and year.] The Board appears ready to imply the hearing requirement where the carrier's disciplinary power is curbed by the "just cause" limitation. 1st Div. Award 16245 (1953). Dr. Lazar implies that the predisciplinary hearing is the usual requirement. LAZAR, DUE PROCESS ON THE RAILROADS 15 (rev. ed. 1958). Compare San Diego Elec. Ry. and Amalgamated Ass'n. of St. Elec. Ry. and Motor Coach Employees Union, 10 P-H LAB. ARB. SERV. 119 (1948) (implying a requirement of fair hearing from notice and challenge requirements in the contract).

employee.<sup>9</sup> In either event the holding of the hearing is mandatory.<sup>10</sup>

The "hearing rule" or "investigation rule" requires that the hearing be held on the local level, often on the property where the alleged infraction has occurred.<sup>11</sup> It is conducted by laymen. Whatever record is made at this hearing is the basis for subsequent attempts at settlement. If the parties are unable to arrive at a settlement, the same record is the basis for the Board's review of the carrier's decision.<sup>12</sup>

The rule requiring a predisciplinary hearing normally provides no more than that a fair hearing must be held. Some rules require that "notice" be given for some period prior to the hearing;<sup>13</sup> and others limit the carrier to holding the hearing no longer than a certain number of days after the occurrence that provoked the charges.<sup>14</sup> But no rule spells out what constitutes a "fair hearing."

The National Railroad Adjustment Board, a statutory arbitration tribunal,<sup>15</sup> is the court of last resort for grievants in the rail-

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9. See text accompanying note 22 *infra*.

10. *Ibid.* But see *Roberts v. Western Pac. R.R.*, 142 Cal. App. 2d 317, 298 P.2d 120 (Dist. Ct. App. 1956) (failure to accord employee requisite hearing not prejudicial).

11. See, e.g., Rule 52, Agreement between the Pullman Co. and International Bhd. of Electrical Workers System Council No. 24 (rev. ed. 1958), stating: "Hearings in discipline cases shall be held by the foreman if a yard employee is involved, or by the shop manager, if a repair shops' employee is involved."

12. The practice is reflected in §§ 301.6 & 301.7 of *NRAB Rules of Procedure*, 29 C.F.R. § 301 (1949). See also Resolution of the NRAB, Second Division, adopted March 27, 1936, implementing these principles. 1 NRAB (2d Div.) 337 (1936).

13. The most elaborate rule that I have seen is contained in Rule 33½ of the Agreement Between the Atchison, Topeka & Santa Fe Ry. and System Federation No. 97, Railway Employees' Dep't. AFL (rev. 1957). It provides for a predisciplinary hearing absent waiver; for prior notice of charges; for "reasonable opportunity" to secure witnesses; for copies of the transcript to be furnished the "employee or his representative" on request; and for payment of employee witnesses.

14. See Rule 32 of Agreement Between the Denver & Rio Grande Western R.R. and System Federation No. 10, Railway Employees' Department, Mechanical Section Thereof, AFL-CIO (rev. 1959): "The investigation shall be held as promptly as possible but within ten (10) days of the date when charged with the offense."

15. The Board was established by amendment to the Railway Labor Act in 1934, 48 Stat. 1185 (1934), 45 U.S.C. §§ 151-58, 160-62 (1958). The Board is composed of 36 members, 18 of whom are appointed by the carrier, and 18 by the employee organizations. The Board is divided into four divisions, "whose proceedings shall be independent of one another." The first division deals primarily with disputes arising between carriers and the operating crafts; the second division with "shop craft" employees; the third division with such groups as telegraphers, sleeping car porters, and maintenance of way employees; and the fourth division

road industry. In addition to uttering decisions in individual cases, its aggregate decisions in discipline cases establish a series of requirements for the conduct of these hearings in a "fair" manner. We have then, in the Board decisions, what some might call a "common law" for the proper conduct of railroad disciplinary pro-

with marine groups and "all other employees of carriers over which jurisdiction is not given to the First, Second, and Third Divisions." 48 Stat. 1190 (1934), 45 U.S.C. § 153(h) (1958). The Board will only hear a case after it has been "handled in the usual manner up to and including the chief operating officer of the carriers." 48 Stat. 1191 (1934), 45 U.S.C. § 153(i) (1958). However, parties are guaranteed the right to a representative of their choice at Board proceedings. For a somewhat dated analysis of the Board, see Garrison, *The National Railroad Adjustment Board, A Unique Administrative Agency*, 46 YALE L.J. 567 (1937). As to its "adjustment" function, see Mono. 17, Att'y Gen. Comm. on Administrative Proc. "Railway Labor" 1940, pp. 8-11. The evidence of the Board's inability to decide difficult cases without the aid of a referee is probative. Over the 25-year period from 1935 to 1959 the first division decided 9,716 cases without a referee, 9,557 with a referee; the second division decided 654 without a referee, 1,954 with a referee; the third division decided 819 without a referee and 6,254 with a referee; and the fourth division decided 248 without a referee and 894 with a referee. Similarly the dependence on referees has increased. The following tables indicate the relationship of decisions by referee to total decisions in the years 1954-1960:

	First Division						
Cases decided:	1960	1959	1958	1957	1956	1955	1954
Without referee:	47	139	273	502	156	83	76
With referee:	228	308	239	253	320	308	237
	Second Division						
Cases decided:	1960	1959	1958	1957	1956	1955	1954
Without referee:	7	3	7	10	11	23	31
With referee:	110	269	259	283	112	132	73
	Third Division						
Cases decided:	1960	1959	1958	1957	1956	1955	1954
Without referee:	3	10	14	15	11	31	24
With referee:	309	233	311	258	253	290	396
	Fourth Division						
Cases decided:	1960	1959	1958	1957	1956	1955	1954
Without referee:	18	4	0	4	8	4	8
With referee:	41	85	74	45	55	37	66

The above figures were obtained from: TWENTY-SIXTH ANN. REP., N.M.B. 83 (1960) and TWENTY-FIFTH ANN. REP., N.M.B. 86 (1959). See also Daugherty, *Arbitration by the National Railroad Adjustment Board, in ARBITRATION TODAY* 101-02 (McKelvey ed. 1955), on the differences between conventional tripartite arbitration and Adjustment Board procedure. The unions have argued that since the decision in *Brotherhood of R.R. Trainmen v. Chicago River & I.R.R.*, 353 U.S. 30 (1957), which held that an injunction lies to compel compliance with NRAB procedures once Board jurisdiction has been invoked by *ex parte* submission, the number of referee decisions has risen sharply. Brief for RLEA as amicus curiae, p. 9, *Brotherhood of R.R. Trainmen v. Denver & R.G.W.R.R.*, 290 F.2d 266 (10th Cir. 1961). *But compare* Publishers' Ass'n of N.Y.C., 36 P-H LAB. ARB. SERV. 706 (1960) (arbitrator compelled to uphold discharge as the only form of punishment that would garner agreement

ceedings. Yet, apart from one landmark study,<sup>16</sup> no attempt has been made to synthesize these decisions of the Board.

Railroad employees, theoretically at least, are not limited to seeking reinstatement and back pay through the Board. They may sue for wrongful discharge<sup>17</sup> alleging that the railroad breached their employment contract. This is an unappealing remedy. The courts normally grant only money damages and not reinstatement with back pay,<sup>18</sup> the employee with many years of rail service may find this a poor substitute for his job. Further, the wrongful discharge suit has become enmeshed in the doctrines of "exhaustion of remedies" and "election of remedies,"<sup>19</sup> reflecting the growing

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from three other board members). The Adjustment Board's awards, however, are not accorded the same status as arbitration awards. They are final "except insofar as they shall contain a money award." 48 Stat. 1191 (1934), 45 U.S.C. § 153(m) (1958). Thus when an employee seeks to enforce a money award in his favor, the Board award and order are only "prima facie evidence of the facts therein stated." 48 Stat. 1192, 45 U.S.C. § 153(p) (1958). See, *e.g.*, *Swift v. Chicago & N.W. Ry.*, 84 F. Supp. 116 (S.D. Iowa 1944) (Board findings have the "probative effect of the evidence of expert testimony"); *Hanks v. Delaware & H. R.R.*, 63 F. Supp. 161 (N.D.N.Y. 1945). *But compare* *Thomas v. New York, C. & St. L. R.R.*, 185 F.2d 614 (6th Cir. 1950) (little regard for the findings of a "nongovernmental agency").

16. LAZAR, *DUE PROCESS ON THE RAILROADS* (rev. ed. 1958). Lazar's study is limited to an analysis of the awards in discipline cases of the first division. Although the first division handles the bulk of Board business, the other three divisions adjudicate disputes under contracts covering a far greater number of employees. A part of the bulk of first division work turns on the complex "rules" cases that come before it. Also, since the divisions are independent and the agreements different, numerous problems show up in the decisions of one division that never come before another. This study, then, rounds out the picture. See also Northrup & Kahn, *Railroad Grievance Machinery: A Critical Analysis*, 5 IND. & LAB. REL. REV. 540, 548 (1952).

17. *Moore v. Illinois Cent. R.R.*, 312 U.S. 630 (1941).

18. The traditional view is that specific performance of a contract for personal services will not be granted. *But compare In re Norwalk Tire & Rubber Co.*, 100 F. Supp. 706 (D. Conn. 1951) (granting reinstatement with back pay). The bar to rail employees' ability to achieve this remedy is "jurisdictional." Since the decision in *Slocum v. Delaware, L. & W. R.R.*, 339 U.S. 239 (1950), the federal and state courts have uniformly refused jurisdiction of any suit turning on a demand for reinstatement and back pay, on the theory of *Slocum* that all matters affecting the interpretation and application of rail labor agreements are within the primary exclusive jurisdiction of the board.

19. *Union Pac. R.R. v. Price*, 360 U.S. 601 (1959) (grievant has elected his remedy when he takes case to the Adjustment Board and wrongful discharge suit is thereafter precluded). *Transcontinental & Western Air, Inc. v. Koppal*, 345 U.S. 653 (1953) (plaintiff must exhaust "administrative remedies" before bringing wrongful discharge suit where exhaustion is required by state law). *Compare Payne v. Pullman Co.*, 13 Ill. App. 2d 105, 141 N.E.2d 83 (1957), with *Jorgensen v. Pennsylvania R.R.*, 25 N.J. 541, 138 A.2d 24 (1958), on the applicability of the exhaustion doctrine to the wrongful discharge suit.

penchant of the courts to relegate labor relations disputes to the tribunal agreed upon by the parties when rights under the contract were created.<sup>20</sup> Therefore the Board remedy, from the standpoint of sufficiency and likelihood of success, is the more important.

The material that follows is a synthesis of the decisions of the four Divisions of the Board in discipline and discharge cases over the course of its 27-year operation.

## I. HEARINGS PRIOR TO DISCIPLINE

As a general rule it is not permissible to administer discipline prior to the holding of a hearing.<sup>21</sup> However, certain contracts provide that the carrier may suspend or otherwise discipline the employee and that upon this event, the employee has a certain time in which to demand a hearing. Where this is the rule, the requirement for holding the hearing is similarly mandatory.<sup>22</sup> Under these circumstances, an "investigation" held prior to the dismissal of the employee is no substitute for the hearing that is required by the discipline rule as it does not provide him with the requisite opportunity for defense.<sup>23</sup> The requirement that a hearing be had is not satisfied by a cursory "interview."<sup>24</sup> Nor is the interrogation of the employee by a management official a "hearing."<sup>25</sup> The thrust of the hearing requirement is illustrated by the opinion in *Award 16890* of the First Division where sworn statements by the accused employee were offered in lieu of a hearing to support the carrier's disciplinary action. The Board said that "the basic requirements which have been written into the rules must be adhered to. Not the least of these is the requirement of a hearing, which implies the development of all pertinent evidence."<sup>26</sup> It should be pointed out that the Board does not expressly state that sworn statements may never be enough to support the carrier's action, but it points to the fact that what is required is a complete picture of what transpired to provoke the disciplinary action. The requirement of a hearing then, means that the employee shall be given all of the rights established in the cases as "fundamental." It must have the following essentials:

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20. See *Jorgensen v. Pennsylvania R.R.*, 25 N.J. 541, 138 A.2d 24 (1958).

21. See note 8 *supra*.

22. *E.g.*, 3d Div. Award 2470 (1944). See also *Connors v. Boston & M.R.R.*, 163 F. Supp. 490 (D. Mass. 1958) (such a provision is in conformity with the statutory requirements).

23. *Ibid.*

24. 2d Div. Award 1219 (1947); 4th Div. Award 207 (1943).

25. 2d Div. Award 972 (1943).

26. 1st Div. Award 16890 (1955).

1. The accused must be apprised of the charges against him.
2. He must receive notice of the hearing within a reasonable time.
3. He must have the opportunity to be present and to have his representatives present.
4. He must have the opportunity to obtain and present evidence.
5. He must have the opportunity to cross-examine the witnesses presented against him.

These requirements "are inherently contained in the rule, whether specifically mentioned or not, by the very use of the words 'fair and impartial trial' and they are not to be lightly disregarded by the carrier."<sup>27</sup> Thus fairness and impartiality are implied requirements for any rail hearing. The rule requires that the hearing be held by the carrier, and the carrier may not rely on the results of some other proceeding. Thus the results of an Interstate Commerce Commission investigation are not conclusive on either party, nor does such a proceeding satisfy the requirements of the investigation rule. The carrier may not discipline an employee subsequent to his testimony before such a body without running the risk of its reversal by the Board.<sup>28</sup>

Similarly the carrier must not prejudge the issue. A pronouncement of a specific number of days suspension prior to the holding of the hearing in effect nullifies the protection of the hearing rule and raises an inference of unfairness requiring the Board to reverse.<sup>29</sup>

#### A. SUSPENSION PENDING A HEARING

Many agreements, particularly those involving unions under the aegis of the Second Division, contain a rule that permits the carrier to suspend the employee pending a hearing. A typical rule reads as follows: "No employee shall be disciplined without a fair hearing by a designated officer of the carrier. Suspension in proper cases pending a hearing, which shall be prompt, shall not be deemed a violation of this rule."<sup>30</sup> Two problems which immediately

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27. 1st Div. Award 5197 (1940).

