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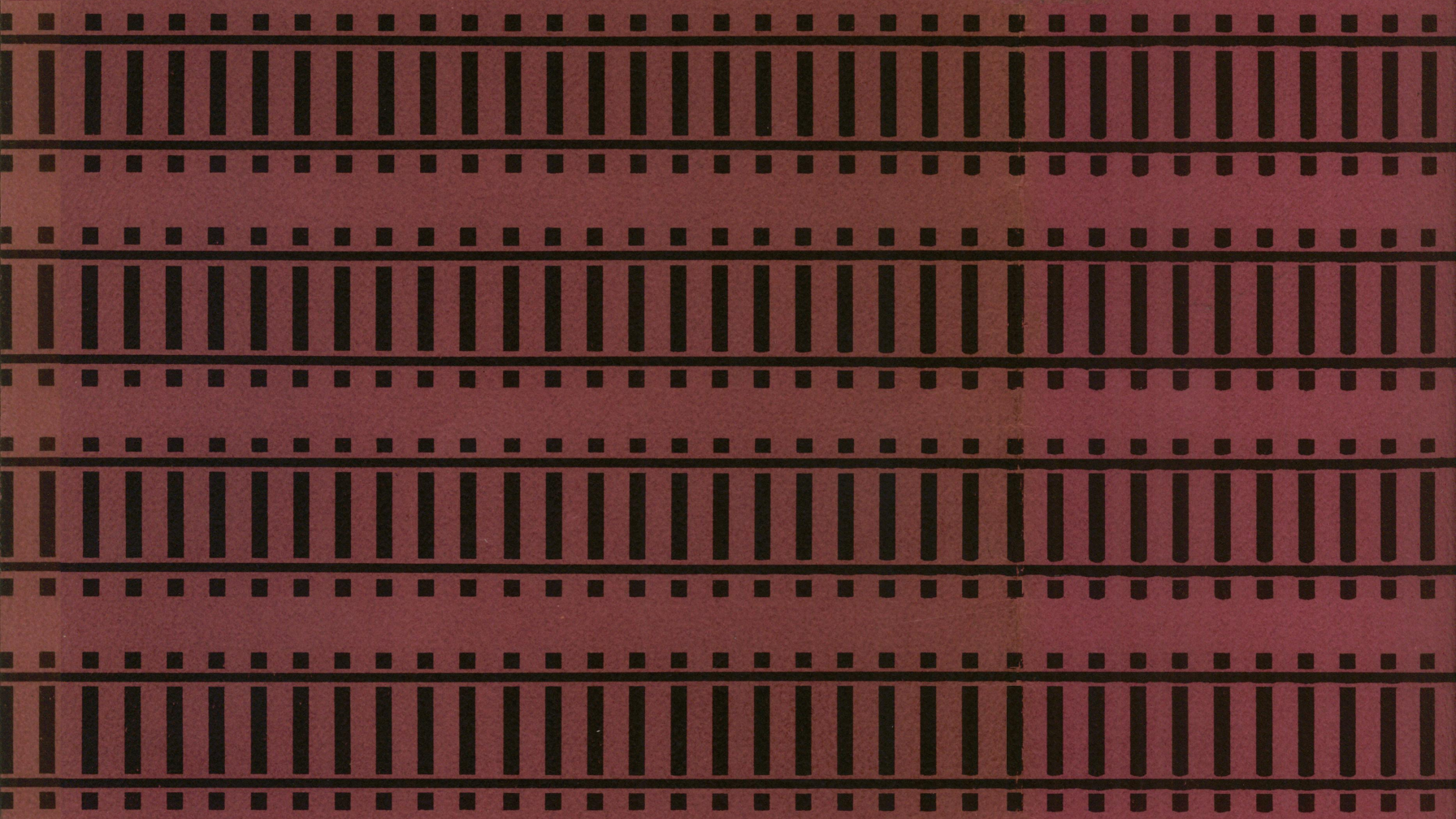

DUE PROCESS ON THE RAILROADS

REVISED EDITION

by Joseph Lazar

Institute of Industrial Relations · University of California, Los Angeles

DUE PROCESS ON THE RAILROADS

DUE PROCESS ON THE RAILROADS: Disciplinary Grievance Procedures before the National Railroad Adjustment Board, First Division

By Joseph Lazar

Revised and Enlarged Edition

INSTITUTE OF INDUSTRIAL RELATIONS (Los Angeles)
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To

KARL NICKERSON LLEWELLYN

Architect of Legal Realism

Foreword

The Institute of Industrial Relations takes pleasure in launching its monograph series with Joseph Lazar's Due Process on the Railroads, Revised Edition. *This series is intended to include studies midway in length between the Institute's reprints and its books. The monographs will receive a distinctive cover treatment to set them apart from the other publications.*

It is particularly fitting that Dr. Lazar's study should be the first in the monograph series. The original edition, published by the Institute of Industrial Relations in 1953, has had an unusually wide distribution among employers and employee representatives in the railroad industry. Important developments since 1953 have led to the publication of this revised edition.

Dr. Lazar holds a Doctor of Laws degree from the University of Chicago, served for over four years as Assistant Supervisor of Wages and Working Conditions on the Norfolk & Western Railway Co., and has had experience as Referee and Arbitrator under the Railway Labor Act. He has been associated with the University of California, Los Angeles, and the University of Chicago, and is presently on the faculty of the Air Force Institute of Technology.

Mrs. Anne P. Cook edited the manuscript. The cover was designed by Marvin Rubin.

BENJAMIN AARON, *Acting Director*
Institute of Industrial Relations
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Contents

Introduction

"No free man shall be seized, or imprisoned, or dispossessed, or outlawed, or in any way destroyed; nor will we condemn him, nor will we commit him to prison, excepting by the legal judgment of his peers, and by the law of the land." *Magna Carta* (1215). "No person shall ... be deprived of life, liberty, or property, without due process of law." *Constitution of the United States, 5th Amendment* (1791).

THE RULE OF LAW and the principle of justice, rooted in the Magna Carta and the Constitution, are yielding through the Railway Labor Act[1] the realities of human rights and ordered liberty in the self-government of the railroad community. In essence, as viewed by the Supreme Court of the United States, the Railway Labor Act is "primarily an instrument of industrial government for railroading by the industry itself, through the concentrated agencies of railroad executives and the railroad unions."[2]

As the fundamental charter for self-government by the railroad industry, the Act must be construed and applied in harmony with the underlying purposes of the Constitution of the United States. The Supreme Court has been performing this task of construction with painstaking care and special solicitude for the healthy growth of the industrial governmental system, while carefully infusing into this system due regard for the human values preserved by the rule of law in a constitutional democracy. The role of the Court, in maintaining due balance between individual liberty and the needs of governmental order, has been understandably difficult. Are individual employees possessors of "rights" which are indestructible even by the representatives of the collective group interest? Can the rights of the individual be preserved without diluting the necessary collective bargaining powers of the group? These basic questions, of course, are similar to those faced by the draftsmen of the Constitution and the Bill of Rights. The answers given by the Court seem clearly in harmony with the theory, purposes, and provisions of the Constitution.

The American system of government is based upon the concept that "all men are created equal, that they are endowed by their Creator with certain inalienable rights, that among these are Life, Liberty, and

[1] 48 Stat. 1185 (June 21, 1934).
[2] Pennsylvania Railroad v. Rychlik, 77 S. Ct. 421, 430 (1957).

the pursuit of Happiness" and "That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed."[3] Accordingly, there was written into the Constitution a system of checks and balances: the separation of executive, legislative, and judicial powers, a federal-state division of powers, a bill of rights, and other provisions to insure a governmental power structure compatible with the Declaration of Independence.

The theory underlying this design is implicit in the construction given by the Supreme Court to the Railway Labor Act. Thus, the self-government concept of the railroad industry appears to follow the constitutional model of separation of powers. The legislative function of the industrial government may be regarded as the negotiation of the collective bargaining agreement; the executive function as the administration of that agreement; and the judicial function as the adjustment of disputes growing out of grievances or out of the interpretation and application of the agreement.

This theoretical separation of functions appears to be in process of definition by the Supreme Court. For through definition and delimitation, it becomes more practicable to apply to the new industrial government the constitutional safeguards of human rights and liberty. Thus, where a bargaining representative arbitrarily discriminated against minority members of the craft represented, by purporting to negotiate an agreement destroying rights of the minority, the Court placed the powers of negotiation in the category of "legislation" for the purpose of applying constitutional restraints on the bargaining representative's authority. The Court declared:

> We think that the Railway Labor Act imposes upon the statutory representative of a craft at least as exacting a duty to protect equally the interests of the members of the craft as the Constitution imposes upon a legislature to give equal protection to the interests of those for whom it legislates. Congress has seen fit to clothe the bargaining representative with powers comparable to those possessed by a legislative body both to create and restrict the rights of those whom it represents, . . . but it has also imposed on the representative a corresponding duty.[4]

If the doctrine of separation of powers is to succeed in enhancing human rights and liberty in industrial self-government, the essential differences between the legislative function and the judicial function must be made explicit. Preliminary lines of demarcation between these two functions under the Railway Labor Act were drawn by the Supreme

[3] The Declaration of Independence in Congress, July 4, 1776.
[4] Steele v. Louisville & Nashville Railroad, 323 U.S. 192, 202 (1944).

Court in the *Burley* case.[5] There the Court distinguished between a claim for "rights accrued" and a claim to have new rights "created for the future." Rights accrued were in the province of adjudication; the creation of new rights belonged in the province of legislation. Accordingly, rights accrued were to be judicially safeguarded from unwarranted legislation of rights "created for the future." Individual rights were not to be wholly submerged in the collective interest:

> It would be difficult to believe that Congress intended, by the 1934 amendments, to submerge wholly the individual and minority interests, with all power to act concerning them, in the collective interest and agency, not only in forming the contracts which govern their employment relation, but also in giving effect to them and to all other incidents of that relation. Acceptance of such a view would require the clearest expression of purpose. For this would mean that Congress had nullified all preexisting rights of workers to act in relation to their employment, including perhaps even the fundamental right to consult with one's employer, except as the collective agent might permit. Apart from questions of validity, the conclusion that Congress intended such consequences could be accepted only if it were clear that no other construction would achieve the statutory aims.

The determination of rights accrued was to be accomplished, and the rights secured, through administrative machinery provided by the Railway Labor Act.

This machinery is the National Railroad Adjustment Board (NRAB). The Act declares that the general purpose of the Board is "to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions," and the Act gives the Board jurisdiction over such disputes. The Act provides that the disputes "shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes."[6]

[5] Elgin, Joliet & Eastern Railway v. Burley, 325 U.S. 711, 733–734 (1945).

[6] The Board consists of 36 members, 18 selected by the carriers and 18 selected by organizations of railway employees which are national in scope. The salaries of these members are paid by the parties that select them, but the salaries of the staff, as well as rent and all other expenses, are paid by the government. Headquarters of the Board are fixed by the Act to be in Chicago, Illinois.

The Board is divided by the Act into four divisions, each of which operates and makes its decisions separately. Each division consists of an equal number of management members and labor members and has jurisdiction over different classes of employees. Division 1 has jurisdiction over train and yard service employees, including

The Board, accordingly, is a mechanism for the performance of a judicial function within the self-governing system of the railroad industry, and is analogous to the judicial branch of government in the larger political community. According to the National Mediation Board, "The function discharged by the Adjustment Board is necessary to the effective day to day observance of labor agreements, for if either party may violate the terms of such contracts with immunity, the agreements become meaningless. Such agreements are in effect codes of laws outlining the rights, privileges, and obligations of the carriers on the one hand and their employees on the other. And it is just as essential to have a judicial body to arbitrate disputes which arise under such a code of labor laws as it is to have our system of courts to dispose of controversies which arise under public laws or out of the application of private contracts."[7]

In view of this analogy, complex problems may be expected to arise in the delicate area of accommodating the constitutional powers of the federal judiciary to the proper judicial powers of the NRAB. The problems may be suggestive of the continuing adjustments of power relationships between the federal and state judicial systems inherent in the con-

engineers, firemen, hostlers, outside hostler helpers, conductors, and trainmen. Division 2 has jurisdiction over shop-craft employees. Division 3 has jurisdiction over station, tower, and telegraph employees, signalmen, clerks, freight handlers, express, station, and store employees, maintenance-of-way workers, and sleeping-car conductors, porters, maids, and dining-car employees. Division 4 has jurisdiction over marine employees and all other employees not included under the first three divisions. Each division consists of ten members, except No. 4 which has six members.

Parties may be heard in person, by counsel, or by other representatives, and the Board must give due notice of all hearings to carriers and employees involved in the disputes. If any division deadlocks and is unable to agree on an award, a referee is selected by the division or is appointed by the National Mediation Board, to sit with the division and render an award.

[7] Useful materials on the National Railroad Adjustment Board include: Lloyd K. Garrison, "The National Railroad Adjustment Board: A Unique Administrative Agency," 46 *Yale Law Journal* 567 (1937); William H. Spencer, *The National Railroad Adjustment Board,* University of Chicago Studies in Business Administration, Vol. VIII, No. 3 (1938); *Administrative Procedure in Government Agencies,* Senate Document No. 10, 77th Congress, 1st Session, Part 4 (1941); Howard S. Kaltenborn, *Governmental Adjustment of Labor Disputes* (The Foundation Press, 1943), Ch. III; Herbert R. Northrup and Mark L. Kahn, "Railroad Grievance Machinery: A Critical Analysis," 5 *Industrial and Labor Relations Review* 365 (1952); Jacob J. Kaufman, *Collective Bargaining in the Railroad Industry* (King's Crown Press, Columbia University, 1954); Wayne L. McNaughton and Joseph Lazar, *Industrial Relations and the Government* (McGraw-Hill Book Co., 1954), Ch. VI, VII; Comment, 18 *University of Chicago Law Review* 303 (1951); Note, 51 *Yale Law Journal* 567 (1942); Joseph Lazar, "The Human Sciences and Legal Institutional Development: Role and Reference Group Concepts Related to the Development of the National Railroad Adjustment Board," 31 *Notre Dame Lawyer* 414 (1956).

stitutional scheme of national and state governments. Thus, much as the Jeffersonian doctrine of local self-government was intended to strengthen the rule of law in opposition to the absolutism of some possible national tyrant, an effective system of industrial self-government may be viewed as establishing and maintaining the rule of law at the local level of the industry. In this light, it is suggested, the Supreme Court has construed the Railway Labor Act as vesting in the NRAB exclusive jurisdiction over appropriate matters. Speaking for the Court in the *Slocum* case, Mr. Justice Black declared:

> The Act thus represents a considered effort on the part of Congress to provide effective and desirable administrative remedies for adjustment of railroad-employee disputes growing out of the interpretation of existing agreements. The Adjustment Board is well equipped to exercise its congressionally imposed functions. Its members understand railroad problems and speak the railroad jargon. Long and varied experiences have added to the Board's initial qualifications. Precedents established by it, while not necessarily binding, provide opportunities for a desirable degree of uniformity in the interpretation of agreements throughout the nation's railway system. . . .
>
> We hold that the jurisdiction of the Board to adjust grievances and disputes of the type here involved is exclusive.[8]

Mr. Justice Reed dissented to the vesting of exclusive jurisdiction in the Board and the abolishing of jurisdiction in the courts. He clearly appreciated the significance of the Court's decision for the evolution of industrial self-government on the railroads, stating: "Our duty as a court does not extend to a determination of the wisdom of putting a solution of industry problems into the hands of industry agencies so far as the Constitution will permit." He would be no party with those who "may deem it desirable to weld various industries or professions into self-governing forms, completely free from judicial intervention."

The constitutional policy of self-government for the railroad industry, it seems, had become firmly established. Subsequently, the Court clarified its basic doctrine as not precluding a discharged employee from resorting to a state-recognized cause of action for wrongful discharge where the employee chose to accept the railroad's action as final and thereby gave up his employee status. The Court quoted the following language from the *Slocum* case in reaffirmation of the autonomy of the Board.

> A common-law or statutory action for wrongful discharge differs from any remedy which the Board has power to provide, and does not involve questions

[8] Slocum v. Delaware, Lackawanna & Western Railroad, 339 U.S. 239, 243–244 (1950). See also Order of Railway Conductors v. Southern Railway, 339 U.S. 255 (1950); Order of Railway Conductors v. Pitney, 326 U.S. 561 (1946); Whitehouse v. Illinois Central Railroad, 349 U.S. 366 (1955).

of future relations between the railroad and its other employees. If a court in handling such a case must consider some provision of a collective-bargaining agreement, its interpretation would of course have no binding effect on future interpretations by the Board.[9]

The rule of law, of course, requires more than the standing availability of a judicial agency. It demands that the governmental processes, and not those of self-help, be employed by contentious parties, for self-help yields settlements born of brute force rather than decisions reflecting a proper welding of right and reason. Understandably, therefore, the Supreme Court, speaking through Mr. Chief Justice Warren in the *Chicago River and Indiana Railroad* case, held that a railway labor organization cannot resort to a strike over matters pending before the Adjustment Board. Quoting Section 3 First (m) of the Act, providing, "The awards of the several divisions of the Adjustment Board . . . shall be final and binding upon both parties to the dispute," the Court declared:

> This language is unequivocal. Congress has set up a tribunal to handle minor disputes which have not been resolved by the parties themselves. Awards of this Board are "final and binding upon both parties." And either side may submit the dispute to the Board. The Brotherhood suggests that we read the Act to mean only that an Adjustment Board has been organized and that the parties are free to make use of its procedures if they wish to; but that there is no compulsion on either side to allow the Board to settle a dispute if an alternative remedy, such as resort to economic duress, seems more desirable. Such an interpretation would render meaningless those provisions in the Act which allow *one* side to submit a dispute to the Board, whose decision shall be final and binding on *both* sides. If the Brotherhood is correct, the Adjustment Board could act only if the union and the carrier were amenable to its doing so. The language of 3, First, reads otherwise and should be literally applied in the absence of a clear showing of a contrary or qualified intention of Congress.[10]

Thus, the coercive powers of the larger political community are exercised to enjoin wrongful strikes over "minor" disputes properly docketed or brought under the jurisdiction of the Adjustment Board; and the rough, frontier justice in employer-employee relations gives way to the industrial self-government scheme of ordered liberty.

It further appears that the Supreme Court construes the Railway Labor Act so as to integrate the NRAB with industrial relations mechanisms on individual railroad properties, much as national and state governmental agencies are related to regional and local governmental

[9] Transcontinental & Western Air, Inc. v. Koppal, 345 U.S. 653, 661 (1953).

[10] Brotherhood of Railroad Trainmen v. Chicago River and Indiana Railroad, 353 U.S. 30, 34–35 (1957).

bodies. As indicated earlier, the Act provides that the disputes over which the Board has jurisdiction "shall be handled *in the usual manner* up to and including the chief operating officer of the carrier designated to handle such disputes" before being referred to the Board. (Italics supplied.) Procedural codes and hearing tribunals are customarily prescribed in collective bargaining agreements or through traditional practices for the handling of disciplinary grievances on the local property. Since these procedures are viewed as an essential component of the scheme for industrial self-government, the Adjustment Board becomes the equivalent of an appellate tribunal for the review of disputes heard and decided in the industrial governmental processes. On this basis, the administrative officers of the railroads and the unions are no less bound to observe the rule of law and the constitutional commands of fair play at the critical local levels than are the officials who sit on the NRAB. All of the officers of this industrial government, from the highest to the lowest levels, are bound to function pursuant to due process of law, even as stated by Mr. Justice Miller in an earlier day and simpler society:

> No man in this country is so high that he is above the law. No officer of the law may set that law at defiance with impunity. All officers of the Government, from the highest to the lowest, are creatures of the law, and are bound to obey it. It is the only supreme power in our system of government, and every man who by accepting office participates in its functions is only the more strongly bound to submit to that supremacy, and to observe the limitations which it imposes upon the exercise of the authority which it gives.[11]

The principle of justice in employer-employee relationships, as in human relationships generally, lies embedded in the customs and collective bargaining agreements on American railroads. Even prior to 1900, collective bargaining was established on the principal railroads among train and engine service employees, and the bargaining agreements almost universally recognized the employee's right to some form of hearing or trial in disciplinary matters. In over half a century of historical development, it has become a matter of course to regard the requirement of a disciplinary hearing as calling for procedures which are fair and impartial. Accordingly, numerous collective bargaining agreements on the railroads explicitly provide for a "fair and impartial hearing" and contain specific procedural requirements pertaining to notice, right of representation, right to be present, right to present evidence, right to cross-examine, and other common ingredients of a hearing code designed to insure due process. As can be expected, numer-

[11] United States v. Lee, 106 U.S. 196, 220 (1882).

ous disputes have occurred on whether a disciplined employee has been accorded a fair hearing in the light of the facts and circumstances in his particular case and in the light of the particular collective bargaining agreement covering him. A multitude of such disputes have been decided by the First Division of the National Railroad Adjustment Board.