28. 3d Div. Award 2654 (1944).

29. 2d Div. Award 476 (1940).

30. Rule 36, Rules and Working Conditions, New York Cent. R.R. (shopcrafts agreement) (1951). Compare Rule 32, Agreement between the Denver & R.G.W.R.R. and System Federation No. 10, Railway Employees' Dept. (1959) qualifying the right to suspend "for very serious offenses" and further limiting the carrier to holding the hearing within ten days "of the date when charged with the offense or held from service." *Quaere*: Is it to be further qualified with the construction "whichever is



come to the fore are: (1) what is a "proper case" for suspension pending a hearing and (2) how soon must the hearing be held under these circumstances so as not to contravene the rule?

*Proper cases:* Some actual cases will illustrate the problem. *X* and *Y*, railroad workers, leave the property to have their lunch. They go to a diner which is owned jointly by *X* and Mrs. *X*. *X* and Mrs. *X* become involved in a fight and Mrs. *X* stabs *X* with an ice pick necessitating his removal to a hospital. Before going, he tells his partner to notify the foreman that he will not return that afternoon. Regardless of the complicated question of whether or not *X* was absent from duty without permission, the Board did find that suspending *X* pending a hearing on that charge was unwarranted.<sup>31</sup> The Board has also held that violation of a safety rule merited suspension.<sup>32</sup> But the fact that an employee was discovered asleep while on duty caused a division of opinion.<sup>33</sup> Over-sleeping and therefore missing a tour of duty was deemed not a "proper" case.<sup>34</sup> Improper performance of the employee's duties was not a "proper" case.<sup>35</sup> But leaving the job without authority, under certain circumstances, was deemed to be a "proper" case.<sup>36</sup> There should be some criteria for the application of this rule. In an early decision the Second Division stated that "if the charges made against . . . [the employee] will sustain his dismissal from the service then it was proper, within the meaning" of this rule.<sup>37</sup> This construction could be self-defeating because it would give the carrier added impetus, in cases where it had already suspended the employee pending a hearing, to find that dismissal was an appropriate measure of discipline. The Board, apparently cognizant of this danger, impliedly abandoned this early rule in a subsequent case. It found that even though an employee was properly dismissed based on extrinsic considerations, it was nonetheless not a "proper case" for suspension pending a hearing, and therefore the employee was entitled to compensation for the period during which he was "suspended" pending the hearing.<sup>38</sup> The test most recently evolved by the Board is that suspension is improper where the "offense was not one that continued employment would have affected the

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earlier"? It is assumed that "very serious offences" would probably be construed much as "proper" cases for purposes of determining the legitimacy of the suspension.

31. 2d Div. Award 1697 (1953).

32. 2d Div. Award 194 (1937).

33. 2d Div. Award 541 (1941).

34. 2d Div. Award 1261 (1948).

35. 2d Div. Award 1312 (1949).

36. 2d Div. Award 1875 (1955).

37. 2d Div. Award 1541 (1952).

38. 2d Div. Award 1697 (1953).

service detrimentally or would have endangered the employee or fellow workers such as intoxication, fighting or gross negligence so as to justify the exercise of such suspension right.”<sup>39</sup> This standard is clear enough, and the Board has shown a strong tendency to abide by it.<sup>40</sup> Nevertheless, the Board, in a recent case,<sup>41</sup> upheld a suspension as proper where it did not meet any of the criteria established in *Award 1964*. No reason was given for straying from this principle. The test laid down in *Second Division Award 1964* is admirably suited to the circumstances. It protects the employees from highhanded use of the suspending power, and it protects the carrier from any imminent danger when the offense is of the type which might breed fear of injury to its facilities, service or employees.

The carrier may rectify the error of improper suspension if it includes the time during which the claimant was suspended as part of the sentence given after the hearing. Thus where a ten-day suspension was assessed against the claimant and the two days he was held out of service was included in the total time lost, there was no cause for reversal.<sup>42</sup>

“*Prompt.*” What does the requirement that the hearing be “prompt” mean? No case in the Second Division turns on this issue alone. It is therefore impossible to say what the Board views the meaning of this clause to be. In *Award 2191* the gap between February 18 and March 3 was not deemed unreasonable under the circumstances. Yet it is submitted that it might be unreasonable under some circumstances. It is reasonable to assume that the parties intended that the hearing be held without unnecessary delay and yet not so soon that the accused would not have sufficient time to prepare a defense. Ordinarily this issue is not likely to arise. If the carrier takes the employee out of service, and if it is a “proper case,” the delay is not likely to have been prejudicial since the punishment would be justified.

#### B. EMPLOYMENT APPLICATIONS; FRAUDULENT APPLICATIONS

The four Divisions of the Board agree that the hearing and investigation rules are inapplicable to one never achieving the status of an employee.<sup>43</sup> “This rule does not extend or purport to ex-

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39. 2d Div. Award 1964 (1955).

40. 2d Div. Awards 2081 (1956), 2175 (1956).

41. 2d Div. Award 2787 (1958).

42. 2d Div. Award 2175 (1956). Compare 3d Div. Award 1265 (1940) where the Board sustained suspension and denied a claim for pay for period despite a finding of innocence, giving no explanation of its decision.

43. See LAZAR, *op. cit. supra* note 16, at 19–20. Rule 52 of Agreement

tend to an investigation of the qualifications of an applicant for employment.<sup>44</sup> Nor does the rule apply to the trial period for determining whether the applicant's work is satisfactory.<sup>45</sup> This is true even where certain requirements are waived by the carrier, as for example in the case of a transferring employee furloughed from another department or another craft. The employee's inability to perform the work is still good cause for dismissal without a hearing and the right of the carrier to discharge on this ground is not waived.<sup>46</sup>

A problem is posed by the question: when does an applicant for employment lose that status and become an employee entitled to the benefits of the hearing rule? The rule has been expressed as follows:

While the agreement provides no period of time for this purpose numerous awards of the several divisions of the Adjustment Board have correctly held that, in the absence thereof, the carrier has a reasonable length of time for this purpose and, while doing so, the applicant is not considered an employee in the service of the carrier.<sup>47</sup>

In this latter case, 48 days was not considered unreasonable. One hundred days is not unreasonable in view of the fact that many contracts expressly provide for a 90-day trial period.<sup>48</sup>

Once the employee has survived a reasonable trial period he is entitled to the benefits of the hearing rule. Therefore any stipulation on the application which purports to waive that right is void as it is in conflict with the rights negotiated under the collective bargaining contract.<sup>49</sup>

Fraudulent statements in the application for employment are uniformly scorned and the employee is subject to dismissal, despite the passage of the trial period<sup>50</sup> or even much longer.<sup>51</sup> It is not clear from the Second Division awards whether a "trial" on the issue of fraud is required, but the First Division does ap-

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Between the Pullman Co. and International Bhd. of Electrical Workers, System Council No. 24 (rev. 1958) incorporated this notion qualifying the hearing requirement "except that a hearing shall not be granted in any case involving the dismissal of an employee prior to completion of his probationary period."

44. 2d Div. Awards 869 (1942), 868 (1942), 867 (1942), 866 (1942). See also 1st Div. Award 6699 (1942).

45. 2d Div. Award 956 (1943).

46. 2d Div. Award 1905 (1955).

47. 2d Div. Award 1715 (1953).

48. 1st Div. Award 3099 (1938).

49. 2d Div. Award 1185 (1947).

50. 1st Div. Award 15570 (1952); 2nd Div. Award 236 (1938).

51. 2d Div. Award 1773 (1954); 1st Div. Award 8302 (1943).

prove of it.<sup>52</sup> A trial on the issue of fraud *vel non* is required by the spirit of the agreements to avoid possible abuse, *e.g.*, use of a comparatively trivial error to dismiss an employee when it would be impossible to adduce sufficient evidence of the primary reason for discipline.

### C. PHYSICAL DISABILITY

“The carrier is under the legal duty to avoid the dangers incident to using a known physically unfit and unsafe employee. The withholding of an employee from service for reasons of safety incident to possible physical lack of fitness would not, without more, constitute a violation of the discipline rule.”<sup>53</sup> Apparently the investigation rule is not applicable initially to such cases.<sup>54</sup> Early in the Board’s history, a rash of cases arose on the contention that the carrier was demanding a physical examination without reasonable cause and thereby eliminating from service many employees because of age, or occasionally, as a device for retaliation against pro-union employees. It was established that the carrier may not demand a physical re-examination of employees unless there is some circumstance clearly warranting it. Mere advanced age is not sufficient.<sup>55</sup> It must appear that continued employment will constitute a hazard to the employee, the carrier, or his fellow employees.

Once there is a physical examination and the railroad’s doctor makes a report justifying the carrier’s refusal to continue to employ the man, the question arises whether the employee is bound by the findings of the doctor. The favored method incorporated in many agreements is for the employee to submit the contrary report of his own physician and then for a neutral doctor, agreed upon by the parties, to determine the issue.<sup>56</sup> The carrier, even where it has good cause, must be reasonable in its demand and not delay too long. In one case the carrier waited 16 months after the return of the claimant from an absence due to an accident, and then ordered him to take a physical examination. The claimant refused and was disciplined for insubordination. Even under these circum-

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52. 1st Div. Award 15506 (1952).

53. LAZAR, *op. cit. supra* note 16, at 21–22.

54. 1st Div. Awards 4846 (1940), 4845 (1940); 2d Div. Award 560 (1941).

55. 2d Div. Award 1308 (1949).

56. 2d Div. Award 839 (1942). See also cases cited in PHELPS, DISCIPLINE AND DISCHARGE IN THE UNIONIZED FIRM 66–67 (1959). *Cf. Gunther v. San Diego & Ariz. E. Ry.*, 192 F. Supp. 882, 886 (S.D. Cal. 1961) (denying authority of the NRAB to require a three-man medical board when there is no contractual provision for it in a compulsory retirement case).

stances the Board upheld the employee in his refusal to submit to what it viewed as an arbitrary demand. Undoubtedly such a delay could be construed to cast doubt on the reasonableness of the carrier's fear.

Generally, if an employee sues a carrier under an applicable federal or state statute for a permanent physical disability and recovers a judgment, the carrier is justified in refusing to restore him to service without a hearing.<sup>57</sup> However, where the carrier is appealing a lower court judgment in favor of an employee, contending that he is not permanently disabled, it is inconsistent to refuse the employee his seniority rights.<sup>58</sup>

#### D. EFFECT OF ADMISSION OF RULES VIOLATION

At least one award of the First Division held that a failure to comply with all the requirements of the hearing rule, notwithstanding the fact that the accused admitted the violation of which he was accused, was sufficient ground for overturning the carrier's action.<sup>59</sup> The Second Division has never decided the precise point of whether the carrier may dispense with a hearing altogether where the carrier is in possession of a statement of admission, but in view of the rigid position the Second Division has taken on waiver, it is unlikely that it would take an admission as an implied waiver.<sup>60</sup> But admission of the offense at the hearing may have the effect of nullifying objections to the conduct of the hearing, since in fact there has really been no prejudice.<sup>61</sup> However, the carrier must not construe a plea for leniency as an admission in this or any other context.<sup>62</sup>

There is much to be said for the view of the First Division which requires the carrier to comply, absent a waiver, with all the requirements of the hearing rule. If a record is going to be made, it should be complete with all relevant material included. Then if the matter reaches the Board on review, there is something to review. Extenuating circumstances, not included in a simple admission, but likely to appear in a full record where all the evidence is presented, may often temper the disciplinary bent of the carrier. It is likely that a harsh punishment under such circum-

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57. Where the disability is only partial, interesting questions may arise. See, e.g., *North Pier Terminal Co.*, 28 P-H LAB. ARB. SERV. 137 (1957); *Merrill Stevens Drydock Co.*, 21 P-H LAB. ARB. SERV. 513 (1953).

58. 2d Div. Award 2100 (1956).

59. 1st Div. Award 11364 (1947).

60. See text accompanying notes 64-66 *infra*.

61. 2d Div. Award 1252 (1948).

62. 2d Div. Award 1437 (1951).

stances would be unreasonable and hence, subject to commutation by the Board.<sup>63</sup>

#### E. WAIVER OF RIGHT TO HEARING

The First Division has held that under certain limited circumstances the employee may waive his right to a hearing.<sup>64</sup> The Third Division has indicated that it finds no bar to waiver "when there is no issuable fact in dispute" since the investigation rule "presupposes the necessity for determining the guilt or innocence of the employee charged."<sup>65</sup> But the Second Division appears to hold a contrary position. *Award 1265* stands squarely on the proposition that the employee may not waive this fundamental right guaranteed him under the contract. Referring to the investigation rule the Board said:

It was the carrier's duty to carry out the rules of the agreement and a failure to do so is a violation thereof. It cannot avoid doing so by entering into agreements with individual employees for a waiver thereof for employees cannot waive the rights that have been obtained for them in collective bargaining agreements under which they work. This must, of necessity, be true if such agreements are to have any force and be effective for to permit such to be done would, in fact, destroy the very purpose for which such agreements are entered into.<sup>66</sup>

This holding seems even stronger in light of the fact that the claimant signed a written waiver of hearing.

It must be noted that where there is an attempted waiver the carrier should demand that it be in writing which, though not conclusive, will buttress its case if the employee later denies having waived his rights. Otherwise the claimant's denial before the Board may induce the ordering of a hearing.<sup>67</sup>

The Second Division view is the more desirable because under the First and Third Division rulings the possibility of intimidation of the accused employee by a local carrier representative remains. Under ordinary circumstances, a lack of witnesses makes it virtually impossible to demonstrate such intimidation. It seems far better then, in fairness to the employees, to hold the hearing. The carrier is protected because a record is made which will contain the pertinent facts upon which the carrier can rely to support its action. Therefore, to protect the employees from overreaching on

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63. See text accompanying notes 259-75 *infra*.