The First Division of this Board has been in operation for some twenty-five years and has filled more than 120 volumes with over 18,000 awards.[12] These awards are, on the whole, inadequately indexed, and many of the most significant have remained in obscurity. In these thousands of awards, silently gathering dust, may lie answers to troublesome questions common to managers and workers in industry generally. Grievance disputes involving seniority questions, for example, may be illuminated by the experience of the railroad industry. Unfortunately, not even the railroads have as yet systematically analyzed and classified the many hundreds of awards in seniority cases alone. Perhaps the industry fears the precedents of its own making and wishes to hide its handiwork; but the time must soon come when systematic treatment will be given to the industrial jurisprudence of the railroad industry. Then there undoubtedly will be feelings of pride and achievement in the building of a new branch of the common law, as well as deep inner-searching and self-examination on the practical and social wisdom of many lines of decision. Surely knowledge of the numerous interpretations of the collective bargaining agreements in the railroad industry is an essential foundation for the building of a sound industrial relations structure through the negotiatory or legislative function of management and the railroad brotherhoods.

This monograph is concerned with those awards of the First Division that relate to the interpretation and application of local-property procedural codes, explicit and implicit, written or customary, self-contained or supplemented by due process or constitutional considerations, dealing with discipline cases. How has the First Division, in concrete instances, answered the question: What is a fair and impartial hearing? It should be noted that the discussion relates only to hearings on the local-property governmental level; the question of fair hearings before the First Division itself is another subject outside the scope of this work.

As will be seen, a consistent pattern of principles is revealed by analysis of the awards, and seeming contradictions can generally be accounted for as particular applications of these principles to differing factual situations. Many of the principles of procedural due process of

[12] Award No. 18238 is the last award included in this monograph.

law formulated from the awards resemble and appear to reflect established constitutional, criminal, and administrative law patterns. These were closely and carefully considered in the writing of this study, and to some extent influenced the system of classification used. The effort here was to state and describe, or to restate, within a systematic, usable, harmonious framework, the requirements of procedural due process in discipline cases as determined by the First Division of the Adjustment Board. It may be of general interest to mention that the classification system of the original study (1953) has been fully adequate for the purposes of this revision. Awards seem to fall naturally into established patterns without strain or stretch. There appears to exist a stability and predictability here much like that of the common law. It is hoped that the study may further the important task remaining undone in this subject area: the work of evaluation, of criticism, of positive contribution toward the ideals of civilized law.

In conclusion, American political philosophy and constitutional government have supplied a dynamic model for the self-government of the railroad industry under the Railway Labor Act. The rights and dignities of the individual employee citizens in this industrial governmental system appear to be preserved and enhanced consistent with their duties of employment. Industrial autocracy on the railroads, like the outmoded divine right of kings, has been replaced by the rule of law.

> The railroad world is like a state within a state. Its population of some three million, if we include the families of workers, has its own customs and its own vocabulary, and lives according to rules of its own making.... This state within a state has enjoyed a high degree of internal peace for two generations; despite the divergent interests of its component parts, the reign of law has been firmly established.[13]

Quoting these words from Garrison, Mr. Justice Frankfurter, chief architect of the industrial governmental structure on the railroads, has declared: "The Railway Labor Act of 1934 is an expression of that 'reign of law' and provides the means of maintaining it."[14]

[13] Garrison, "The National Railroad Adjustment Board: A Unique Administrative Agency," 46 *Yale Law Journal* 567, 568–569 (1937).

[14] Elgin, Joliet & Eastern Railway v. Burley, 325 U.S. 711, 751–752 (1945).

I. General Aspects of Fair and Impartial Hearing in Discipline Cases

A. *The Collective Bargaining Agreement and Procedural Due Process of Law*

The constitutional requirements of due process of law are fundamental prerequisites which must be observed in the administration of discipline. The carrier and the collective bargaining representative have the obligation "to afford the individual employee the due process to which he was entitled under an agreement which was lawfully in effect and made for his protection."[1] As stated in Award No. 5197, "the rule providing that an employee will not be suspended or dismissed without a fair and impartial trial contemplates that the accused will be apprised of the charges preferred against him, that he will have notice of the hearing with a reasonable time to prepare his defense, that he shall have an opportunity to be present in person and by representative, that he shall have the right to produce evidence in his own behalf and the further right to cross-examine witnesses testifying against him . . . The requirements of a fair and impartial trial as herein defined 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."

An accused enjoys "the inalienable right to have the charge proven at a fair and impartial hearing as the rules imply."[2] Award No. 9561 declares that the agreement requirement of a fair and impartial hearing "puts into effect the constitutional requirement of 'due process of law,' and secures to every man his 'day in court' in advance of, and as necessary to, any judgment against him. This principle is embodied in Article 27 of the Agreement. It secures to employes under the agreement a most important and valued right, for nothing is more important than security of employment, and this may not be denied except in the manner provided in the agreement under which they work. Employes many times lose their positions through the exercise of the powers of discipline vested in management. Possessing these powers, they must be

[1] Award No. 15510.
[2] Award No. 15508.

reasonably exercised, and as a curb thereon, and as a protection to employes, bargaining agreements provide for investigation and fair hearing in all cases when an employe's right to work is at stake by reason of alleged misconduct. Article 27 of the current Agreement so provides." In similar vein, Award No. 16245 declares: "Article 31 under which claimant was tried provides: 'He will not be discharged without just cause.' And, as a matter of course, implies that he will receive a fair and impartial hearing. . . ."[3]

Award No. 12626 declares, "This Division and all carriers should exercise the utmost vigilance to insure that before such a separation occurs every precaution has been taken to insure a foolproof investigation, whatever the reading of the incidental article may be." Again, as stated in Award No. 10616, "the rule of law, which forbids one person to assume the role of prosecutor, witness, and judge, is not a technical rule. It is an incorporation by courts into this procedure of the ordinary principles of fair play which men customarily adopt in their dealings with one another."[4]

A "full investigation" contemplates that an accused employee has the right to cross-examine witnesses, to develop additional facts, to test credibility, to direct the investigation to his particular responsibility, to introduce witnesses in his own behalf, etc.[5] Award No. 15508 notes the shocking injustice to an employee which may result from failure to observe due process: ". . . abhorrent is the failure to give the accused a fair and impartial hearing when called upon to defend against charges of personal misconduct, the proven guilt of which makes him an outcast in the eyes of society as unfit for a service related to the public's interest."

A fair and impartial trial is a fundamental prerequisite for the invocation of a penalty, and when such trial or investigation "has been defective to the possible prejudice of the claimant's rights, the Division has not hesitated to set the penalty aside."[6] The policy of the Division is clear: "It is much better that a case of the most clearly desirable discipline fail for want of proof than that it rest upon such a hearing as was here attempted."[7] Where discipline is supported by evidence of rules violation "and made pursuant to due processes of agreement," the Division is reluctant to disturb the discipline.[8]

[3] To like effect are Awards Nos. 2370, 2397, 2398, 2399, 2401, 2419.
[4] Also see Awards Nos. 13006, 13007, 13008, 13354.
[5] Award No. 14469. Also see Award No. 16015.
[6] Award No. 14351.
[7] Award No. 14987.
[8] Award No. 14582.

B. *Purpose and Nature of Investigation or Hearing*

Upon railroads, "the term 'investigation' seems to be used interchangeably with the term 'hearing.' "[9] As observed in Award No. 16890, "The rule states that an engineman taken out of service will be given a 'hearing'; it later refers to an engineman 'brought to trial for an offense'; and at another point provides that witnesses may be produced at the 'investigation.' All three words apparently are used interchangeably."

The hearing is not an adversary proceeding. Its purpose is fairly and impartially to inquire into all the facts connected with the investigation so as to develop the truth, regardless of the result to either party.[10] "The purpose of the investigation rule is to protect the substantial rights of every accused employee."[11] The holding of an 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."[12] Award No. 15661 states: "An investigation is not a trial. It is an attempt to secure the facts of an occurrence so that if there was fault in the conduct of the employes it will be disclosed."

"The main purpose for an investigation is to give an accused employee the right to have an impartial, fair hearing in order to prevent being disciplined by the carrier without due cause."[13] Similarly, "The basic design of the rule is reasonable protection and preservation of the rights of the employee."[14] Award No. 14469 is to the same effect: "rules providing for charges, full investigations, opportunity to be heard, sustaining charges by proof, etc., before discipline is imposed are for the benefit of the employee. Without them and without compliance with their requirements, the employee is subject to the arbitrary action of the carrier. They are designed to prevent such action." It follows, then, that a sworn statement, on the whole, does not constitute a hearing, trial, or investigation.[15] Award No. 14062 observes that "the purpose of an investigation is to determine whether or not rules have been violated" and Award No. 13606 states that "Hearings or investigations are had for the purpose of determining the guilt or innocence of employees of the charges made against them."

Emphasis on safeguarding the interests of the employees, however,

[9] Award No. 13354.
[10] Award No. 12500.
[11] Award No. 11498. Also see Award No. 15510.
[12] Awards Nos. 5297, 10348, 14351, 14354.
[13] Award No. 15131.
[14] Award No. 16559.
[15] Award No. 16890.

includes the policy contained in the statement: "Discipline has a dual aspect, one in the nature of punishment, and the other corrective in the interest of safety."[16] Where the nature of an examination in no way exposes or tends to expose an employee to disciplinary action, such an examination is often called an "inquiry" and is not deemed to be a "hearing" or "investigation" within the application of the investigation rule.[17] Where the carrier has an operating rule not part of the collective bargaining agreement, "It is no part of the discipline procedure prescribed by the agreement and obviously cannot modify or affect the procedure agreed upon by the parties."[18] An investigation or test of a signal or apparatus, however, whose functioning is in question, is subject to the fundamental requirements of fairness and impartiality where such investigation or test may affect the determination of discipline.[19]

A court trial is not deemed to be the same as a disciplinary investigation: a district court trial "involved different charges and different requirements of proof. That was concerned primarily with the personal guilt of claimant; this was concerned primarily with the safety of the public, the employes and the property of the carrier."[20]

C. *Burden on Parties for Substantial Compliance*

The obligation rests upon both the carrier and the employee faithfully to observe agreements.[21] Moreover, "it is to the best interest of both parties to comply with such an important rule as the Investigation Rule in every respect, but when the employees and their representatives are aware that the rule is not generally being complied with it is their obligation to notify the carrier of their desire to have the rule complied with and endeavor to reach a definite understanding as to the proper application of the rule for the holding of investigations."[22] A local agreement on the property in conflict with the basic schedule of rules may be, depending on circumstances, without legal effect.[23]

The agreement rule must be complied with substantially and in good faith before the penalties it provides may be exacted of the employee, and the burden of care that the spirit of the rule and justice to the employee be not violated in the conduct of the investigation is placed

[16] Award No. 2216. Also see Awards Nos. 12275, 13054, 13573, 13633, 14890.
[17] Awards Nos. 12275, 13633.
[18] Award No. 16711.
[19] Award No. 15100.
[20] Award No. 17158.
[21] Award No. 5555.
[22] Award No. 1130.
[23] Award No. 15176.

on the carrier.[24] This special burden on the carrier is explained: "This Board has held it is the prerogative of management to promulgate rules and to enforce them. The burden is on carrier to see that the hearing is conducted in a fair and impartial manner and that its decisions are reached in a just and reasonable manner."[25]

D. *Technical Criminal Law Rules Not Necessarily Applicable*

An investigation "is not a criminal proceeding" and "strict rules of evidence do not apply." The requirement is that the investigation "be fair and impartial."[26] Award No. 16912 observes: "It is not the purpose of this or any discipline rule to require that the parties conduct hearings and investigations with the finesse of lawyers and judges." But basic requirements of fairness must be accorded: "The rules governing the assessment of discipline by a carrier should not be overly technical or restrictive and should by no means in matters of formal requirements approximate those of a court of law. But the basic requirements which have been written into the rules must be adhered to."[27] Again, "Management is not held to the high level of court procedure in developing facts and passing judgment on the conduct of its employees. Neither, however, can the hearing descend to the level of mere formality or device through which management channels either a preconceived judgment or an arbitrary decision induced by the expediency of fixing blame at some point, where blame appears to have existed, and fixing it seems necessary."[28]

"Discipline cases are not like criminal cases" and the court rules do not necessarily apply.[29] As stated in Award No. 12500, "The objection to the introduction of this statement was on the ground that the witness should have been present and thereby afforded an opportunity for cross-examination. In a court of law, such an objection would have been properly sustained and the offered statement rejected. But this proceeding is not in a court of law and the strict rules of evidence are not always observed." Award No. 13606 points out: "In this respect it must be borne in mind that the conduct of a hearing in a disciplinary proceeding does not require an adherence to all the attributes of a trial of a criminal proceedings in the courts. Prior to the advent of collective

[24] Awards Nos. 8260, 8261. Also see Awards Nos. 10372, 12287, 12772, 16890.
[25] Award No. 16707.
[26] Award No. 18119.
[27] Award No. 16890.
[28] Award No. 16699.
[29] Award No. 13140.

agreements management could hire and fire, or otherwise discipline employes, without reason and without cause. This prerogative has been limited by contract and it is the enforcement of these limiting contractual provisions with which we are here concerned. In other words, the carrier must show that it acted upon evidence that warranted the application of discipline, or, stated inversely, it must show that it did not act unreasonably or arbitrarily. The carrier's trial officer represents it in making this determination. It is a matter of contract compliance in which the trial officer interprets the agreement in the light of the evidence."

E. *Hearing to Precede Administration of Discipline*

Generally, for a proper compliance with the investigation rule, "it is necessary that such investigation be had prior to the administration of discipline."[30] Award No. 14062 states: "As the purpose of an investigation is to determine whether or not rules have been violated and then punishment administered, it is a condition precedent that the investigation precede the punishment (unless such cannot be avoided) according to the rule."[31] If discipline is to be administered, it must be grounded on a proper investigation in which the disciplined individual participated and not on some earlier investigation involving other crew members.[32] Award No. 9561 states: "Section B of Article 27 is specific as to what shall be done where an employee is held off duty, and is afterwards exonerated. [The employee] has not been exonerated, but he has not been accorded the hearing in which he might have been able to establish facts which would have required his exoneration. That it is improbable that he could have done so is immaterial; he should have been given the opportunity to try."[33]

If an employee is restored to service as a result of an investigation, he may not later, without further investigation and for the same offense, be discharged.[34]

Where, under a peculiar contract provision not usually found, the burden of requesting a hearing or investigation rests on the employees, "it would be proper for the carrier to request each of the interested parties to state in writing whether or not an investigation was desired"

[30] Awards Nos. 2397, 2398, 2401, 14798, 15159, 15406, 17021, 17233.

[31] Also see Awards Nos. 13573, 13722.

[32] Award No. 14687.

[33] Also see Awards Nos. 465, 775, 768, 1058, 1096, 2372, 2416, 2610, 2611, 4485, 5166, 5555, 7914, 8980, 9561, 11586, 11943, 12016, 13468, 13501, 13573, 14345, 14505, 14506, 14507, 15159, 15545, 15655, 16015, 16482, 16930.

[34] Award No. 14690.

and "if this were done at or prior to the preliminary inquiry it would have a tendency to lessen the complaints that no investigation was held or that the matter was prejudged."[35] In some cases, the investigation rule differs from the usual ones in that a hearing is required subsequent to the disciplinary action. Thus, Award No. 6485 notes: "The discipline rule in this schedule differs from the usual ones in that a hearing is required, not before suspension or discharge, but upon a grievance complaint filed by the employee 'within five days from time he is taken out of service.' "[36] The general requirement, however, is typified by the language of Award No. 15545: "It appears that the claimant was discharged on June 18, 1950 prior to the holding of an investigation as required by Article 18 of the Engineers' Agreement. Such imposition of discipline is clearly prohibited by that article and cannot be sustained."

F. *Objections Where Hearing Void*

Where an employee is disciplined without a proper investigation, such purported discipline is a nullity, of no force and effect, and a failure to appeal within the stipulated period for appeal cannot validate the void discipline. Thus, Award No. 5166 states, "the purported dismissal was of no force and effect and a failure to appeal cannot validate the void dismissal."[37] Award No. 1055 states: "The claimant in this case was dismissed from service without having been charged with an offense and without a hearing. His failure to immediately protest his dismissal cannot condone its impropriety." Also, Award No. 9561 holds: "It cannot be that what occurred there was the fair and impartial hearing contemplated by the agreement. It was, in fact, no hearing and the awards of this Division which hold that objections to methods employed in investigations and hearings must, if later relied on, have been made at the time used, do not apply to cases where there is a total absence of any hearing or proper investigation."

G. *Waiver of Right to Fair and Impartial Hearing*

Given the proper circumstances, the right to an investigation may be waived by an employee.[38] Thus, Award No. 14042 carefully circumscribes the conditions under which such a fundamental right may be considered waived, stating: "The right to an investigation should, of

[35] Award No. 16108.
[36] Also see Awards Nos. 1122, 11943, 12976, 17149.
[37] Also see Awards Nos. 6272, 12380.
[38] Award No. 16108. Also see Award No. 18118.

course, be carefully guarded, and conclusive action taken in the absence of an investigation, unless such absence is directly caused by the employe himself, should not be condoned. However, as is the case of numerous other sacred rights, given the proper circumstances, the right to an investigation cannot but be considered to have been waived. Such is the case here. In such cases, assuming the action of the carrier was otherwise warranted by just cause, the absence of an investigation does not invalidate the carrier's decision."

Simple failure to appear at investigation is not deemed a waiver where justifiable request for postponement has been made.[39] The employee's failure to act in good faith, it must be observed, may place his right to a hearing in jeopardy. As stated in Award No. 15509, "All rules are for the aid, guidance, and protection of responsible persons. The right of the employee to be heard before being disciplined is a personal right which he can waive by action, inaction, or failure to act in good faith. He cannot play fast and loose with the rule and expect its strict observance by others who too are accountable for failure to act promptly, justly, and in good faith."

Where an employee has waived his right to an investigation, but the investigation is held with the employee attending, it is proper to look into the basic fairness with which the investigation was conducted.[40] It should be clearly recognized that a "trial waiver" is not to be construed as a confession of guilt.[41] When there is the waiving of objections of a technical nature to the conduct of the hearing, such a waiving "was never meant to include the waiving of claimant's positive fundamental right in being afforded a fair and impartial trial."[42] The Board will make a close and searching examination, if the waiver is to be deemed valid, to see that "there is no evidence that the signing of the waiver was other than an uninhibited free choice on the part of the claimant" and that the claimant "was not under duress or pressure in making such decision."[43]

Where an employee waives his right to an investigation, the waiver, to be effective, must be had within the period stipulated for the holding of investigations.[44] In proper circumstances, an employee may waive his right to an investigation prior to formal notice of investigation: "No unfair advantage was taken of claimant; his admission was vol-

[39] Award No. 14435.
[40] Award No. 15240.
[41] Award No. 14348.
[42] Award No. 17028.
[43] Award No. 14353.
[44] Award No. 4667. Also see Award No. 10616.

untary, his signing of written statement was voluntary, and the avoidance of further investigation and publicity was to his benefit."[45]

The specific and positive requirements of the investigation rule are not construed to be waived by an employee's admission that he has had a fair and impartial trial. Award No. 11929 strictly construes the employee's admission, holding: "The Carrier in its written notice that the investigation would be held did not charge the claimant with any offense as required by Rule 131. The claimant may have suspected—indeed, he may have known—that he would be charged with some fault in connection with the matter under investigation. But the written notice did not charge him with any offense. The failure of the Carrier to comply with this fundamental requirement was not cured by the claimant's answer to the Carrier's question at the close of the investigation as to whether he had had a fair and impartial hearing. While an affirmative answer to this question is evidence that the hearing was conducted in a fair and impartial manner, it cannot be construed to be a waiver of specific and positive requirements of the investigation rule. (See Award No. 5197.)"