64. 1st Div. Awards 18118 (1957), 16108 (1953), 14348 (1951), 14042 (1950).

65. 3d Div. Award 2339 (1943).

66. 2d Div. Award 1265 (1948).

67. See 3d Div. Award 2528 (1944).

the part of the carrier, and to protect the carrier by guaranteeing orderly and uniform procedure, the right to a hearing should not be subject to waiver.

## II. EVIDENCE

### A. ORDER OF PRESENTATION OF EVIDENCE

The principle that controls the presentation of evidence is best expressed in the following statement by the Fourth Division: "The Agreement does not prescribe by whom or the order in which the accused or the witnesses shall be questioned, and so long as a full opportunity is afforded the accused to testify and present his defense in person or by a designated representative," the requirements of the rule are met.<sup>68</sup> This is operative in all Divisions of the Board and leads to a looseness in procedure that tends to blur other conventional rights of an accused—*e.g.*, the right to remain silent, and if the carrier has no affirmative proof, the right to an acquittal.

### B. BURDEN OF PROOF

There is accord on the principle that the burden of proof, in the sense of the burden of persuasion, is on the carrier to establish all of its affirmative allegations, and to justify its disciplinary action.<sup>69</sup> This it need not do beyond a reasonable doubt, because these are not criminal proceedings governed by technical criminal law rules.<sup>70</sup> The carrier need only sustain its position by "enough" evidence, "sufficient" evidence, or as the Board put it in Second Division *Award 1687*: "where there is evidence, which, if believed, supports the charge, this Board will not interfere with the assessment of discipline."<sup>71</sup> This test will operate to justify the hearing officer's action where the evidence is evenly balanced. While this is the general test as to the weight of the evidence, some decisions of the First Division were decided on what purported to be a "beyond reasonable doubt" basis.<sup>72</sup> One opinion suggested that where the charge was serious and the consequences equally so,

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68. 4th Div. Award 331 (1946).

69. 2d Div. Awards 1116 (1946), 621 (1941); 3d Div. Award 1294 (1940).

70. 1st Div. Award 12043 (1948).

71. 2d Div. Award 1687 (1953). See also 2d Div. Award 1979 (1955).

72. 1st Div. Award 9921 (1944) (one witness for each side appeared to balance out). See also 1st Div. Award 10373 (1945) (contract establishes the nature of carrier's burden.)

the carrier should have sustained its charge by a preponderance of the evidence.<sup>73</sup>

Since the test is more generous than that employed in the criminal courts, we find that many cases have arisen where the accused has been dismissed by the carrier on the same charge on which a verdict of acquittal was rendered in a criminal proceeding. Pursuing the logic of its position the Board has held that the carrier is not bound by the verdict of acquittal in the parallel criminal proceedings.<sup>74</sup> While the same evidence might leave a jury in "reasonable doubt," it may still be "enough" to convince the carrier officer of the claimant's guilt.<sup>75</sup>

Although the test is not as strict as a criminal law test, the burden is still on the carrier to prove specific negligence or specific rule violations. It "is the carrier's obligation to build its case and make the charges stick."<sup>76</sup> It must present witnesses who will paint a credible picture of guilt. It is dangerous for the carrier to rely on a single witness to an event. The carrier should present corroborative testimony, especially in the face of the claimant's presentation of a number of witnesses corroborating his version of the incident involved. Failure to do so, and reliance on one individual under such circumstances, may well lead the Board to question the sufficiency of the carrier's case.<sup>77</sup>

It will not do for the carrier to rely on presumptions. If anything, a presumption of innocence is operative in the favor of the accused.<sup>78</sup> Discipline must rest on more than mere suspicion or possibilities. For example, it is not probative to note that subsequent to an air conditioning failure a pole-changer failed, and, therefore, to reason that the inspection made sometime earlier was defective and was the reason for the failure.<sup>79</sup> Where the accused's testimony that he performed a proper inspection is undisputed and it appears that the "hearing officer resolved the dispute upon the theory that if the claimant was not guilty, then who was?", the board properly observed that the carrier had in effect shifted the burden of proof from itself to the employees. This it cannot

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73. 1st Div. Award 11923 (1948). Compare 1st Div. Award 9921 (1944).

74. 1st Div. Award 15577 (1952); 4th Div. Award 332 (1946).

75. 2d Div. Awards 1428 (1951), 1427 (1951).

76. 1st Div. Award 17369 (1956).

77. *Ibid.* See also 4th Div. Award 978 (1954) (carrier justified where its witness is corroborated by another). Compare 1st Div. Award 14493 (1951) (employee accused was only witness); 4th Div. Award 1063 (1955) (no need for corroboration).

78. 3d Div. Awards 2654 (1944), 2653 (1944).

79. 2d Div. Award 1969 (1955). See also 2d Div. Awards 2548 (1957), 1348 (1949), 1304 (1949).



do.<sup>80</sup> In one case the Second Division spelled out that purely inferential testimony was wholly inadequate. The carrier is required to establish the circumstances leading to the mishap by direct testimony. The inferences from these facts or circumstances must be reasonable and not arbitrary. For example, if the carrier wishes to prove that a train wreck occasioned by a "hot" journal is the fault of a particular car inspector, it must prove by direct testimony that the box was empty. The inference that the car inspector failed to note and repair it must then be reasonable.<sup>81</sup> Thus, if the accused has direct evidence to corroborate his version of the facts and the carrier relies on mere speculative evidence, the Board will reverse.<sup>82</sup>

While mere assumption or "who else" reasoning must fall, the carrier may establish, by sufficient credible evidence, such facts that the conclusion is inescapable that the defective condition must have existed and therefore should have been found on proper inspection. If such a state of facts is revealed, the carrier is warranted in imposing discipline.<sup>83</sup> But the Board has pointed out in many of these cases that even where it is clear that defects must have existed and been undiscovered or that certain work was indeed not performed this alone is insufficient. The carrier, said the Board, must show "direct evidence of guilt on the part of the employee accused."<sup>84</sup> What is meant is that the carrier must show that the defect "was so located and of such a nature that the inspector in the proper performance of his duties should have discovered it."<sup>85</sup> Where the carrier is able to show this, the necessary link is provided whereby the accused is properly held responsible. Similarly, where the accused admits the possibility that he may have been the cause of the difficulty and where the circumstances are strong in favor of the carrier's position, the Board will not interfere.<sup>86</sup>

### C. TRANSCRIPT

If the transcript of the hearing proceedings is not a verbatim report of what transpired, the Board will be unable to review the proceedings and it will be impossible to gauge the basis for the

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80. 2d Div. Award 2583 (1957). See also 2d Div. Award 1222 (1948).

81. 2d Div. Award 1437 (1951). See also 2d Div. Awards 1769 (1954), 1768 (1954).

82. 2d Div. Award 1325 (1949). *Accord*, 2d Div. Awards 1178 (1947), 1061 (1945).

83. 2d Div. Awards 2122 (1956), 1767 (1954).

84. 2d Div. Award 1197 (1947). *Accord*, 2d Div. Awards 1201 (1947), 1200 (1947), 1199 (1947), 1198 (1947).

85. 2d Div. Award 1111 (1946).

86. 2d Div. Award 2051 (1956).

discipline assessed.<sup>87</sup> In effect, there is no evidence without a transcript.<sup>88</sup> It is clear therefore that if a valid transcript of what transpired at the hearing is not prepared, the discipline must fall. The difficulty arises in regard to the transcript in two ways: (1) failure to make a verbatim record; (2) failure to provide a copy to the employee or his representative or both.

The Board has said that the transcript of the proceedings must be an exact replica of what was said and done at the hearing.<sup>89</sup> However, it is inevitable that there will be mistakes and omissions from such transcripts. Where the errors or omissions are minor, they neither go to the essence of the basis of action of the carrier nor do they reflect adversely on the fairness of the proceeding.<sup>90</sup> However, substantial omissions—encompassing the material and relevant—sufficiently defeat the purpose of the hearing so that the Board will remand the case for a rehearing.<sup>91</sup> Thus the Board said of the failure of the carrier officer to insert a question and answer material to the issue that his attitude “warrants sharp disapproval . . . and . . . it can be characterized as nothing short of an arrogant assertion of authority.”<sup>92</sup> The Board then emphasized a cardinal principle for the conduct of these proceedings. “In this atmosphere employees under investigation and their representatives have the right to protest and have their protests noted as to any matters they deem violation of the right to a fair . . . hearing and an opportunity to make a complete defense.”<sup>93</sup> Presumably, a qualified stenographer should record the proceedings. In absence of admitted guilt, a transcript of the hearing made by the hearing officer will prejudice claimants’ rights.<sup>94</sup> The seriousness of such an omission is underscored by the fact that the Board will not decide between conflicting contentions to supply a deficiency in the transcript.<sup>95</sup> This emphasizes the importance of guaranteeing the timely register of objections into the record. At a later date it would be virtually impossible to make a valid objection.

There is a conflict as to whether or not the transcript need be authenticated. The First Division suggests that both parties should

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87. 1st Div. Award 12140 (1948); 2d Div. Award 28 (1936).

88. 1st Div. Award 16890 (1955).

89. 2d Div. Award 1695 (1953).

90. 1st Div. Award 15027 (1951).

91. 1st Div. Award 15159 (1952).

92. *Ibid.*

93. *Ibid.*

94. 1st Div. Award 17149 (1955).

95. 1st Div. Award 15507 (1952). The Board will limit its review to the transcript unless a strong showing of prejudicial omission is made and proved. See 2d Div. Award 2290 (1956).

authenticate the record.<sup>96</sup> The Second Division points out that, absent a rule requiring authentication, certification, or notarization, there is no need for the record to show any of these.<sup>97</sup>

Where the rule provides for the employee to be furnished a copy of the transcript he must secure one notwithstanding that he is absolved of any responsibility at the hearing and no discipline will be forthcoming.<sup>98</sup> No case squarely decides the issue where there is no express contractual provision to the effect that the accused shall receive a copy, but one First Division Award states that where the employee always did get a copy of the transcript, this is a practice that should be continued.<sup>99</sup> The First Division went on to say, however, that where the rule does not require that the representative receive a copy of the transcript, "the Division does not see any necessity for furnishing a copy to both the employee investigated and his representative and so holds."<sup>100</sup> One Third Division Award implies, however, that a failure to provide the employee *and* the representative a copy of the transcript is prejudicial to the guaranteed right of appeal.<sup>101</sup>

It is the record containing this transcript which is binding on the parties. As noted above, neither the carrier nor the employees may rely on subsequent evidence to buttress its appeal. The basis for the Board's review is whether, on the facts as developed in the record, a reasonable carrier officer could find the accused guilty, and if so, whether the discipline imposed was not unreasonable.

### III. PROBLEMS ARISING PRIOR TO THE HEARING

#### A. NOTICE

The four Divisions agree that fair play requires the accused employee be made aware of the fact that the carrier proposes to discipline him so that he can prepare to meet this threat with a defense. Failure to notify the employee excuses his failure to appear and likewise nullifies any action taken against him.<sup>102</sup> One Third Division opinion goes so far as to say that a failure to give *adequate* notice, *i.e.*, to make a specific charge, excuses the employee's failure to appear.<sup>103</sup> This latter opinion goes too far, and may

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96. 1st Div. Award 8261 (1943).

97. 2d Div. Award 1695 (1953).

98. 2d Div. Award 1978 (1955). 1st Div. Awards 11847 (1947), 1283 (1936).

99. 1st Div. Award 5019 (1940).

100. *Ibid.*

101. 3d Div. Award 3736 (1947).

102. 2d Div. Award 1289 (1949).

103. 3d Div. Award 4607 (1949).

lead the employee into a trap because he runs the risk of error. It would be better to appear and raise an objection to the inadequacy of the charge at the hearing.

The problems in this area that plague both parties revolve, not so much around failure to give notice at all, but from disputes arising around the time allowed between notice and hearing and the adequacy of the charges.

When the rule expressly provides for written notice, the carrier is bound to comply, or else the discipline is void.<sup>104</sup> Here again, the requirement may be waived.<sup>105</sup> Absent an express provision in the contract, it is not clear whether the notice must be in writing.<sup>106</sup> It is a much safer practice for the carrier to notify the employee in writing of the fact that an investigation is to be held and of the charges, rather than run the risk that the notice given will not accomplish its purpose.

The precision of the charges set forth by the carrier is a frequent source of controversy. While there are no formulae that will be applicable to every situation, there are certain minimum requirements which must be met. The first and most important thing to remember is that "these proceedings involve agreements and rules to be enforced by laymen and . . . the technicalities of legal procedure ought not to be required . . . . But there must be substantial compliance."<sup>107</sup> The charges must be definite enough to fulfill the function of the notice requirement. They must tell the accused what he has done to call down the disciplinary procedure of the carrier. The spirit of this requirement is reflected in *Award 5183* of the First Division where it is said that the charges must be "sufficiently specific to acquaint the claimant of the matters to be examined into at the investigation." And it must make clear that the employee is about to have an investigation or hearing under the rules, and not just a visit to discuss some event. Thus, the Mae West approach—"come in and see me" type letter—is frowned on as inadequate notice.<sup>108</sup> Failure to make clear that what is contemplated by the carrier is an investigation, deprives the claimant of his right to prepare a defense.<sup>109</sup>

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104. 1st Div. Award 11879 (1948).

105. 1st Div. Award 10376 (1945). See *Farris v. Alaska Airlines*, 113 F. Supp. 907 (W.D. Wash. 1953) (objection to failure to furnish written notice waived).

106. 3d Div. Award 2806 (1945) (implies notice should be in writing).

107. 2d Div. Award 1605 (1952). See also *Washington Terminal Co. v. Boswell*, 124 F.2d 235 (D.C. Cir. 1941).

108. 1st Div. Award 8261 (1943).

109. 3d Div. Award 2621 (1944).