Further force to this holding is provided by Award No. 14469, which declares: "The Carrier contends that the claimant waived the requirements of the rule. Here claimant was asked at the beginning of the investigation if he had received proper notice to appear and was ready to proceed with the investigation. He replied that he had and was. At the conclusion he was asked if he considered that the investigation had been held in a fair and impartial manner and in accordance with the rules. He answered in the affirmative. Similar questions were asked of the other employees. This contention is answered in Award 11929 where similar questions were asked at the beginning and close of the investigation. It was there held that such replies cannot be construed to be a waiver of specific and positive requirements of the investigation rule. The questions relate to the investigation being held, not to the absence of charges against the claimant. At the time the questions were asked and answered, claimant had not been advised as provided by the rule that he was being or was to be charged with an offense. He cannot be held to have waived charges when none were made, for it is the carrier's position here that he is not to be notified of the offense charged until the letter of discipline issues. We agree with Award 11929 on the matter of waiver."[46]

[45] Award No. 17152.

[46] Also see Award No. 7183.

Although investigation may be waived in writing, unwarranted and unjust discipline may be set aside by the Board.[47]

H. *Hearing Right Where Employment Application Disapproved; Fraudulent Applications*

"The investigation rule has no application to one who has never become an accepted employee of the carrier."[48] Job applicants are consistently refused any right under the rules pertaining to investigations and discharges. Award No. 12770 states: "The Carrier has the right to select its employees unless it therein contravenes some law that pertains thereto. This man can claim no rights under the agreement that would require an investigation or hearing before the disapproval of the application and the refusal of employment to the claimant.... This Division has consistently refused to grant job applicants any right under the rules pertaining to investigations and discharges." Similarly, Award No. 14989 observes: "Claimants have never been in the 'service' of the carrier within the meaning of the schedule rules... and an investigation was not in such cases required.... The rejection of the application is at the election of the carrier and does not call for a good and sufficient reason therefor, or, in fact, any reason at all. Claimants were serving a probationary period prior to induction into service proper and the rules they rely upon do not apply as in discipline. No discipline was here involved, and neither claimant was discharged."

In the absence of any time requirement for the disapproval of an application, after the employee has commenced service, the First Division construes the agreement rules as contemplating that such action will be taken within a reasonable time, and 100 days has been held to be a reasonable period.[49] However, should the carrier exceed a reasonable period or agreed-upon time limit for approval of a new employee, the carrier would then have the obligation to accord the employee a proper hearing before administering any discipline to him.[50] The time limit rule for approval of applications, however, applies to applicants for jobs and not to one who was employed as and under the name of another.[51]

What the application forms shall consist of, or how many there shall

[47] Award No. 15236.

[48] Award No. 5256. Also see Awards Nos. 3327, 4120, 6175, 6699, 9305, 10196, 11234, 13126, 15497, 16678.

[49] Awards Nos. 3099, 6175, 6699, 9305, 10775, 11234, 12029, 12161, 15247.

[50] Awards Nos. 66, 15506.

[51] Award No. 16239.

be, where law and agreement are silent, "is a matter for the employer to determine."[52]

Although the collective bargaining agreement takes precedence over the application form,[53] a job applicant who is guilty of wilfully making false statements regarding a material matter is not protected.[54] Where fraud is involved, the job applicant is not favored. Award No. 8302 declares: "Claimant's admitted fraud wipes out his alleged status as an employe. See Minneapolis, St. Paul and Sault Ste. Marie Railway Company versus Rock, 279 U.S. 410, 73 L. Ed. 766, 49 S. Ct. 363. Docket No. 728 (Award No. 66) does not indicate that this case was called to the Board's attention. The railroads are affected with a public interest. Sec. 15a of the Interstate Commerce Act requires the Commission to give due consideration to 'honest' management. This must of necessity include the employes." Similarly, Award No. 15506 states: "... railroad employments being such as the public has an interest in, if gained by fraudulent means, are abhorrent to public policy and the employment contract is void and not voidable. Claimant, having practiced fraud on the carrier never did enjoy full employment status, but he was entitled by rule of agreement to have the fraud proven and established at a 'trial.' Having enjoyed that right, he has no further cause to complain."[55] Nevertheless, the carrier may waive its right to cancel an applicant's contract containing untrue statements.[56]

I. *Right to Fair and Impartial Hearing—Resignations, Absenteeism, Physical Disability*

Where there is a voluntary withdrawal or separation from the service by the worker, his right to a fair and impartial hearing is terminated and the carrier may remove him from its roll of employees without a hearing.[57] The employee is consistently denied the right to a hearing where he of his own free will and accord, voluntarily, and without duress resigns from the service.[58]

Where the evidence clearly establishes a voluntary termination of the employment relationship by the employee and there is no question concerning any rules violation by the employee, the general holding is that there is no right to a hearing. Thus, in Award No. 18147, the Division declared: "Claimant contends he was discharged from the

[52] Award No. 12161.
[53] Award No. 13127.
[54] Awards Nos. 8792, 12159, 15506, 15570, 16239, 16747, 17162.
[55] Also see Award No. 16239.
[56] Awards Nos. 12501, 17162.
[57] Awards Nos. 12876, 13054, 16730, 17353, 17526.
[58] Awards Nos. 6316, 10803, 11635, 14043, 17548.

service of carrier without an investigation. The question for our consideration is: Was he entitled to an investigation? The answer is in the negative. Article 38 cited by petitioner does not apply because claimant was not disciplined but voluntarily gave up his seniority with respondent carrier to work in the service of another carrier." On the other hand, as in Award No. 13501, where question existed over possible violation of the leave-of-absence rule by a disabled employee who engaged in outside business activity, the employee was entitled to a fair and impartial hearing. Similarly, where there was question as to overstaying leave of absence and determining whether such conduct was tantamount to resignation, the employee had the right to a hearing.[59]

The carrier is within its rights in denying to a claimant the privilege of withdrawing his resignation.[60] However, as held in Award No. 5269, "the acceptance of an undated resignation by a carrier from an employe with the understanding that he shall continue in its employ subject to this right of the carrier to accept the resignation at any time, is a circumvention of the investigation rule and a dismissal procured in this indirect manner will ordinarily not be recognized."[61]

A physically disabled or physically unfit employee, like a physically able and fit employee, may voluntarily choose to terminate his employment relationship, and if he chooses to resign, he will no longer be entitled to a hearing. Thus, as held in Award No. 16410, where the language of a release given by an injured employee in settlement of his claim against the carrier is sufficiently broad so as to be deemed a termination of employment and a relinquishment of seniority rights, the discipline rule is inapplicable.[62] In similar vein is Award No. 18120: "If in his settlement with carrier claimant had been paid his damage from total and permanent loss of employment by carrier and carrier was released from obligation therefor, claimant could not rightfully demand return to the service for loss of which he had been paid and from obligations for which he had signed full release.... Since this was not a discipline case and there was no dispute as to the facts but only as to the meaning and intent of the settlement and release no investigation was required."[63]

The carrier is under the legal duty to avoid the dangers incident to using a known physically unfit and unsafe employee. The withholding

[59] Award No. 12381. Also see Awards Nos. 11586, 13606, 14498, 14558, 15510, 15512, 15568, 15891, 16569, 16708.

[60] Award No. 10196.

[61] Also see Award No. 16824.

[62] Also see Awards Nos. 3322, 8266, 11640, 14262.

[63] Also see Awards Nos. 6479, 15543.

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.[64] But the carrier's unilateral determination of the employee's physical fitness is not controlling. A neutral doctor, or a medical arbitration board, may be required to make a final determination of the employee's physical fitness.[65] Once a proper medical finding of physical fitness has been made, the discipline rule becomes applicable in safeguarding the employee's rights to a fair and impartial hearing. Thus, Award No. 17009 declares: "In our view, carrier's refusal to permit claimant to work at the job to which he was entitled amounted to an arbitrary discharge from service once the joint medical board conducted its examination and made the findings above described. The discipline rule is therefore applicable. . . ."[66] Accordingly, "a refusal to reinstate when claimant is entitled thereto is the same as a wrongful discharge and will be considered as such" under the governing rule.[67] A clear-cut court determination of permanent physical disability, coupled with adjudication of damages for physical complete disability, asked for by the injured employee who voluntarily accepts payment for his permanent injuries, resembles a situation combining elements of both medical determination of unfitness and voluntary release and resignation. In such a case, the employee is not entitled to a hearing under the discipline rule.[68] Of course, where an employee's damage suit against the carrier is not deemed to constitute an adjudication of permanent disability, and the carrier arbitrarily refuses to reinstate the employee who is physically fit, the discipline rule is applicable.[69]

J. *Disciplinary Action by Foreign Carrier*

The right of an employee to a fair and impartial hearing under the provisions of the agreement between the carrier employing him and the accredited representatives of its employees is protected against infringement by a foreign carrier temporarily in the position of employer. Award No. 4731 observes, "In view of the operating contract between the two roads it is considered that insofar as the Denver and Salt Lake undertook to supervise, including discipline, D. & R. G. W. employees it assumed the status of employer of them, at least to the extent that

[64] Awards Nos. 15765, 17018.

[65] Award No. 16340.

[66] Also see Award No. 17157.

[67] Award No. 15655. Also see Awards Nos. 17355, 17454, 17459, 17500.

[68] Awards Nos. 15543, 16819, 16820, 16821, 16849, 16932.

[69] Award No. 16911. Also see Awards Nos. 318, 536, 1096, 1110, 3321, 3322, 3323, 4931, 5166, 5182, 5249, 5299, 5468, 5551, 6222, 6279, 6479, 8265, 8300, 10712, 11501, 12016, 12050, 12882, 13605, 13632, 14281, 14505, 14506, 14507, 15510, 15543, 15888, 16482, 16819, 16820, 16821, 17645.

it was bound to follow the D. &. R. G. W. schedules in according these men the right to investigation before infringement upon their seniority."[70]

Where the foreign carrier and the employing carrier jointly conduct the hearing in a fair and impartial manner, and in accordance with the schedule of the employing carrier, this does not infringe the rights of the employee.[71] Similarly, it is held: "Further, discipline of employes must be assessed in accordance with the agreement with them. The agreement here requires hearing before a proper officer of the carrier and is not complied with by hearing before an officer of any other Company. No joint hearing was attempted. Therefore the notation of discipline should be expunged."[72] If a foreign carrier wishes to impose discipline, it should do so of its own accord and volition, after an investigation under its rules, and not simply in compliance with the request of the employing carrier which previously conducted a hearing.[73]

K. *Effect of Employee's Admission of Rules Violation on Right to Hearing*

A full investigation should be held although the employee admits the rules violation. Award No. 11364 states: "The employes say that there was no full investigation, and that all interested parties were not notified to be present. There was no full investigation under the rule, and this the carrier does not deny. It contends that a full investigation was not required since the violation was admitted.... The findings with regard to this must be against the carrier for at least one reason. It is true that the carrier considered the violation which was admitted sufficient, and it may be that in point of fact it was, to justify the penalty imposed. On the other hand maybe it was not. But it cannot be said with any degree of certainty on this record that all of the facts pertinent to a determination of that question were disclosed by the partial investigation or the admission of violation, or both.... In this connection, it may well be said that the carrier's is not the last word on the question of suspension. The last word under the processes of the Railway Labor Act is the word of this Division. The Division has the right to review the action of the carrier for at least the purpose of determining the question of whether or not the Carrier acted without warrant, or unreasonably or arbitrarily. This Division could not determine this question intelligently in the absence of a record of full investigation."

[70] Also see Awards Nos. 5024, 5221, 9176, 9177, 9517, 14588.
[71] Award No. 11843.
[72] Award No. 14497.
[73] Award No. 12890.

II. Placing Charges and Setting Date of Hearing

A. *Preliminary Inquiry to Determine Whether or Not Charges Shall Be Placed*

Where a preliminary inquiry is conducted by the carrier to determine whether or not it shall place charges against an employee, the carrier may not regard the information developed as constituting final "conclusions," and may not require employees in discipline cases to make separate, written statements, without knowledge of what fellow employees have said.[1] Evidence obtained at an earlier investigation involving other crew members may not properly be the basis for administering discipline following a later investigation.[2] Where statements taken at a preliminary investigation are not introduced into the formal hearing and no prejudice is established to any right of the accused, the preliminary investigation is not, in itself, improper.[3] A prehearing statement made by an accused, may, however, be introduced into a formal investigation when again accepted by the accused as correct and when no objection is raised as to the propriety of introducing the written statement.[4]

B. *Placing of Charges by Fellow Employees*

Agreement rules may provide for fellow employees placing charges against an accused.[5] Where the agreement requires that "All complaints made by one (1) employe against another employe must be in writing. Verbal complaints will not be entertained," and the rule is violated by the carrier, such action "vitiates the proceedings and the discipline imposed."[6] If charges are placed against one employee by a fellow employee under such a rule as just quoted, the charges are required to be in writing.[7] It is not necessary, however, in order to comply with

[1] Awards Nos. 5555, 8301, 12379.
[2] Award No. 14687.
[3] Award No. 15905. Also see Award No. 16124.
[4] Awards Nos. 16408, 16409.
[5] Award No. 13574.
[6] Award No. 16706. Also see Awards Nos. 10871, 11879, 11880, 11909, 16266.
[7] Award No. 9561.

such a rule, "that a written charge be made by a witness to the incident giving rise to the discipline. It was the carrier acting through its officials and not the foreman who initiated the charge in the proceedings against the claimant."[8] Prejudice, however, may be deemed to exist where there is "refusal to permit the employee or his representative to see written statements of his accusers."[9]

C. *Date of Hearing—General*

"The time for holding these investigations is under the control of the carrier. The carrier is the moving party."[10] "The hearing is conducted by and is under the control of the carrier."[11] "It is the duty of the carrier, not the accused, to set the time for investigation."[12] Nevertheless, the carrier must exercise this power judiciously and in conformity with the requirements of the collective bargaining agreement.

Where an employee is prohibited by action of the state from attending his investigation, the carrier should postpone the investigation. Award No. 1120 states: "The Carrier having been acquainted with the fact that [the accused employee] had been removed from the Carrier's service by the State of Louisiana, which prohibited his attending the investigation called for September 19, 1934, it should have granted the request for postponement of the investigation until his guilt or innocence of the crime for which he was charged with having committed had been adjudicated by the courts of law of the State."

Also, where an employee is seriously ill and the carrier is made aware of this fact, the investigation should be postponed.[13] It is deemed prejudicial to hold an investigation while the employee has a suit for damages against the carrier pending. Award No. 11501 states: "The investigation of Yardman . . . should not have been held while his suit against the Carrier for damages for personal injuries was pending. His rights appear to have been prejudiced by failure to appear at said proceedings, but they undoubtedly would have been adversely affected had he undertaken to present any defense at that time. Under the circumstances a fair and impartial hearing, such as is contemplated by the Investigation Rule, was not and could not have been held." Where, however, the carrier postpones the investigation on being notified that the employee is physically unable to attend, the employee has

[8] Award No. 13846.
[9] Award No. 17149.
[10] Award No. 7064.
[11] Awards Nos. 5248, 5297, 8260, 14965, 15159.
[12] Award No. 15406.
[13] Award No. 12380.

the duty, within a reasonable time, to inform the carrier when he may be able to attend the investigation.[14] The employee has the right to enter a special appearance for the purpose of protesting the date of investigation.[15]

D. *Date of Hearing—Statute of Limitations*

Investigation rules calling for hearings within a specified period from date of the alleged offense, or from date of notice of hearing, and containing words of flexibility, such as "ordinarily," "if possible," "if practicable," "if convenient," impose a duty upon the carrier to hold the hearing within the period of the statute of limitations or to show valid explanation for any delay beyond the specified period.[16] Where a rule calls for a hearing within five days after charges are preferred, charges are deemed to be preferred "when they are mailed" and not when the decision to prefer charges is made in a carrier official's mind, nor when they are dictated, transcribed, or dated.[17]

A "valid" reason for delay may be found "from the nature of" the complex facts and circumstances in the case. Thus, hearings may be held beyond the prescribed time because of the nature or seriousness of the violations, which required additional time for investigation. In other words, the reason for not holding the hearings within the prescribed period must be inherent in, connected with, and flowing out of the facts and circumstances of the particular case. In this view, an absence of the General Manager, on vacation, was a "self-imposed" reason and not a valid justification for delay.[18] Illness of the employee offers a valid reason for delay.[19]

Where a specific investigation rule calls for hearings within seven days, if possible, and for promptly advising employees of decision, such a rule "is of substance both in requiring investigation while witnesses are available and memories clear and in keeping employees free from fear and suspense." Accordingly, in the event of delay, the carrier has the burden of showing impossibility of earlier action.[20] Where the carrier has a plausible explanation for delay, and there was clearly no prejudice to the employee because of the delay, the Division may reject

[14] Awards Nos. 5217, 10459.
[15] Award No. 13574.
[16] Awards Nos. 7064, 7464, 12379, 14014, 14052, 14551, 14552, 14555, 14556, 14765, 14890, 15406, 15565, 15566, 15574, 15579, 15661, 16007, 17911.
[17] Award No. 16912. Also see Award No. 16366.
[18] Award No. 16299.
[19] Awards Nos. 12912, 15365.
[20] Award No. 14492.

a technical insistence on strict compliance with the time rule.[21] It should be noted, however, that where an investigation rule expressly stipulates that "investigations shall be held" within a specified number of days, the rule is mandatory in nature and "should be literally complied with," and failure to hold the investigation within the specified period results in the investigation being "untimely and, to say the least, voidable."[22] Of course, where a valid continuance is agreed to and there has been no showing of prejudice to the accused, objection as to time limit for holding the hearing is without merit.[23] Any waiver of the time limit, however, must be clearly established.[24]

E. *Place of Hearing*

The hearing should be conducted at such a place as will not be prejudicial to the interests of the accused.[25]

[21] Awards Nos. 15574, 16785, 17369.
[22] Award No. 15902.
[23] Award No. 16706.
[24] Award No. 15406.
[25] Award No. 16411.

III. Notice

A. *Notice—A Fundamental Right*

The First Division has consistently held that a person charged with an offense is entitled to know the nature of the charge against him in advance of the hearing. Without this knowledge, the Division has held that he can make no defense, and the failure to afford the right is more than an irregularity in practice, it is a vital defect. This principle is not a technicality, but rests on the plainest principles of justice and fair play; it puts into effect the constitutional requirement of "due process of law," and secures to every man his "day in court" in advance of, and as necessary to, any judgment against him.[1]

Award No. 8261 states: "The rule here involved, Article 31, is one that protects the substantive rights of the employes under their agreements with the carrier. It must be complied with substantially and in good faith before the penalties it provides may be exacted of the employe. The employe was discharged from the service of the carrier in violation of his rights under the rule in several particulars.... The rule provides certain requirements that must be met in the conduct of the investigation.... First 'the accused shall be duly apprised within ten days after knowledge of the occurrence, the nature of the charge or charges that are to be brought against him.' This calls for a clear statement of the charges that are to be investigated to be made to the employe so that he may know what he and his representative (provided for in the rule) must be prepared to admit, deny, or explain. It should be so worded that the employe may know that an investigation under the rule is to be had. A notice to 'see me in regard to remittances of cash fares,' a 'talk' with the employe ... or a request over the telephone that the employe 'come to the office in connection' with a complaint is not a substantial compliance with a material element of the rule. The requirement of the rule as to apprising the employe of the nature of the charge or charges to be investigated was not met in any of the three matters investigated."[2]

Award No. 14469 declares: "The Carrier contends further that the

[1] Awards Nos. 5197, 9561.