The charge need not be so detailed that it becomes evidentiary. The Second Division in *Award 1695* stated:

Here claimant was charged with having failed to properly inspect a certain car, sufficiently identified . . . all in violation of certain operating rules of which he was required to have knowledge. Carrier is not required to set forth in the written statement containing the charge all of the evidence it will adduce in support thereof. It is sufficient if the charge made sufficiently informs the employee of what he is being charged with.

Nor need the statement of charge cite the express rule which the carrier deems violated.<sup>110</sup> Surely the mere citation of rules considered violated may be insufficient. Where an employee was "charged with violation of Rules Q, 37, 38, 66, 111 and 112" of the *Maintenance of Way Book of Rules*, the Board said: "We think that the requirement of notification of the precise charges against an employe requires an exact specification of the action or non-action which is alleged to constitute a dereliction of duty. A charge of violation of the general rules specifying employes' duties . . . is not a precise charge."<sup>111</sup> Where the designated rules are accompanied by a specific instance of their violation the requirements of the hearing rule are more than amply met.<sup>112</sup>

A recent decision of the Second Division points to the necessity for precision in the charge as to the violation alleged. The charge read as follows:

You were box packer in the enginehouse on April 11, 1951, and worked boxes on engine truck of engine 455 on this date. The engine was dispatched on train 243 same date. The left lead engine truck brass ran hot, melting all the metal, necessary to rebrass it at Matoaka, Florida, delaying the train 100 minutes.

The Board said: "The foregoing not only does not state a precise charge but it does not purport to state any charge of rule violation at all. If the claimant admitted every statement in the purported charge to be true, he would not thereby admit any rule violation or wrong doing on his part."<sup>113</sup> Thus, an *offense* must be stated,<sup>114</sup> not merely the fact from which the carrier hopes to imply an offense.<sup>115</sup> And where an offense is stated, mere omission of

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110. 1st Div. Award 13207 (1950).

111. 3d Div. Award 4607 (1949).

112. 3d Div. Award 6067 (1953).

113. 2d Div. Award 1598 (1952).

114. 1st Div. Award 11929 (1948).

115. To the effect that the Board is not always as clear as to what an "offense" is, and how an "offense" differs from a mere statement of fact, see 3d Div. Awards 4169 (1948), 2498 (1944).

the date is not enough to make the charge defective when there could be no doubt as to which day the carrier referred.<sup>116</sup>

#### B. VARIANCE

While the Board is not overly technical as to the nature of the charge, this does not mean that the carrier may charge the employee with one offense and then penalize him for another. The evolution of this doctrine in the First Division is instructive. Early in its history a case arose where the employee was charged with the violation of one rule and then dismissed for violation of another. Said the Board: "The charges preferred informed the employee of the acts and conduct complained of, and the time and place of their occurrence. This is all that is required. Upon trial, the accused may be disciplined for any rule violations disclosed by the investigation."<sup>117</sup> This latter statement is pure *obiter*, since in fact the employee in the above case was disciplined based on his actions of the date as set forth in the charges. The same Division in *Award 12156* pointed this out. Here the claimant was charged with violation of Rule "G" on a certain date and was found guilty based on his misconduct of that date, although not of violation of Rule "G." The Board upheld the discipline on the ground that the facts investigated were the action and conduct of the accused on the named date and therefore the accused was not prejudiced. But the Board said they would not go so far as the prior decision in *Award 5253*—that any violation disclosed at the hearing might be punished—since such an approach would clearly raise the question of whether the accused had been given adequate and proper notice. A more facile formulation of this approach was developed by the same Division in *Award 13663*, where it stated that "the claimant may be disciplined for rule violations as developed thereat and flowing out of the act with which he was charged in the notice."

This approach seems to conform to the decisions of the Second Division as well.<sup>118</sup> The Second Division has held also that the accused may not be disciplined, even in part, as to matters not indicated in the notice to appear.<sup>119</sup> This was a curious case since the notice advised the accused that he would be tried on the question of improper attention to one oil plug and at the hearing it was attempted to question his attention to all the oil plugs in-

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116. 2d Div. Award 2204 (1956).

117. 1st Div. Award 5253 (1940).

118. 2d Div. Award 1605 (1952). In this case the other offense was not a violation of any company rule.

119. 2d Div. Award 1318 (1949).

volved. The case is weakened by the fact that the Board felt the hearing was called in an unreasonably short time, and it is not clear whether the objection to the charge alone would sustain reversal. It would appear that the Board was being overly technical since a variance of this sort could be encompassed by the approach laid down in the First Division. However, the Second Division does deal squarely with this problem in a later case. The accused was caught aiding a fellow employee who was incapacitated from too much alcohol. He was charged with absenting himself without permission from duty—a charge that did not hold up—and the carrier could not later rationalize its decision by pleading before the Board that it really assessed this discipline on the ground that the accused was guilty of attempting to conceal a violation of the rules.<sup>120</sup>

### C. WAIVER

The requirement that the employee be advised of the precise charge against him may be waived. This usually comes about by conduct rather than by express waiver. If the employee and his representatives appear at the hearing and raise no objection, and if it appears from the transcript that the employee was aware of the nature of the offense, the objection is deemed to have been waived.<sup>121</sup> This is true where the charge is inadequate<sup>122</sup> or even where there has been no charge at all.<sup>123</sup>

If the notice afforded the employee is to perform its function a reasonable period must elapse between the date of notice and date of hearing to enable the accused to prepare his defense. Absent an express provision as to time, it is uniformly agreed that a "reasonable" time must pass. "Just what is a reasonable length of time for such purpose must necessarily depend upon the facts of each individual case. What might be sufficient time in one case may not be in another. Ordinarily from about noon of one day to 10:00 AM of the next would not be a reasonable length of time . . . ."<sup>124</sup> Similarly, where the hearing followed ten minutes after the close of the preliminary investigation to determine if charges would be placed, the time was "unreasonably" short.<sup>125</sup>

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120. 2d Div. Award 2199 (1956).

121. 2d Div. Award 1788 (1954). See also 1st Div. Award 17460 (1956).

122. 2d Div. Award 1788 (1954).

123. 2d Div. Award 1884 (1955).

124. 2d Div. Award 1693 (1953).

125. 2d Div. Award 1821 (1954). The objection as to time raised at the preliminary inquiry negated waiver, even though the objection was

The rationale of the requirement is exemplified in Second Division Award 1318 where the equipment failure which provoked the hearing occurred 700 miles away from the point of inspection. Yet the hearing was called the day after the breakdown occurred. The Board pointed out in that case that the employees clearly would have no time to solicit statements and gather evidence from the many witnesses whom it would have to interview along that route in a one-day period.

There are two types of investigation rules, one of which specifies a time limit in which the carrier must hold a hearing measured from the date of the alleged offense, and the other which does not. In the first instance, which covers most of the First Division agreements, the rule reads "ordinarily such investigation will be held within five (5) days after the offense has been committed." The Board pointed out that such a rule does not mean that the hearing will *always* be held within the five-day period. Nor does it mean that it shall be held within a "reasonable time." It means that it shall be held within five days unless there is "good and sufficient reason it cannot or should not be held within that time."<sup>126</sup> The carrier has the burden of showing a valid reason for not observing the agreed limitation. However, the Board recognizes the obvious fact that certain offenses may not come to the carrier's attention or their exact nature become known for a period of more than five days. Here too the five-day rule does not bar the carrier's action.<sup>127</sup> But if the carrier does know of the facts and does not act promptly the discipline will fall. Take for example the case where the carrier does know of the facts and notice is given 11 days after knowledge of one of two offenses, the other offense having happened two or three days later. A ten-day rule is in operation. The employee raises the objection as to the one charge being barred by the limitation of the ten-day rule. In such a case the Board held: "The carrier made a finding of guilt on both charges. There is no way to unscramble the penalty imposed on the one the carrier had a right to hear."<sup>128</sup> The entire discipline was set aside. Waiting eight months after the incident has come to the attention of the carrier has been held to be an "unreasonable" delay.<sup>129</sup> However, failure to raise the objection may be a waiver.<sup>130</sup>

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not made again, because the Board viewed the whole meeting as one continuous proceeding.

126. 1st Div. Award 7064 (1942).

127. 1st Div. Award 7464 (1942).

128. 1st Div. Award 8259 (1943).

129. 4th Div. Award 376 (1947).

130. 4th Div. Award 898 (1953).



The usual rule in agreements covered by the Second Division does not expressly provide for a limitation period, so waiting a few weeks is not prejudicial to the accused.<sup>131</sup> The problem in the Second Division has seldom been delay, but on the contrary, inordinate speed.<sup>132</sup>

#### IV. RIGHT TO REPRESENTATION

The requirement that the employee receive a fair hearing includes the right to be represented by one who will act as his counsel.<sup>133</sup> Some agreement rules require that the "duly authorized" committee or representative shall receive notice of the precise charge in the same way as the accused.<sup>134</sup> Here, even where the employee waives representation, the organization must be made aware of the hearing and it has a right to be present.<sup>135</sup>

##### A. RIGHT TO REPRESENTATIVE OF HIS OWN CHOOSING

The problem that arises in this area is whether the employee, if he does not waive representation, may have a representative other than the designated official representative of his craft. He may want to be represented by an attorney or by the representative of some craft whom he feels will be able to do a better job for him. The question is: can he have a representative "of his own choosing" or is he restricted to being represented by the official representative of the organization designated to represent him under the procedures of the Act? The Railway Labor Act has been construed to preserve the right to a representative of the accused's choice. The First Division, following the reasoning of the United States Supreme Court in the *Burley* case,<sup>136</sup> held that the representative an employee chooses for hearing purposes need not be the same representative designated as his official representative under the procedures set forth in the Act.<sup>137</sup> However, this statutory "right" may be limited by contract,<sup>138</sup> and where it is, the Board has not hesitated to enforce the contractual limitation.<sup>139</sup>

131. 2d Div. Award 1695 (1953).

132. See text accompanying notes 124-25 *supra*.

133. 1st Div. Award 3509 (1939).

134. *E.g.*, Rule 35, New York Cent. R.R. Shopcrafts Agreement (1951); Rule 23, Delaware & H. R.R. Shopcrafts Agreement (1956).

135. See 4th Div. Award 980 (1954).

136. *Elgin, Joliet & E. R.R. v. Burley*, 325 U.S. 711 (1945). See 1st Div. Award 16973 (1955).

137. 64 Stat. 1238 (1951), 45 U.S.C. § 152 (1958).

138. *Broadly v. Illinois Cent. R.R.*, 191 F.2d 73 (7th Cir.), *cert. denied*, 342 U.S. 897 (1951).

139. See *Butler v. Thompson*, 192 F.2d 831 (8th Cir. 1951); *Brooks v. Chicago, R. I. & P. R. Co.*, 177 F.2d 385 (8th Cir. 1949); *D'Amico v.*

The Second Division of the Board has said, "we can find no provision of the Railway Labor Act which gives to employees the right to a representative of his own choice at an investigation on the property by carrier officials of a charge that the employee has violated some company rule or order."<sup>140</sup> The Board then qualified its statement by pointing out that in "investigations, conferences, or hearings before officers of the carrier the terms of an existing contract control . . . ."<sup>141</sup>

It is not clear from the decisions what "term" of the contract operates to restrict the right to a representative of the accused's choice. Where the contract expressly says the representative shall be the duly authorized representative, the view of the Board would seem to be justified.<sup>142</sup> But there are a number of contracts in which the discipline rule does not even mention the fact that the employee is entitled to representation. In some there is only a reference to the fact that the "duly authorized" representative shall be notified.<sup>143</sup> It would seem that so fundamental a right should not be cut off if there is no express provision in the agreement that does so. The Second Division reached its conclusion in *Award 1821* by construing the "Note" that appears at the foot of some discipline rules<sup>144</sup>—which only gives the employee the right to

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Pennsylvania R.R., 191 F. Supp. 160 (S.D.N.Y. 1961); Roberts v. Thompson, 107 F. Supp. 775 (E.D. Ark. 1952).

140. 2d Div. Award 1821 (1954). The language of the statute is susceptible of a number of constructions. 48 Stat. 1191 (1934), 45 U.S.C. § 153(j) (1958), provides for a broad right of representation before the Board. *Quaere*: Can this be construed to be a right available to employees at all preliminary proceedings on the properties? The statutory language would not appear to support such a construction. See cases cited in note 139 *supra*.

141. 2d Div. Award 1821 (1954). *Cf.* 3d Div. Award 5367 (1951). Three other second division awards dealt with facts that posed the issue of the right of the accused to have an attorney represent him at the local hearing, but in all three cases the Board skirted the issue and arrived at its decisions on other grounds. 2d Div. Awards 2118 (1956), 1495 (1951), 463 (1940).

142. Even here, however, an argument might well be made that the parties ought not be able to deprive an accused of a "fundamental" right. Since most of the safeguards to the employee have been implied from the requirement that the hearing be "fair," why not read in this requirement as well? This is especially meaningful when the employee feels his authorized representative may be hostile to his cause. For an illustration of this problem see *Soto v. Lenscraft Optical Corp.*, 7 App. Div. 2d 1, 180 N.Y.S.2d 388 (1st Dept. 1958), *rev'd.* 7 N.Y.2d 397, 165 N.E.2d 855, 198 N.Y.S.2d 282 (1960) (employee fearing union will scuttle his cause has no right to his own counsel at arbitration hearing).

143. See Rule 35, New York Cent. R.R. Shopcrafts Agreement (1951).

144. *Ibid.*

present his own case<sup>145</sup>—as barring the employee from having someone else present his case. This disposes much too handily of the right of representation.

It must be made clear that this limitation on representation on the property is not present in regard to representation before the Adjustment Board. Here the statute expressly guarantees the right of the employee to have anyone he chooses represent him,<sup>146</sup> and numerous cases have been presented to the Board by counsel<sup>147</sup> on behalf of individual employees.