[2] Also see Awards Nos. 1055, 1096, 2157, 2370, 2397, 2398, 2399, 2400, 2401, 2419, 8260, 10131, 11601, 11929, 13501, 13506, 13606, 13607, 13983, 14190, 14490, 17305.

claimant in any event was not prejudiced. As pointed out herein, he was not granted a fundamental requirement of the rule; because he was not charged, he was not in a position to take advantage of the rights that flow to an accused employee; and he has had discipline imposed in violation of the rule. These things constitute prejudice."

B. *Adequacy of Charge—as to Persons*

Where the notice is silent as to the persons accused, it is defective. It should be so worded as to put named persons on defense. "The only written notice was one directed to the entire crew of five men ordering them to report 'for investigation in connection with alleged violation of Rule G.' It was absolutely silent as to the persons accused, and if it constituted any charge at all, it must have been against all five persons named, of which there is no contention. Certainly the other three employees named are not to be considered as having been charged with a violation of Rule G, and if not, neither were the two claimants. These circumstances nullify the action taken and the penalty imposed."[3] In the absence of prejudice to an employee, however, common charges may be brought against all the members of a crew.[4] Where the very nature of an alleged violation applies to only certain persons and not to a crew or group of persons, the fish-net technique of common charges against the crew or group would be improper.[5]

C. *Adequacy of Charge—Time and Place of Hearing*

The time and place of the hearing should be clearly brought to the attention of the person charged.[6] Where the time of the investigation is changed, such notice should be given. Award No. 13292 observes: "Furthermore there is little or no excuse shown for failure to give notice of the change of time of the investigation." The carrier, of course, should not impose undue burden in the time and place of investigation.[7]

D. *Adequacy of Charge—as to Specificity of Offense and Rules Violation*

Where the investigation rule requires that charges shall be specific, and the carrier has placed specific charges against the employee, he is not subject to discipline on being found guilty of behavior other than that covered by the specific charge made. Award No. 13499 states:

[3] Award No. 6329. Also see Awards Nos. 6482, 14469, 15661, 16699.
[4] Award No. 17643.
[5] Award No. 6329.
[6] Awards Nos. 13140, 13207.
[7] Award No. 14490.

"Carrier is required to make whatever charges it has against a fireman specific. When it does then it must produce evidence to show that he is guilty of the specific charges made in order to sustain a finding of guilt. To establish that he is guilty of some charge other than that which has been made against him will not sustain a finding that he is guilty of the specific charge made."[8]

If a charge brought against an employee is to be deemed "specific," as required by the investigation rule, it must at least apprise the accused "of the time, place, and nature of the alleged offense and sufficiently put him on notice that he was charged with responsibility."[9] Award No. 17909 observes: "Petitioner contends that claimant was not properly notified of the investigation. The rule requires that for any offense the charge shall be specific. Claimant was charged with laying off July 30th without permission, and also charged with being absent without permission July 31st and August 1st. Violation of Operating Rule Q was not charged as such, but being absent without permission constituted violation of Rule Q. The notice was sufficient in content." A defective charge given to an accused not only failed "to specify the nature of an offense, it failed to give notice that claimants were charged with any offense whatever."[10]

It is improper to discipline an employee on a ground not covered by the notice where material discrepancy exists.[11] "The failure to make an affirmative finding" on a specific charge "is tantamount to an exoneration of claimant with respect thereto" and imposition of discipline in respect thereto is improper.[12] Where more than one specific charge is brought against an employee, "the function of the Division is to ascertain whether one or more of the claimed infractions has been sufficiently sustained and if so, whether the character of the infraction or infractions was sufficient to justify" the discipline.[13] The Division has observed that "while it is the better practice to make charges definite and certain, there is no prejudicial error in imposing discipline for an included and lesser offense, where the penalty is not manifestly unjust and has substantial support in the record." Extreme care, however, must be exercised to safeguard the fairness of the investigation against confusing a lesser offense, which is an essential element of the offense charged, with a different offense, where the employee is not properly

[8] Also see Awards Nos. 13264, 14491, 14494, 15465, 15470, 16170, 17028.
[9] Award No. 16890.
[10] Award No. 16699.
[11] Awards Nos. 11120, 16751.
[12] Award No. 14865.
[13] Award No. 16596.

apprised of the charge against him in advance of the hearing.[14] It is fundamental error to base a severe discipline on insubstantial charges when more serious charges, such as Rule G violation, are without sufficient support.[15] But it is important to note that where the findings resulting from an investigation "involve a lesser offense than the one charged, but one which constitutes an essential element of the offense as charged," discipline which is not unreasonable may be imposed, based on the findings.[16]

The charge against an employee should be sufficient to inform him that he is to be held responsible for an alleged offense, even in the absence of any rule requirement that the charge be specific. Award No. 13633 describes an insufficient charge: "The chronology is significant. The accident happened at 1:15 A.M., August 21, 1947. The same day notice was sent to the claimant of an investigation to be held the next afternoon at 2:30 P.M. It was for hearing on the following matter—'relative to engine derailment 701 Pittsburgh Yard, 1:15 A.M., August 21.' It is doubtful if this was sufficient to inform the claimant that he was to be held responsible for the accident, rather it would appear to have been for the purpose of inquiry."[17] Where the charges include "previous unsatisfactory record," and past infractions are considered solely to determine extent of discipline to be applied and not as an independent basis for rendering discipline, such a charge, while inviting possible controversy and question, "is not fatally defective."[18]

Where an investigation rule requires that specific charges be brought, such a rule is reasonably construed so as to afford the employee adequate protection; the rule is not construed so as to make impossible or unduly difficult the holding of a proper investigation. Award No. 12157 notes: "The facts of record show that claimant was given specific information as to what was being investigated, hence the contention must be rejected that he received no specific charge."[19] Complaint by the employee that the charge was not specific must be made in due time. Award No. 6482 states: "There is no contention that the usual method of conducting the investigation was not allowed, and the complaint that the charge was not specific, would seem under the authorities to have come too late." If the employee has been deprived of his fundamental right of notice, however, this is another matter.

[14] Award No. 15152.
[15] Award No. 14691.
[16] Award No. 14413.
[17] Also see Awards Nos. 11726, 11826, 14469, 14470, 14471, 14472, 14473, 14890, 15370, 15903, 16698, 16699, 16808.
[18] Award No. 14695.
[19] Also see Awards Nos. 12160, 13846, 14238.

The charges against an employee must be broad enough to include the cause for which he was dismissed and sufficiently specific to acquaint the employee of the matters to be investigated.[20] The charges preferred must inform the employee of the acts and conduct complained of, and the time and place of their occurrence. Upon trial, where the investigation rule does not require precise charges, the accused may be disciplined for any rule violations disclosed by the investigation. Award No. 5253, the leading award on this point, reads: "Employe contends he was charged with violating Rule 846 and dismissed for violating Rules 846 and 99, and that this is a non-compliance with the investigation rule. There is no merit in this contention. The charges preferred informed the employe 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."[21] But this does not open the door to indiscriminate fishing expeditions. As stated in Award No. 16707, where a charge was "meaningless and in no way specific" it was improper for the hearing officer to overrule the protest of the employee and say in substance that the evidence in support thereof would be brought out as the hearing progressed; this was acting "in an unjust, unfair, and unreasonable manner" and the employee "was denied a fair and impartial hearing."

E. *Notice—Written or Not*

Where an investigation rule provides that notice shall be in writing, failure of the carrier to comply with this requirement renders the discipline proceedings void. In Award No. 11879 the First Division observed that the failure of the carrier to give written notice "renders the discipline proceedings void: merits of the case are therefore not now under consideration."[22] The requirement of written notice applies with equal force where the agreement specifies that complaints by one employee against another employee must be in writing; violation of such a rule "vitiates the proceedings and the discipline imposed."[23] It should be observed, furthermore, that where specific information as to the charge against an employee must be supplied, under the agreement, on a particular form, failure to supply the specific information

[20] Awards Nos. 5183, 17460.

[21] Also see Awards Nos. 5183, 11667, 12156, 13207, 13603, 15903, 15904, 16266, 17350.

[22] Also see Awards Nos. 776, 2157, 2370, 2419, 5197, 5253, 5555, 6329, 8259, 8260, 8261, 9561, 11120, 11601, 11880, 11929, 12288, 13008, 13139, 13207, 13603, 13663, 13846, 14469, 14470, 14471, 14472, 14473, 16268, 16679, 16688, 16689, 16699, 16955, 17030.

[23] Award No. 16706. Also see Awards Nos. 10871, 11879, 11880, 11909, 16266.

on the required form is a basic violation of the agreement and requires that the discipline be set aside.[24]

In the event the rules do not require written notice, and it is the practice to give notice verbally on the property, it may suffice to show that an accused received actual notice by telephone and that such notice was fully sufficient as to context.[25]

F. *Waiver of Requirement That Notice Be in Writing*

The written notice rule is one made for the protection of the employee, which he may waive. "The cited rule requires that charges against engineers must be in writing. The charges here were in writing but delivered by telephone and so accepted. The engineer appeared at the hearing, with a representative, acknowledged due and proper notice was given and participated in the investigation. The written notice rule is one made for the protection of the employe. Being for his advantage he may waive its provisions. Here he manifestly waived any claim that the method of delivery was not proper or that the notice was not proper."[26]

G. *Communication of Notice*

The way notice is given to an employee is a serious matter, and the chances of error in handling should be minimized. The employee "should not be required to go questing among friends or fellow employees" to get the necessary information.[27] Where the employee fails to receive the notice of the hearing in time to be present, it is proper to place the blame for such failure on the employee, on the carrier, or on both parties. In Award No. 11958 the First Division remarked upon the unsatisfactory statement of the record on the question of who was to blame for the failure of the claimant to receive the notice of the hearing in time to be present, and as a result the claim was dismissed without prejudice to further handling on the property.[28]

In Award No. 12379, it is observed that the employee "did not appear on October 29, because through no fault of his own, he did not receive notice of the scheduled hearing." Award No. 12921 finds that "the carrier alone is not responsible for the events that transpired." Actual knowledge by the employee is a pertinent factor. Award No. 13574

[24] Award No. 16679.
[25] Award No. 17146.
[26] Award No. 10376. Also see Awards Nos. 10381, 16268.
[27] Award No. 8260.
[28] Also see Award No. 13606.