The employee must have a reasonable time to procure proper representation, and this is determined under all the circumstances, including the known demands on the time of the designated representative and also the peculiar circumstances under which the employees work, e.g., road or yard work and distance.<sup>148</sup>

#### B. DUTY TO COMPENSATE EMPLOYEE REPRESENTATIVE

The Second Division cases appear to indicate that for the right of representation to be meaningful, the local committee must be paid in accordance with the local discipline and grievance rules. They appear at no loss of time to themselves.<sup>149</sup> This is also true for the employee required by the carrier to attend the hearing, unless he is found guilty and the dates of appearance are counted in the final penalty assessed.<sup>150</sup>

A problem then arises if a hearing that is called during the regular working hours of the local committee extends beyond those hours. In one case, the employees on the committee left the hear-

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145. Compare the famous proviso to section 9(a) of the NLRA stating that "any individual employee or a group of employees shall have the right at any time to present grievances to their employer." 61 Stat. 143 (1947), 29 U.S.C. § 159 (1958). It is not clear under the NLRA whether a minority union is barred from grievance handling. See *West Texas Utilities Co. v. NLRB*, 206 F.2d 442 (D.C. Cir.), *cert. denied*, 346 U.S. 855 (1953) (holding the certified majority representative has the exclusive rights on "major" disputes). Yet the courts have been rigid in denying the employer the right to minority union representation at disciplinary hearings conducted on the railroads. *United Railroad Workers v. Atchison, T. & S.F. Ry.*, 86 F. Supp. 666 (N.D. Ill. 1950); *cf. Switchmen's Union v. Louisville & N.R.R.*, 130 F. Supp. 220 (W.D. Ky. 1955) (based on collective agreement providing for representation by "duly authorized representative"). *But cf.* Judge Hand's reasoning in *Douds v. Local 1250*, 173 F.2d 764 (2d Cir. 1949).

146. See note 140 *supra*.

147. This is hardly an advisable procedure since bypassing the union may alienate the union members of the Board, and since the claim is against the carrier, the carrier members will likely be hostile.

148. 4th Div. Award 1036 (1955).

149. 2d Div. Award 1035 (1944).

150. *Ibid.*

ing, refusing to continue past their regular working hours, and the accused left because he had no representation. Both were dismissed for insubordination. The Board reversed.<sup>151</sup> However, the carrier's responsibility for paying the union representatives and the accused, if a hearing extends beyond their regular working hours, is still undecided.

The problem is complicated by the fact that carrying the hearing beyond regularly scheduled work hours will involve payment of overtime to the employees involved. While compelling the carrier to pay overtime rates to carry a hearing to completion may seem onerous, it is equally onerous to burden the employees with a lengthy proceeding which disrupts their normal schedule. Where possible, the hearing should be adjourned until the next regular workday. Where this is not feasible, either because of the urgency of resolving the accused's status or because the staggered days of rest would lead to a lengthy delay, it would seem fair to have the carrier pay the additional money since it is its unwillingness to wait that caused the disruption. Perhaps a flexible rule would allow the carrier to resist such a claim where it is the employees who urge the extension. But this burden should be heavy in light of the fact that the employees' ability to defend may be inhibited when they are rushing to avoid missing other obligations.

#### C. DISCIPLINE OF THE EMPLOYEE REPRESENTATIVE

The right of representation is not a mere "paper" right; the representative is entitled to conduct his defense in the most vigorous manner, provided he does not make the conduct of the hearing impossible. He may not be disciplined by the carrier for his conduct at the hearing.<sup>152</sup> Any other rule would make *employee* representation of other employees an impossible objective.

Like other rights which the employee has, the right of representation may be waived.<sup>153</sup>

#### D. RIGHT OF THE EMPLOYEE TO BE PRESENT

"Ordinarily, in the absence of some good and sufficient reason, the rule contemplates the employee charged should appear at the

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151. 2d Div. Award 531 (1941).

152. 3d Div. Award 5367 (1951).

153. 1st Div. Award 16134 (1953). Is it possible that other divisions may not follow this rule? For example, would the second division, which is unwilling to obviate the necessity of holding the hearing despite an employee waiver, also hold that an employee can not waive his right to representation on the same rationale *i.e.*, that the record should be preserved?

hearing held thereon."<sup>154</sup> This right to be present goes to the essence of the provision for a fair trial.<sup>155</sup> If he is not afforded an opportunity to be present the entire proceeding is a nullity.<sup>156</sup> The right to be present extends to the *entire* investigation.<sup>157</sup> Thus excusing the employee prior to the taking of hostile testimony, notwithstanding the representatives of the employee remained, was deemed violative of the employees' rights.<sup>158</sup> The implication is that this right goes to the very essence of a fair hearing, and does not turn on contractual provisions. "An accused subject to a penalty is, under *fundamental* law, entitled to be present during taking of testimony if he so desires."<sup>159</sup> However, here again the employee may waive this right, and under the circumstances described above the waiver is implied unless the record shows an objection.<sup>160</sup>

Where the employee has been properly served with notice of the charge and advised of the time and place where the hearing will be held, his failure to appear does not vitiate the proceedings.<sup>161</sup> This principle has been applied in one somewhat ludicrous opinion where it was plain that the carrier knew that the employee could not be present. The Board said that there is nothing in the rules, nor "can it be inferred from the terms 'fair trial,' which made the actual presence of the respondent mandatory, provided, as here, adequate notice and opportunity for appearance was provided."<sup>162</sup> The opinion does not discuss what opportunity for appearance was present where, as here, the claimant was in jail at the time of the hearing.

Failure to provide opportunity for the accused to be present would generally be grounds for vacating the discipline assessed. However, where the claimant has not been prejudiced by the violation—where the discipline in fact rested solely on the claimant's own admissions—the improper practice by the carrier is deemed nonprejudicial and will not be a basis for Board reversal.<sup>163</sup>

Generally, failure to appear without good and sufficient excuse

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154. 2d Div. Award 1693 (1953).

155. 1st Div. Award 5197 (1940).

156. 1st Div. Award 3509 (1939).

157. 1st Div. Awards 12156 (1948), 5404 (1941).

158. 1st Div. Award 4306 (1939).

159. *Ibid.* (Emphasis added.) See also 1st Div. Award 4596 (1940).

160. *Ibid.*

161. 1st Div. Awards 16702 (1954), 15614 (1954); 2d Div. Award 1693 (1953) (failure to appear may itself constitute a distinct offense, e.g., insubordination).

162. 2d Div. Award 1334 (1949). See also 2d Div. Award 2590 (1957).

163. 1st Div. Award 4848 (1940) (employee had admitted the offense).

may be, in and of itself, sufficient grounds for discipline.<sup>164</sup> The Third Division states that failure to appear is at least tantamount to a manifestation of intent by the accused not to contest the validity of the charges.<sup>165</sup> There is some dictum to the effect that where the conditions preclude the possibility of a fair hearing the employee is justified in refusing to appear.<sup>166</sup>

#### E. DISCOVERY

Where the agreement rule specified that the accused should receive notice of the "matter to be investigated, and his representatives shall be furnished such information on the matter as the company may have, prior to the hearing," the Third Division construed the rule strictly and deemed failure of the carrier to comply a denial of a fair hearing. The Board pointed out that "the purpose of furnishing this information to the employee is obvious. It enables him to know the contents of the report . . . [it gives him] time to investigate . . . and time to prepare to answer, explain or deny. That is a substantive right."<sup>167</sup> Lawyers may—at least in this modern era—blanch at the thought that they have no way of ascertaining the nature of the adversary's case, his witnesses, or his basic evidence. Yet the same evidence and material are just as valuable in the preparation of an employee's defense. While the Board is adamant that these are not adversary proceedings, the plain fact is that a charge is brought by the carrier with intent to make it good. Carrier officer reports and statistics should be available to the employee prior to the hearing. Even reports the carrier does not intend to introduce as evidence should be available; they may prove the employee's case. If these are not adversary proceedings, the only sense in which this is true is insofar as both sides are after the truth. If so, then here of all places, the refusal to let the employees at the relevant materials is baseless. The right of discovery should become a fundamental right *implied* in all hearing rules.

#### F. WAIVER OF OBJECTIONS

Waiver of the right to an investigation should not be confused with waiver of objections to the conduct of the trial proper, or to defects in other aspects of the disciplinary procedure.

As a general rule, the Board is reluctant to scan the record for

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164. 1st Div. Awards 15237 (1952), 14469 (1951), 9562 (1944), 2327 (1937); 2d Div. Award 1693 (1953).

165. 3d Div. Award 4433 (1949).

166. 1st Div. Award 3321 (1938).

167. 3d Div. Award 3288 (1946).

violations of fair procedure when the record does not show that the employee objected at the proper time. It is safe to say that if the record does not show an objection to violation of the hearing rule at the time the infringement occurred, or the making of a motion for a continuance or to correct an error, a strong presumption of fairness will control the issue. The Board is suspicious of representatives who sit through the hearing without pointing out any defects, and then on appeal raise a plethora of objections. Witness the language of the Board in *Award 1251*, the first case in which the Second Division looked squarely at procedural problems in this area. In referring to the requirements of the hearing rule, it said:

Generally, the record should show that they have been reasonably complied with. Here [claimant] . . . was represented by the acting local committeeman who either knew or should have known his rights. No objection was made that [claimant] had not been properly informed of the precise nature of the charges. Nor was any motion made for continuance so time might be had to secure witnesses and prepare for trial, but evidence was introduced and a hearing was had on the merits. It must be presumed that [claimant] and his representative felt they were prepared to proceed.

The Board will not countenance the claimant's gambling on the outcome of the hearing. When he finds out that he has lost, the Board will not pay heed to his fervent objections. He "will not be permitted to complain thereof, because, by his conduct, he has waived his right to object."<sup>168</sup>

At the other extreme is the situation where the employees refuse to proceed with the hearing because the hearing officer refuses to accede to demands of the employees as to the conduct of the hearing. One thing is clear; the employees may not leave the hearing for failure of the carrier officer to observe some procedural requirement of the hearing rules. Said the Board: "Conceivably, the conduct of the hearing by officers of the carrier might be so palpably unfair as to justify the employe in refusing to participate in it. His remedy, however, is not to walk out but to invoke this Board's jurisdiction."<sup>169</sup>

A question that often arises in connection with the issue of waiver is whether or not an affirmative answer to the question: "Has this hearing been conducted in a fair and impartial manner?", usually put at the end of a hearing to the employee and his representative, constitutes a waiver of objections to the conduct of the

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168. 2d Div. Award 1251 (1948). See also 2d Div. Awards 1252 (1948), 1225 (1948).

169. 3d Div. Award 2554 (1944). See also 3d Div. Awards 6120 (1953), 2945 (1945).

hearing. The First Division views such an answer as some evidence, though hardly conclusive, of fairness.<sup>170</sup> The Second and Fourth Divisions have never squarely dealt with this issue. In one curious decision the Third Division ruled that an affirmative answer to this question is not a waiver of rights of which the accused may be unaware.<sup>171</sup> Generally, it is safe to say that when objections are in the record the question and answer amount to nothing more than filigree. By the same token, a mere negative answer to the question, without more, would not be enough to preserve the claimant's rights.

#### G. BURDEN ON THE CARRIER TO DEVELOP ALL THE FACTS

These investigations are under the control of the carrier . . . . It is obvious that the carrier's rights will be safeguarded at the hearing. The employee's rights must be protected likewise. The holding of the investigation is not for the purpose of proving the correctness of the charges but for the purpose of developing all facts material to the charges, both against and favorable to the employee.<sup>172</sup>

The investigation, then, unlike an adversary proceeding, requires that the carrier conduct itself in such a way as to guarantee that the entire picture is developed. It may not rely on witnesses attesting only to its version of the facts where it has knowledge of contrary opinions on the part of other witnesses. Where the carrier has discovered a contrary view on the part of witnesses it has interviewed prior to the hearing, and where it does not introduce these witnesses at the hearing, the employee has been prejudiced and the Board must reverse.<sup>173</sup> In another instance the Board said an impartial trial contemplates that " 'all evidence,' both for and against the accused, shall be presented. The hearing is conducted by and is under the control of the carrier. It is the carrier's duty to present at that hearing all material evidence of which it has knowledge bearing upon the question under investigation."<sup>174</sup> While this Award may appear to be predicated on an express stipulation in the applicable rule, the Board made it clear that the principle adopted in these decisions goes beyond any express provi-

170. 1st Div. Awards 13606 (1950), 11929 (1948), 5197 (1940). Cf. 1st Div. Award 17028 (1959).

171. 3d Div. Award 2470 (1944). *But see* 3d Div. Award 9322 (1960) (affirmative answer to the question was evidence that the employee was not prejudiced by failure to call requested witness).

172. 1st Div. Award 5297 (1940). *Accord*, 1st Div. Awards 14354 (1951), 8261 (1943).

173. 1st Div. Award 8260 (1943).

174. 1st Div. Award 5248 (1940). The agreement rule in this case expressly required "all evidence" to be submitted.



sion in the contract to the very fairness of the proceeding itself. It is incumbent on the carrier to take this approach notwithstanding the absence of express language in the rule.<sup>175</sup>

#### H. DUTY TO PROCURE WITNESSES

It is clear that the requirement that the accused receive notice reasonably in advance of the hearing is partially designed to afford the accused an opportunity to procure available witnesses.<sup>176</sup> Assuming that this requirement has been met, the problem arises as to whose duty it is to guarantee the presence of material witnesses. In an important decision the First Division developed the logic of its position—that it was the duty of the carrier to develop all pertinent evidence—by holding that once notified it was the duty of the carrier to see to it that the employee's witnesses were present. The Board said, "When it is made known to the officer conducting the hearing that certain witnesses have information concerning the matter being investigated it certainly becomes the duty of such officers to make inquiry of such persons."<sup>177</sup> Thus, from the notion that it is the carrier's duty to call all known material witnesses, there emerges the doctrine that the carrier should call witnesses whom the *employee* deems material. Of course, in this regard, the carrier does not convene these hearings at its peril and the employee must make his request for the witness' presence or else there is no prejudice.<sup>178</sup>

Difficult questions arise if the carrier refuses to call a witness once the employee requests his presence. Can the employee, without more, sit back and point to this defect on appeal? The First Division dealt with this problem in *Award 14729*, and said:

An employee accused . . . may request that the carrier call certain witnesses believed by the accused to be material and necessary . . . . The carrier . . . in good faith, may refuse to call the requested witnesses. The accused may then call the desired witness or witnesses and in the event that at the investigation it is shown that the witness, so called by the accused, contributes testimony necessary to developing the facts regarding the incident, then the witness should be compensated in the same manner as if he had been called by the carrier.

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175. 1st Div. Award 16890 (1955). It is difficult for this writer to understand why the other divisions of the Board have never espoused this approach. Perhaps it is due to the laxity of the organizations appearing before the other three divisions. It is clear that the impact of this rule, and the approach it embodies, is significant for the conduct of the parties. Were the approach of the first division in this area coupled with the approach of the third division on the matter of discovery, an entirely different atmosphere would prevail at the hearings.

176. 2d Div. Award 2008 (1955).

177. 1st Div. Award 12500 (1948).

178. 1st Div. Awards 13207 (1950), 13204 (1950).

Thus, where the witness is requested in advance of the hearing, and the carrier fails to call him or refuses to do so, it is up to the employee to secure his presence.

The right of the employee to have witnesses present is but a paper right unless the witnesses, when called by him, will be paid for attendance. It is unthinkable that the Board would add to the employee's burden of securing favorable testimony in the face of carrier charges, the additional detriment that the witness, if he were to appear, would do so at loss of time. Plainly, when the carrier orders the witness to appear he must be paid according to the contract provision applicable to appearance at hearings or investigations.<sup>179</sup> But the rule is anything but clear in the following instances: (1) when the employee calls the witness; (2) when the investigation extends beyond the regular working hours of the witness; (3) when the hearing is held on the regular rest day of one of the witnesses; or (4) when the hearing is held on a shift other than the one on which the witness is scheduled to work. Similarly the rule is unclear as to non-employee witnesses.

*Award 14729* appears to indicate the only sound method of resolving problem (1). If the employee calls the witness and his testimony is found to be pertinent, he is compensated as if he had been called by the carrier.<sup>180</sup> The other three questions are not conclusively dealt with in the decisions of any of the Four Divisions of the Board. The Third Division shows two strong lines of decisions on the question of payment of witnesses. The earliest, and for many years the dominant tendency, was the narrow, technical view that because appearance of witnesses at an investigation was neither "work" nor "service" under the contract, appearance was not compensable.<sup>181</sup> Another line of decisions followed the logic of Referee Shaw who stated, "The efforts to distinguish 'work' and 'service' are entirely vain. The fact is that the Carrier took two hours of . . . [the witnesses'] time for its own use and benefit and in the furtherance of its own business. . . . Neither refinements of reasoning or quibbling . . . can alter the plain facts of the case," and so these decisions order the witnesses to be compensated.<sup>182</sup> Later decisions justified payment where

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179. 1st Div. Award 15013 (1951). *But see* third division awards cited at note 181 *infra*.

180. *Cf.* 1st Div. Award 2518 (1938) (witness called by employee not compensable by carrier). How the witness should be paid has led to dispute as to whether he should be paid only for time lost or for time lost plus expenses as is the case in many court attendance rules. See 1st Div. Award 16061 (1953).

181. 3d Div. Awards 3343 (1946), 3230 (1946), 2132 (1943).

182. 3d Div. Award 2032 (1942). *Accord*, 3d Div. Award 2223 (1943).

there was a "mutual interest" in having the witness appear; non-payment where there was not.<sup>183</sup> This test results in almost all nonaccused witnesses being compensated when called by the carrier. The rule is not clear where the witness is called by the employee with no provision made for payment. The Fourth Division disposed of this problem by deeming the attendance at such investigations "work" and thus avoided the Third Division dilemma.<sup>184</sup> The First Division rule set out in *Award 14729* is the only rational way of solving the problem consistent with the demands of fair play. If an off-duty employee is called by the accused he should be compensated by the carrier if his testimony is relevant.<sup>185</sup>

Nonemployee witnesses—doctors, technicians and bystanders—may be vital to the accused's defense. There is no unanimity either on the burden of producing or payment for such witnesses.<sup>186</sup> But fairness again would dictate a duty on the carrier both to request the presence of such witnesses, if possible, and to bear the payment of expenses if their testimony is relevant.

If the hearing officer refuses to allow the testimony of an offered witness there is ground for reversal when the employee can show the exclusion to have been prejudicial.<sup>187</sup> The Board issued a word of caution to hearing officers on this point, suggesting that it is "better to risk the waste of a few minutes hearing time for the irrelevant than to expose the Carrier to payment of several thousands dollars in lost wages in a case where the exclusion is later deemed prejudicial."<sup>188</sup> Where the evidence is in sharp conflict and where the witness is material, the exclusion is likely to be deemed prejudicial.<sup>189</sup> While the carrier officer is bound to hear out the testimony of material witnesses, and may not high-

183. 3d Div. Awards 5010 (1950), 4911 (1950), 4570 (1949), 4569 (1949), 3968 (1948), 3966 (1948), 3912 (1948), 3911 (1948), 3722 (1947), 3478 (1947), 3343 (1946). See 3d Div. Award 3462 (1947) (contract of train dispatchers labelled appearance at hearings "service").

184. 4th Div. Awards 463 (1948), 454 (1948), 447 (1948).

185. A knotty question is then posed as to the rate at which he should be paid—straight time or premium time? Justification for payment of premium time rate may be found in the fact that he is performing "work," *i.e.*, fulfilling a responsibility to the carrier in excess of his regular work week. On the other hand it seems unfair to penalize the carrier for holding a hearing.

186. See 1st Div. Award 16411 (1953) (appears to imply payment for doctor would be sanctioned).

187. 1st Div. Award 10348 (1945); 2d Div. Award 2529 (1957). See also 1st Div. Award 5301 (1940) (expert witness).

188. 2d Div. Award 2529 (1957).

189. 1st Div. Award 16802 (1954).

handedly limit the scope of the testimony,<sup>190</sup> he is not compelled to sit through irrelevant meanderings by the witness. Thus, when the hearing officer halted the interrogation of a witness after asking the employee "to state his point and what he was attempting to bring out," and the answer indicated no relevance to the subject matter of the inquiry, the hearing officer was within his rights in cutting off the testimony.<sup>191</sup> The hearing officer should use his discretion to keep the questioning limited to the facts and issues pertaining to the case at hand.<sup>192</sup>

It should be noted here that where the carrier refuses to call a witness the Board may find strong evidence of a predisposition on the carrier's part to find the accused guilty. "His [the hearing officer's] statement, made even before the carrier's witnesses testified, shows that he had prejudged the case. The conductor's report was 'sufficient,' other witnesses were not 'necessary.' It is quite obvious that an impartial, open-minded investigation was not had."<sup>193</sup> Similarly the burden imposed by the First Division decisions cited above which require that the carrier produce "all" the witnesses, is relieved by some limitation. For example, facts establishing the claimant's responsibility may be brought out at a prior hearing conducted in relation to other individuals. Yet at the accused's hearing the accused admits the facts testified to at these previous hearings. The admission negatives the carrier's burden to bring in all this other evidence.<sup>194</sup> The employee may waive the production of witnesses—his own or the carrier's.<sup>195</sup> Where all the accused can demonstrate is that the witnesses he desired would only have corroborated his own testimony and shed no new light on the facts, it may not be enough to cause the Board to reverse.<sup>196</sup>

Assuming that the hearing officer does exclude a witness either by refusing to call him, or once calling him by refusing to allow him to testify or by cutting off his testimony, what should be the employee's approach? Clearly, his remedy is not to walk out of the hearing.<sup>197</sup> He should insist that the record show either that the witness was requested to testify, that a continuance was moved

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190. 1st Div. Award 15159 (1952).

191. 1st Div. Award 10382 (1945).

192. *Ibid.*

193. 1st Div. Award 8260 (1943).

194. 1st Div. Award 14687 (1951).

195. By express waiver, 2d Div. Award 1225 (1948); by agreement to subsequent affidavit, 2d Div. Award 1884 (1955); by failure to object, 1st Div. Award 15904 (1952); 2d Div. Award 2125 (1956).

196. 1st Div. Award 10380 (1945).

197. 3d Div. Award 2554 (1944).

or that a request that a statement be secured was made.<sup>198</sup> Further he should make an "offer of proof," namely, a statement of the facts the offered testimony would have been given to prove.<sup>199</sup> Since the Board in most cases is limited to the record on appeal, doing this avoids the objection that the Board must search outside the record for a basis for reversal. Thus where the carrier officer excluded the testimony of a witness because it would have been "hearsay," and also unduly limited the accused's examination of another witness, the Board, in view of the showing that the testimony would have been material and relevant, held the exclusion prejudicial.<sup>200</sup>

### I. RIGHT OF REPRESENTATIVE TO CROSS-EXAMINE

Implicit in the requirement of a fair hearing is the right of the representative to cross-examine the accused or any other witness.<sup>201</sup> He must be allowed to do this directly, and not through the hearing officer. Where the hearing officer denies this right of direct interrogation, the Board will reverse.<sup>202</sup>

### J. TESTIMONY

Must a carrier official testify when called upon to do so by the accused? The First Division holds that

[A]n official is not excused from testifying where the proposed examination is directed to his knowledge of facts or issues under investigation. When so limited it is the duty of the official to submit to an examination by the representative of the employe under investigation.<sup>203</sup>

The Third Division has similarly held that where the hearing officer denies the employee the right to interrogate the carrier officer who preferred the charges and who was present at the hearing, there is conclusive evidence of unfairness.<sup>204</sup>

In these days of congressional investigations, administrative agency investigations and press publicity on the rights of an accused before such tribunals, it is common among employees and

198. 1st Div. Award 10380 (1945).

199. 2d Div. Award 2529 (1957). A recent third division award emphasizes this requirement. Failure of the carrier to call the witness was excused in view of the fact that (a) the employee admitted the hearing was "fair" and (b) he failed to show the "nature or materiality of his expected testimony." 3d Div. Award 9322 (1960). An "offer of proof" is requisite to support any objection to the exclusion of evidence. 4th Div. Award 1387 (1959).

200. 2d Div. Award 1965 (1955).

201. 1st Div. Award 3088 (1938).

202. 2d Div. Awards 907, 906 (1943).

203. 1st Div. Award 5297 (1940).

204. 3d Div. Award 2996 (1945). See also 3d Div. Award 3000 (1945).

carrier officers to view the hearing procedure in a somewhat analogous fashion. Often in disciplinary proceedings, the only evidence that the carrier has, other than a few extrinsic facts, is the testimony of the accused himself. This is especially true in the Second Division where a failure of equipment is likely to provoke the hearing, and where the only evidence of what the employee did to the equipment can come from his lips. Knowing this, the questions that immediately come to the employee representative's mind are: Can the accused remain silent and put the carrier to its proof and failing that; will the accused be held blameless where the carrier has no independent evidence? This attitude was reflected in the actions of one employee representative who refused to allow the carrier officer to question the accused "on the theory that the burden of proof was on the carrier and that the accused could not be required to answer questions."<sup>205</sup> Said the Third Division: "[I]n this, the Representative was in gross error. At a hearing of this kind, the Carrier may properly examine the accused concerning every point bearing on his innocence or guilt, whether or not he testifies on his own behalf."<sup>206</sup> Furthermore, if the accused refuses to answer questions concerning the alleged violation he subjects himself to the inference "that the replies if made would have been favorable to the carrier."<sup>207</sup> The First Division is in accord with this approach.<sup>208</sup> However, in the face of a pending criminal prosecution, the Board held that the accused was within his rights when he declined to testify—the plea of fifth amendment protection held to be proper in such circumstances.<sup>209</sup> While silence will not bar a finding of guilt when independent evidence warrants it, the Board suggested that where there is no corroborative evidence, mere silence will be insufficient to raise an inference of guilt.<sup>210</sup>

The carrier may properly discipline an employee at a subsequent hearing for giving false testimony at a prior proceeding.<sup>211</sup>

#### K. RIGHT OF CONFRONTATION

It was early established by the Board that where neither the employee nor his representative were present during the taking of testimony of adverse witnesses, nor allowed to question them, the

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205. 3d Div. Award 2945 (1945).

206. *Ibid.*

207. 3d Div. Award 5104 (1951). See also 3d Div. Award 4749 (1949).

208. 1st Div. Award 9298 (1944).

209. 1st Div. Award 15574 (1952). See also 1st Div. Award 17158 (1955).

210. 1st Div. Award 17149 (1955) (dictum).

211. 2d Div. Award 2016 (1955).

discipline assessed could not stand.<sup>212</sup> The First Division has affirmed this principle in numerous awards.<sup>213</sup> There is no violation where a witness' statement, taken at some prior time, is introduced at the present hearing along with the witness so that he may be questioned on the material in the statement.<sup>214</sup> But providing the accused with a copy of the statement without the opportunity to examine the witness is a violation of elemental requirements of fairness.<sup>215</sup> In fact, where the carrier introduces separately signed and individually prepared statements, it runs the risk that the Board will find that this practice is powerful evidence of a predisposition to condemn the accused without a fair hearing. It is deemed to manifest a "treacherous" practice, said the Board, of building up the case against the accused.<sup>216</sup>

Assuming the witness is offered in person and the opportunity to examine him is conceded, the question arises whether both the employee *and* his representative must be present for this purpose. The decisions are not clear; some require the accused himself be present,<sup>217</sup> but this requirement is not uniform.<sup>218</sup>

Fairness requires that both the accused and his representative be present during adverse testimony. After all, the accused knows what happened and can cue his representative to loopholes in the testimony. Of course, if the failure to provide the opportunity to confront the witness does not result in prejudice, *e.g.*, when the discipline rests entirely on the evidence given independent of the statement of the witness in question, the Board may not reverse.<sup>219</sup> The employee may waive his opportunity to question the adverse witness, or he may fail to object to the procedure whereby the opportunity is denied him and thus impliedly waive the right to examine the witness.<sup>220</sup>

Due to problems peculiar to the work of some crafts covered by the Third Division, the right to confront witnesses has been preserved with some variations. This is because the accusers in these cases are often not employees of the carrier,<sup>221</sup> and there is no

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212. 2d Div. Award 28 (1936). This is one of the few awards in the discipline area that was "adjusted" rather than rendered by a referee.

213. 1st Div. Awards 13577 (1950), 8268 (1943), 6329 (1942), 3509 (1939), 2399 (1937), 2398 (1937), 2153 (1937).

214. 1st Div. Award 8301 (1943).

215. 1st Div. Award 12379 (1948).

216. *Ibid.*

217. 1st Div. Award 12156 (1948); 3d Div. Award 2162 (1943).

218. 3d Div. Award 1823 (1942).

219. 1st Div. Award 12147 (1948).

220. 1st Div. Award 13606 (1950); 2d Div. Award 1402 (1950); 3d Div. Award 892 (1939).

221. *E.g.*, a passenger who alleges illicit advances by a porter.

way that the carrier can compel them to be present at the hearing. As a general rule, the Third Division affirms the principles inherent in the right of confrontation.

We do not go so far as to say that it was incumbent upon the carrier to have the witnesses personally present at the hearing, or that formal depositions were necessary. What we do say is that the Agreement . . . requires that one charged with misconduct shall be afforded a reasonable opportunity to meet his accusers face to face.<sup>222</sup>

Therefore, where there has been no waiver,<sup>223</sup> and the witnesses are not present at the hearing, the carrier must (1) give the organization advance information as to the names and addresses of the proposed witnesses or (2) give the accused notice of the time and place where the statements are to be taken.<sup>224</sup> Some few decisions require a showing of prejudice resulting from the carrier's failure to do either (1) or (2).<sup>225</sup> Where the carrier fails to notify the accused in one of the above two ways, the accused must ask for a continuance to interview the witnesses<sup>226</sup> and object to the introduction of their statements if that privilege has been denied.<sup>227</sup> Otherwise, the objection is waived. Similarly, if the carrier officer offers a continuance so that statements may be taken by the accused and the latter refuses, he may not later object to the procedure.<sup>228</sup>

#### L. QUALITY OF EVIDENCE

Technical rules of evidence do not govern these hearings.<sup>229</sup> Thus, hearsay "is admissible where fairly received and justly evaluated,"<sup>230</sup> although what the Board called "second-hand" hearsay is not.<sup>231</sup> The Board has at times cautioned against its use as undesirable because it is untested by cross-examination and further,

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222. 3d Div. Award 2613 (1944).

223. 3d Div. Award 2978 (1945).

224. 3d Div. Award 2613 (1944). *Accord*, 3d Div. Awards 3288 (1946), 3213 (1945), 2614 (1944). *Contra*, 3d Div. Award 2895 (1945).

225. 3d Div. Award 3498 (1947) (witness had been available for a long period and was known to the accused). See *Carner v. Union Pac. R.R.*, 30 L.R.R.M. 2496 (D. Neb. 1952) (failure of carrier to procure presence of nonemployee witnesses does not impair the fairness of the hearing).

226. 3d Div. Award 4976 (1950).

227. 3d Div. Award 3213 (1946).

228. 3d Div. Award 4771 (1950).

229. 2d Div. Awards 1427 (1951), 18 (1936).

230. 1st Div. Award 17158 (1955). For a curious use of hearsay, see 3d Div. Award 2945 (1945).

231. 3d Div. Award 2653 (1944).



that "wherever practical the witness should be present and testify."<sup>232</sup>

A curious version of the "character rule" prevails. An employee's past record is inadmissible to bear on the question of his guilt.<sup>233</sup> But once guilt is determined it is admissible to determine the amount of punishment to be assessed.<sup>234</sup> However, only record discipline is within the compass of this rule.<sup>235</sup>

#### M. SEGREGATION

While it is apparently the rule that witnesses may not interrogate one another,<sup>236</sup> the views of the various divisions on the question of segregation of witnesses are not clear. Only one case in the Second Division deals with the issue. In that case the Board said:

No rule of the parties' effective agreement is cited to support this contention nor have we been able to find one. No objection to their doing so appears to have been made at the hearing. Such practice is common procedure in civil matters tried in courts and no prejudice appears to have resulted therefrom here.<sup>237</sup>

The Third Division has taken the same position.<sup>238</sup> The First Division observed in one instance that absent a rule requirement that witnesses be segregated and absent a request that they be excluded there is no error in allowing them to be present.<sup>239</sup> However, in an instance when the carrier did segregate witnesses the same Division said "the Investigations Rule, does not require that witnesses be permitted to remain . . . and hear all testimony. The practice of excluding witnesses is quite common in the courts of the country, particularly where there are controverted questions of fact."<sup>240</sup> Thus, as Lazar observes, the matter in the First Division seems discretionary.<sup>241</sup> Because in many of these hearings the witnesses are testifying before their own local supervisors in their capacity as hearing officers, and since the danger of intimi-

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232. 1st Div. Award 12500 (1948).

233. 2d Div. Awards 1367 (1950); 3d Div. Awards 2498 (1944), 2440 (1944), 1599 (1941), 1587 (1941), 562 (1938), 430 (1937).

234. See text accompanying notes 262-63 *infra*.

235. See awards cited at note 233 *supra*.

236. 1st Div. Award 12500 (1948).

237. 2d Div. Award 2134 (1956).

238. 3d Div. Award 5061 (1950). See also *Haynes v. Winston-Salem Southbound Ry.*, 252 N.C. 391, 113 S.E.2d 906 (1960) (providing for segregation of witnesses by contract).

239. 1st Div. Award 5301 (1940).

240. 1st Div. Award 10373 (1945).

241. LAZAR, *op. cit. supra* note 16, at 56.

dation is very real, it is a simple concession to fairness to provide for the exclusion of witnesses so that the more impressionable sort will not be intimidated. At any rate, even if the Board is unwilling to lay it down as a general rule, the employees should strive to enforce this principle in practice, registering in the record the reasons why they feel the witnesses should be excluded so that a basis is laid for reversal on the grounds of prejudice. The issue has yet to be put squarely before any Division of the Board.

#### N. THE HEARING

It is the function of the hearing to bring out all relevant facts and to guarantee the employee the right to be heard. Very early in the Board's history, Referee Garrison wrote for the Third Division: "The requirements of notice, hearing . . . were all designed to assure . . . a fair opportunity to the employee to be heard . . . and to have the final judgment rendered by an official not personally involved in the dispute and detached by distance as well as authority from any local feelings or prejudices."<sup>242</sup> The curious position of the carrier at these hearings is suggested in First Division *Award 10372*: "[T]he Carrier in these investigations occupies the conflicting position of interested party, prosecutor and judge, and accordingly carries a burden of care that the spirit of the rule . . . be not violated in the conduct of the investigation." It is common practice for the same individual to act as judge and prosecutor.<sup>243</sup> Characterizing the rule common to all four Divisions the Second Division said: "As long as the official in charge of the investigation or hearing does not have to consider his own testimony in deciding the question of guilt, it cannot be said that such investigation or hearing has been unfair."<sup>244</sup> Thus the Board sees no objection to the union of functions in the hearing officer of judge and prosecutor.<sup>245</sup>

But the Board balks at the eminently unfair procedure of uniting a third function with the other two; the hearing officer may not also be a complaining witness.<sup>246</sup> This applies even where he does not take the position of witness officially if the only support for the charge comes from his mouth.<sup>247</sup>

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242. 3d Div. Award 232 (1936).

243. 1st Div. Award 13354 (1950).

244. 2d Div. Award 1788 (1954).

245. 1st Div. Awards 13354 (1950), 10649 (1945), 5301 (1940); 2d Div. Awards 1745 (1954), 1543 (1952), 1211 (1948); 3d Div. Award 4317 (1949). See also *Weaver v. Pennsylvania R.R.*, 141 F. Supp. 214 (S.D.N.Y. 1956) (approving the unity of hearing officer and prosecutor).

246. 1st Div. Award 11910 (1948); 2d Div. Award 2568 (1957); 3d Div. Awards 4634 (1949), 4317 (1949).

247. 2d Div. Award 1157 (1946).

## O. CONDUCT OF OFFICER

The officials conducting the hearing, both carrier and employee representatives, are Ministers of Justice entitled to all of the respect and dignity traditionally accorded functionaries of justice. Bias and prejudice, partisanship and vindictiveness should not enter the hearing rooms; but calmness, objectivity, reasonableness, considerateness, uprightness, and a sense of fairness and justice should permeate the atmosphere of the proceedings.<sup>248</sup>

This article has indicated that there are certain things the hearing officer may do that will indicate bias and even lead the Board to reverse the discipline. Dr. Lazar's words indicate what the ideal representatives should be. But needless to say, few if any hearings are conducted in such a rarified atmosphere. It is logical to expect to find that the carrier representatives rarely approach the hearing with the objectivity that we expect of a judge, and few union representatives would long hold their jobs if they did not approach the matter, not in the pose of "Minister of Justice," but in the stance of a gladiator. However, evidence of the hearing officer's bias which finds its way into the record will vitiate the proceedings. For example, where the hearing officer has offered for the record in *prior* investigations of others that they were responsible along with the accused for the mishap, the Board will reverse.<sup>249</sup> The hearing officer is under a solemn duty not to pre-judge the case. The Board held that a fair hearing was impossible where the record showed the hearing officer had made several remarks for the record *which required no answer*.<sup>250</sup> These attempts by the Board to demand fairness in the attitude of the hearing officer are tantamount to expecting the impossible. Unless some practical method of changing this procedure is discovered, it will remain an ineluctable obstacle to the holding of fair hearings. Since obtaining an impartial third party might present problems which the parties are not prepared to solve, it is certainly possible at the moment to look to Referee Garrison's vision<sup>251</sup> and obtain a carrier representative from some other department, unfamiliar with the parties and uninvolved in the consequences of a finding one way or the other. The Board could insist on this without waiting for a change in the contractual arrangement between the parties.<sup>252</sup>

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248. LAZAR, *op. cit. supra* note 16, at 54.

249. 1st Div. Award 5404 (1947).

250. 1st Div. Award 13354 (1950). *Cf.* 1st Div. Award 13606 (1950).

251. See text accompanying note 242 *supra*.

252. I am told that many carriers do follow such a practice even though it is not mandatory.

#### P. DUTY TO RENDER A DECISION WHERE CONTRACT REQUIRES IT

The rule is clear that after the hearing the carrier must render a decision. There must be a finding on the merits and not merely some offhand passing comment to a third party as to the carrier's opinion of the accused's guilt.<sup>253</sup> A failure to render such a decision is a deprivation of the claimant's right to appeal.<sup>254</sup> The rule is not so clear as to the effect of a delay by the carrier in rendering its decision. Where the rule provides for notifying the employee of the outcome of the hearing within a specified time, *e.g.*, ten days, the First Division appears to hold that it should be complied with, but failure to do so will not vitiate the proceedings. It will merely result in compensation to the accused for any injury incurred by the carrier's delay.<sup>255</sup> One Second Division decision appears to hold that failure to render the decision in conformity with the requirement of the rule is equivalent to an exoneration of the accused so the discipline must be reversed.<sup>256</sup> The Third Division appears to be in accord with the Second Division that failure to give notice in compliance with the rules is equivalent to exoneration.<sup>257</sup> When there is no time limit in the contract it would appear that the carrier is not bound to render its decision within any specified time.<sup>258</sup>

#### Q. PROPORTIONALITY OF PUNISHMENT

Once confronted with the fact that the employee he represents may be found guilty as charged, every committeeman is faced with the extremely troublesome question, plaguing the employee's mind as well, of how much punishment will be meted out. It would horrify the average citizen if he were to assume that, having gone through a red light, he might receive a punishment ranging in extent from a two-dollar fine to a life sentence. A discharge from the service of the carrier is, in many parts of the country, equivalent to social ostracism. For older men it means condemnation to a less skilled occupation and perhaps unemployment. The stakes gambled in these disciplinary hearings are high. As a consequence the Board has erected some safeguards to curb disciplinary action and prevent injustice.

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253. 2d Div. Award 2364 (1956).

254. *Ibid.*

255. 1st Div. Award 13845 (1950).

256. 2d Div. Award 2364 (1956).

257. 3d Div. Award 5472 (1951). See also 3d Div. Awards 3736 (1947), 3697 (1947), 2590 (1944). *Contra*, 3d Div. Award 1497 (1941).

258. 2d Div. Award 1666 (1953).

The Board is firmly committed to the policy that the discipline of its errant employees is the province of the carrier and the Board will only intervene when the safeguards of due process have been violated or when the discipline imposed is so out of proportion to the offense as to amount to arbitrary or capricious action.<sup>259</sup> The Board recognizes that misdemeanors should not carry life sentences.<sup>260</sup> What does constitute arbitrary or capricious conduct on the part of the carrier? How does the Board go about evaluating the situation in close cases? The following criteria were set forth by the Board in one case:

1. The seriousness of the infraction.
  - (a) Did such violation create a hazard to life or property?
  - (b) Was there a question of moral turpitude?
  - (c) Was the violation intentional or was it a result of accident, misconception or ignorance of the rules.
2. The past record of the violator.
  - (a) The length of time spent in the service of the carrier.
  - (b) The service record of the violator throughout his entire service with the carrier.
3. The attitude of the employee in respect to the likelihood of a violation in the future.
4. The effect of the amount of discipline upon the other employees, in pointing out the necessity of compliance with the rules.<sup>261</sup>

Past record is a critical factor in the reviewing Board's estimate. While the past record is not proper evidence bearing on guilt or innocence of the accused, it is proper in assessing the amount of discipline to be applied. The Board said: "It is not only proper but essential, in the interests of justice, to take the past record into consideration, for what might be just and fair discipline to an employe whose past record is good, might . . . be inadequate discipline for an employe with a bad record."<sup>262</sup>

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259. 1st Div. Award 1041 (1936); 3d Div. Awards 2621 (1944), 135 (1936); 4th Div. Awards 281 (1945), 865 (1953). Compare the common arbitration practice described in ELKOURI & ELKOURI, *HOW ARBITRATION WORKS* 419-23 (1960).

260. 3d Div. Award 913 (1939).

261. 2d Div. Award 2066 (1956). In another decision the Board explained its view:

While it is true that this Board will on occasion reinstate employees who have been properly dismissed from the service, such action ordinarily results from the nature of the charge, the gravity of the offense, the past record of the employee and subsequent mitigating circumstances, when all such indicate that the purposes of discipline have been accomplished and that the employee could be returned to service without expense to the carrier, or detriment to the service.

2d Div. Award 1459 (1950).

262. 2d Div. Award 1261 (1948). See also 2d Div. Awards 1664

In cases where the accused is involved in an altercation with a fellow employee the Board added the following three factors for consideration:

1. Was the accused the aggressor?
2. Was the violence justified?
3. Did injury to the opponent result?

Even here, it is not clear what role each factor plays.

Lest the cataloguing of the above factors tend to be misleading it must be said that a survey of the discipline cases reveals no clear standard or measure of punishment. Where an employee with a good record commits a minor rules infraction that is unintentional, it is arbitrary to dismiss him.<sup>263</sup> But where an employee with a bad record commits a willful offense causing severe damage to the company property, it is not unfair to deprive him of his employment. But between these extreme cases, where the bulk of discipline cases fall, it is impossible to predict with any degree of certainty what the action of the Board will be. The Board is reluctant to intervene where the discipline has been only a suspension, especially of short duration, presumably on *de minimis* grounds.<sup>264</sup> Rarely will the Board reinstate an employee with back pay solely on the grounds that the punishment has been arbitrary where there is no showing of unfairness in the hearing procedure itself. The normal rationale is that the suspension to date has constituted sufficient punishment so the employee is reinstated without pay.<sup>265</sup> While this is a habit with arbitrators for various reasons,<sup>266</sup> there is an added practical reason for this approach under the Railway Labor Act. The awards of the adjustment board are "final" except in the instance of money awards. Here, the carrier would have the express statutory right to appeal to the courts.<sup>267</sup> When the employee is only reinstated, and there is no money award, there is no room for evasion by the carrier.<sup>268</sup>

While discriminatory treatment may be a reasonable ground for

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(1953), 1477 (1951), 1459 (1951), 1411 (1950), 1191 (1947), 1189 (1947), 1188 (1947); 1st Div. Awards 8004 (1948), 5408 (1941), 5222 (1940), 139 (1935); 3d Div. Award 5498 (1952); 4th Div. Awards 472 (1948), 263 (1945).

263. 2d Div. Awards 1664 (1953), 1411 (1950).

264. 2d Div. Awards 1389 (1950), 571 (1941).

265. 2d Div. Awards 1411 (1950), 603 (1941).

266. See ELKOURI & ELKOURI, *op. cit. supra* note 259.

267. Railway Labor Act, 48 Stat. 1185 (1934), 45 U.S.C. § 153 (1958).

268. Several referees have told me that fear of reversal on review due to this provision has never had any effect on the remedy they order. It seems difficult to believe, however, that this had not had its effect in discipline and other types of cases.

appeal,<sup>269</sup> the mere fact that another wrongdoer has not been punished is not enough to warrant reversal.<sup>270</sup> Thus the fact that others are stealing company property is not a mitigating factor, nor is the fact that the property taken is of small value.<sup>271</sup> But "fair play requires that, when all things are equal, employees be granted equal treatment."<sup>272</sup> When all the other employees involved in the same incident have been reinstated, the Board may be moved to find a continued punishment of the accused improper.<sup>273</sup> But where the record of the one still under suspension is substantially worse than his cohorts the Board will not necessarily apply the equality principle.<sup>274</sup> The Board will also listen to the argument that formerly the carrier has treated similar offenses more lightly in apprising the harshness of the carrier's instant action.<sup>275</sup> It must be emphasized that while these are all factors considered by the Board, no one is decisive.

#### R. INSUBORDINATION

In the cases of insubordination that arise so frequently it is important for the employees to bear in mind the factors laid down by the Board for evaluating these cases. The primary responsibility for the direction of the work force lies with the management. Thus the Board has said that the

[C]arrier . . . is obliged, when exercising this authority, to make the initial interpretation of the rules and direct how the work shall be done. In this respect employees must, as a general rule, carry out the orders given for this purpose and, if such orders are improper, seek redress under their contract in the manner provided for that purpose by the Railway Labor Act.<sup>276</sup>

Thus, whenever the carrier issues an order the employee is bound to obey it, with one cardinal exception—"where there is present such a visible danger that to obey the order would result in immediate peril to the body or health of the employe."<sup>277</sup> But the danger must be "clear and present." "In doubtful cases the employe should point out the risk and having registered his protest

269. 2d Div. Award 617 (1941).

270. 2d Div. Award 2179 (1956).

271. 2d Div. Awards 1851 (1954), 1850 (1954).

272. 1st Div. Award 5397 (1941). See *STESSIN, EMPLOYEE DISCIPLINE* 42-43 (1960).

273. 1st Div. Award 3317 (1938).

274. 1st Div. Award 5397 (1941).

275. 1st Div. Award 13663 (1950).

276. 2d Div. Award 1787 (1954). See also 1st Div. Award 12267 (1948); 2d Div. Award 2715 (1957).

277. 2d Div. Award 1787 (1954).

should then proceed to do the ordered chore<sup>278</sup> following it up by filing a grievance. Any other behavior may lead to properly placed charges of insubordination.<sup>279</sup>

#### S. WORK PERFORMANCE

An employee who performs a task on a piece of railroad equipment and signs, or in some other way indicates his responsibility for the job, is responsible for doing the work in conformity with the applicable standards. Where he does a job but lacks time to do it properly he is "covered" only when he reported it, and failure to do so leaves him open to discipline for improper performance of his duties.<sup>280</sup> When he does an inadequate job at the request of the supervisor he should refuse responsibility for the job and make an "effective protest" as to the way in which he was instructed to perform his duties.<sup>281</sup> He should insist on the proper manner of doing the work, and if ordered to do it otherwise, he should decline responsibility for it.

#### T. APPEALS: STATUTE OF LIMITATIONS

Where the contract contains an express clause limiting the time in which an appeal may be taken from the decision, either to the next carrier official or even to the Adjustment Board itself, the clause is strictly construed against the employees.<sup>282</sup> This is so regardless of how erroneous is the action of the carrier.<sup>283</sup> But the claimant is not barred where the discipline is void for failure to give notice and hold a hearing.<sup>284</sup>

The carrier must assert the objection as to the passage of time or else it will be deemed to have been waived.<sup>285</sup> Continued hearing of an appeal by the carrier officers without ever mentioning the fact that the time has run on the claim is equivalent to waiver.<sup>286</sup> It is too late to assert the defense when the case reaches the Adjustment Board.<sup>287</sup> However, it is not clear how soon after an ap-

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278. 2d Div. Award 2715 (1957).

279. 2d Div. Award 1849 (1954); 4th Div. Award 196 (1942).

280. 2d Div. Award 2125 (1956).

281. 2d Div. Award 1115 (1946).

282. 1st Div. Award 15375 (1952); 2d Div. Awards 2096 (1956), 2028 (1955), 1847 (1954), 1510 (1952).

283. 1st Div. Award 5217 (1940); 4th Div. Awards 493 (1948), 218 (1943), 183 (1942).

284. 1st Div. Award 6272 (1941). Similarly failure to set a date for hearing of the appeal is equivalent to a deprivation of the right to appeal, and the running of the time limit is no bar. 1st Div. Award 16705 (1954).

285. 2d Div. Award 1552 (1952).

286. 1st Div. Award 3211 (1938); 3d Div. Award 1294 (1940).

287. 2d Div. Award 2256 (1956).



peal is entertained the carrier must raise the objection before it can rebut the implied waiver.<sup>288</sup> Of course, once the case has been processed on the property in "the usual manner" there is no time limit on appeals to the appropriate division of the Railroad Adjustment Board.<sup>289</sup> Where there has been an inordinate delay in coming before the Board with a case, the Board will consider whether an affirmative award if granted would cause the carrier serious injury because of the delay. If so, it is possible the Board will refuse to hear the case.<sup>290</sup>

The carrier is bound by the evidence it produces against the accused during the hearing and may not rely on evidence acquired subsequently, even before the Adjustment Board,<sup>291</sup> and even though that subsequent evidence would clearly warrant the discipline assessed and the finding that was made.<sup>292</sup> The same limitation applies to the unions. When the union feels that it needs more time to develop further evidence it should seek a continuance.<sup>293</sup>

Where the union has appealed to the carrier for a reinvestigation based on newly discovered evidence, the Board will review both the new evidence and the carrier's denial before deciding whether the reinvestigation should have been granted.<sup>294</sup> This is a difficult situation. When the later evidence is of "vital importance" the Board may order a reinvestigation so that the new matter will be part of an entire record for review.<sup>295</sup> But the cases show that the evidence must be very strong before the Board will be so moved. It is plain that this evidence must be newly discovered and that the employee must not have known of it at the time of the original investigation, or else the Board will not act.<sup>296</sup>

## CONCLUSION

This survey of Board awards reveals an underlying insistence on *fairness* in the conduct of disciplinary proceedings. It is a concept

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288. 1st Div. Award 14468 (1951).

289. Railway Labor Act, 48 Stat. 1185 (1934), 45 U.S.C. § 151 (1958).

290. 2d Div. Award 1716 (1953). Some commentators have recommended a "statute of limitations" for submission of disputes to the Board. See, e.g., Garrison, *The National Railroad Adjustment Board: A Unique Administrative Agency*, 46 YALE L.J. 567 (1937); *Administrative Procedure in Government Agencies*, S. Doc. No. 8, 77th Cong., 1st Sess. 186 (1941) (recommending a one year limitation "following the act or acts against which the complaint is made").

291. 1st Div. Award 9646 (1944); 3d Div. Award 1294 (1940).

292. 2d Div. Awards 2371 (1956), 2292 (1956).

293. 1st Div. Award 13606 (1950); 2d Div. Award 1694 (1953).

294. 2d Div. Award 1591 (1952).

295. 1st Div. Awards 14445 (1951), 11726 (1947).

296. 1st Div. Award 16411 (1953).

of fairness defined in terms of the unique conditions of the railroad industry, the particular collective bargaining agreement, and the conditions on the local property that gave rise to the dispute. The particular forms that this principle takes are transitory; what is fair today may appear unfair tomorrow. In part the new concepts will reflect changes in our concepts of the rights of labor in industrial society.

Three broad areas of reform are called for in the Board rules. The Board has been too cavalier in rejecting the right of the accused to be represented by someone other than his duly authorized bargaining agent. The accused should be entitled to have as his representative an attorney, the representative of some other craft, and even a representative of a minority union. Because of the seriousness of these hearings the Board should hold that the right of an accused to representation by an attorney, or by the representative of some other craft,<sup>297</sup> is implied in the requirement that the hearing be fair and impartial.<sup>298</sup> No reasonable basis exists in these two instances for denying the employee this right, and in fact a benefit might be reaped in that a decent record would be made in the event an appeal is necessary.<sup>299</sup> There is a problem when the accused seeks to be represented by a minority union. It can be argued that if this were allowed it would tend to undermine the status of the majority representative.<sup>300</sup> If a minority union were permitted to negotiate on all grievances many problems would be created. It is possible however, to distinguish representation at disciplinary hearings from other types of grievance handling. For the most part disciplinary hearings are concerned with ascertaining matters of fact,<sup>301</sup> and are not concerned with "bargaining" over

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297. I mean by "some other craft" some other certified representative of employees, e.g., an electrical worker might want the local machinists' steward representing him at the hearing.

298. Where the hearing rule expressly provides for representation *only* by the duly authorized representative of the majority union, the Board would be hard pressed to find such an implied right.

299. I am assuming that the accused has good reason for going afield for representation. The usual case would be that the accused feels that his local representative is not competent to do the job. On appeal the problem is not so serious because the higher echelon union official, often a full time employee of the union, is experienced and knowledgeable. But the local committeeman is apt to be quite naive about the procedural requirements of disciplinary hearings and is at a loss for resources save for what he has gleaned of the proper posture of an advocate from watching the Perry Mason television series.

300. See cases cited at note 145 *supra*.

301. For a broader use of this distinction see Summers, *Individual Rights In Collective Agreements—A Preliminary Analysis*, N.Y.U. 12TH ANN. CONF. ON LABOR 63, 83-88 (1959).

interpretation of the agreement (except for the hearing rule). The hearing is more a trial than a bargaining meeting. It is small solace to the accused who is compelled to accept representation by an incompetent, or perhaps hostile majority union representative, that the majority status of his union is not being undermined. In order to avoid problems that might arise in processing the appeal through the normal channels, the Board could simply require that the carrier allow the employee to be represented by whomever he desires *at the hearing itself*.<sup>302</sup>

It is necessary for the Board to fashion a rule that will eliminate the situation in which the hearing officer is also the judge and the prosecutor. Undoubtedly it would be too burdensome to require the use of nonrailroad personnel to conduct the hearing. But it should be possible for the carrier to appoint a hearing officer from some other department or property without any significant expense or inconvenience. Such an official, albeit an employee of the carrier, is much less likely to be biased against the particular accused, and his presence would be less likely to inhibit the presentation of the employee's case.

Finally, the Board should compel the carriers to make all relevant materials available to the accused prior to the hearing so that he is accorded a fair opportunity to prepare a defense. There is no sound reason for refusing the accused the right of discovery. The present system puts the accused in a disadvantageous position, and a change in the rule would place no significant burden on the carriers.

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302. This would also eliminate the worry that the carrier would be compelled to deal with an endless number of unions on the same agreement.