states: "The record is clear that the claimant had actual knowledge of the scheduled investigation in ample time to attend the hearing."[29] The carrier, of course, should be concerned with giving genuine, actual notice, rather than with just "going through the motions" in notice giving. Thus, the Division states: "Patently the so-called notice which the Superintendent had addressed and sent to claimant's residence when he knew claimant was being held at the Municipal Farm, was merely a pretense and in fact no notice unless and until actually received."[30]

H. *Notice—Reasonable Time in Advance of Hearing*

Unless notice is given within a reasonable time in advance of the hearing, it is insufficient. "The rule providing that an employee will not be suspended or dismissed without a fair and impartial trial contemplates that the accused . . . will have notice of the hearing with a reasonable time to prepare his defense."[31] "The rule contemplates that there will be time for the accused to select the representative and prepare for trial. Here the investigating officer proceeded without permitting the accused to either ask for time or select a representative. He was given neither time nor opportunity to secure witnesses for his defense."[32] Reasonable notice is not afforded, obviously, where the employee "could not get ready and have his representative present for the hearing."[33] The employee, however, although given short notice, may waive his rights by proceeding with the hearing and not requesting postponement of the hearing although he is aware that the opportunity to request postponement is afforded him.[34]

I. *Time Limitations on Giving Notice*

The right of the carrier to hear and determine a charge against an employee is barred by the failure to give notice within the time limitations of the investigation rule. Where several charges are placed against an employee and one of the charges is outside the statute of limitations, the entire proceedings may be without effect. Thus, Award No. 8259 states: "The carrier made a finding of guilty on both charges. There is no way to unscramble the penalty imposed on the one that the carrier had the right to hear and determine and on the one that was barred by

[29] Also see Awards Nos. 8301, 13008, 14284, 14965, 17909.
[30] Award No. 17305.
[31] Award No. 5197.
[32] Award No. 8261. Also see Awards Nos. 8260, 13633, 14215, 16699, 17016.
[33] Award No. 14987.
[34] Awards Nos. 16087, 17909.

the failure to give notice within time. Fairness requires that the entire proceeding be set aside."[35]

In applying the time limitations rule, notice is effective as of the time it is given to the employee. Where notice is mailed to the employee before the expiration of the period and received by him after the expiration of the period, the carrier, upon objection by the employee, should not have inquired into that matter.[36] Where the time limitations rule calls for notice to be given within a certain number of days from the occurrence, consideration is given to the time when the carrier first received information concerning the alleged offense. If the carrier seeks an exception in the application of the rule, however, it should give notice promptly after receiving such information.[37] It has been held that unreasonably incomplete information is not sufficient to bring into play an agreement rule specifying that an employee shall be notified "within five days after the Company has information of the offense."[38]

A reasonable and not an absurd interpretation should be given to the time limitations rule. The First Division has stated: "The interpretation of the contract, or rule in question contended for by claimant would, in many instances, lead to absurd results. We must know that offenses involving suspension or discharge if the charges be established, may not in the nature of things, be known to the carrier in many cases within five days. It is true that we are not authorized to add language to a contract otherwise clear and susceptible of but one meaning; but we are authorized, and it is our duty, to interpret ambiguous rules and agreements so as to arrive at the true intent of the parties thereto, and, likewise, so as to arrive at a reasonable, as distinguished from an absurd, result. Long acquiescence in an interpretation of an ambiguous rule, or agreement, must likewise be given some weight."[39] Similarly, Award No. 17158 holds: "The applicable rule provides that charges will be heard within five days. The Committee shows that like rule has been construed on the property to mean within five days 'from the date the Company has knowledge of the occurrences to be investigated.' Rules should not be so construed as to produce absurd results. 'Knowledge' requires dependable information rather than unconfirmed newspaper report involving the one charged with rule violation and imparted to a responsible official or agent of the carrier with authority to act. See Award 16487 of this Division. We think notice was timely."

[35] Also see Award No. 8261.
[36] Award No. 8259.
[37] Award No. 5555.
[38] Award No. 16659.
[39] Award No. 7464.

J. *Notification of Interested Parties*

Where the investigation rule provides for notice to all interested parties, there is no proper investigation unless all interested parties are notified to be present. Thus, Award No. 11364 states: "The employees say that there was no full investigation, and that all interested parties were not notified to be present. There was no full investigation under the rule, and this the carrier does not deny."

IV. The Right of Representation

A. *Right of Representation—General*

A person charged with an offense enjoys the right to have the assistance of counsel for his defense. The opportunity to be represented is contemplated by the phrase "fair and impartial hearing."[1] "The rule providing that an employee will not be suspended or dismissed without a fair and impartial trial contemplated that the accused . . . shall have an opportunity to be present in person and by representative."[2]

B. *Right of the Employee to Select His Own Representative*

The employee has the right to be represented at the hearing by a representative of his own choosing, and this right is given him by the Railway Labor Act. Award No. 11943 states: "On June 30, 1944 he was again dismissed from service and requested a hearing. The carrier refused to permit him to be represented at this hearing by a representative of his own choosing, the Switchmen's Union of North America, and so far as the record shows no hearing was held. This was a denial of a right given him by the Railway Labor Act. Section 3(j) provides that in hearings before the National Railroad Adjustment Board parties may be heard either in person, by counsel, or by other representatives, as they may respectively elect. Obviously for the proper functioning of the machinery set up by the Act to settle grievances they must have the right to select their own representatives in hearings before the carrier. The provisions of Sec. 2, Ninth, which provide for the manner of selecting bargaining agents by different classes of employes do not apply to the selection of representatives by employes to adjust grievances cognizable by the National Railroad Adjustment Board." Accordingly, an employee is "entitled to have the representative of 'his choice,' not someone in place thereof as a second choice or as an alternative of having no one at all."[3]

In similar vein is the language in Award No. 16973: ". . . we are confronted immediately with one particular outstanding fact, namely: the claimant selected Mr. . . . , General Chairman, Order of Railway Con-

[1] Award No. 3509.

[2] Award No. 5197. Also see Awards Nos. 2370, 2397, 2398, 2399, 2400, 2401, 2419, 4306, 5404, 10312, 11575, 12380, 16890.

[3] Award No. 14987.

ductors, as *his* representative. This was his right under the Railway Labor Act, Section 2, (1), General Duties, Second: 'All disputes... shall be considered... in conference between representatives designated and authorized so to confer, respectively, by the carrier... and by the employees thereof interested in the dispute.' This right is further augmented by the expression in Section 3, First (j) of the Act in the following words: 'Parties may be heard either in person, by counsel, or by other representatives, as they may respectively elect.' Further support of this fundamental right is found in the Supreme Court's pronouncement in Burley vs. E. J. & E., wherein the majority of the Court in its opinion on rehearing explained the meaning of its original decision concerning the rights of an individual in the following words: '... under our ruling his rights to have voice in the settlement are preserved, whether by conferring... or by having representation before the Board according to his own choice.' In this case the claimant availed himself of his right as an individual to choose his representative. It was *his* case and he chose [the General Chairman]. Although the decision of his case may have consequential effect on the group rights of his fellow workers, as an individual, he has the statutory right to assert his claim through his personal representative without having his claim jeopardized by merging it in an interpretation of the group interest handed down by a spokesman not of his choice. We hold, therefore, that in a disciplinary case involving an individual who selects a personal representative other than the organization holding the governing agreement, and where the selected representative appears and defends the individual while under investigation, such representative has the continuing sole right to settle, dismiss, appeal, or otherwise progress the case until his authority is shown to have been abrogated. To hold otherwise would be divisive and would violate the individual's right to choose his own representative as guaranteed by the Act. However, this ruling does not in any way take from the general representative his fundamental statutory right 'to make and maintain agreements... to settle disputes,' to confer and join in a general interpretation of employee group rights (or individual rights he is properly progressing), or any of his traditional functions."

It should be plainly recognized, however, that the above-stated broad right of the employee to have any representative of his own choosing may be subject to the provisions of the collective bargaining agreement, such as a provision that an accused employee may be represented only by a fellow employee or only by the representative of a certain labor organization.[4] As stated in Award No. 15613, "There can be no doubt

[4] Awards Nos. 4731, 5301, 8261, 11943, 12287, 12892, 12893, 13510, 13511, 14798, 15891, 16576.

that under the statute an employee has absolute freedom of representation before this Division. And it is equally well settled that he has no such freedom under contract. Carrier and employees may contract so as to restrict representation on the property. See Broady vs. Illinois Central Railroad Company, USCA, Seventh Circuit, 96 Fed. Supp. 751, 20 L.C. 66, 462, decided in 1951; and Butler vs. Thompson, USCA, Eighth Circuit, 20 L.C. 66, 668, also recently decided. Under the governing agreement (Article 42) we have such a restriction on the right to representation, by which only the 'duly authorized representatives of the men,' meaning, as we interpret this provision, the representative or representatives of the craft duly certified as the designated representative, or bargaining agency, on the property."[5]

C. *Reasonable Time for Selecting Representative*

The employee has the right to sufficient time for selecting his representative with the accustomed incidents of consultation and an adequate opportunity of preparation for trial. "The rule contemplates that there will be time for the accused to select the representative and prepare for trial. Here the investigating officer proceeded without permitting the accused to either ask for time or select a representative."[6] Ordinarily, a continuance should be granted where the representative of the employee is unexpectedly absent. However, where there plainly has been no prejudice to the employee, the discipline need not necessarily be disturbed.[7]

D. *Waiver of Right of Representation*

The employee has the right to waive representation at the hearing.[8] Where representation is waived, the official conducting the hearing should use care that facts favorable to the employee are developed to the same extent as those unfavorable, and the employee should be offered an opportunity to examine the witnesses.[9]

E. *Right of Representative to Cross-Examine*

The employee's representative has the right to interrogate all witnesses against the accused. Where the carrier fails to arrange for the employee's representative to hear all of the evidence, this is a violation of the bargaining agreement.[10]

[5] Also see Award No. 15575.
[6] Award No. 8261.
[7] Award No. 4670. Also see Award No. 16087.
[8] Awards Nos. 15837, 16056, 16087, 16134, 16406, 17303.
[9] Awards Nos. 5301, 13991.
[10] Awards Nos. 4929, 5522, 6329, 16128.

F. *Summing Up by Representative*

Summing up may be deemed to be merely a matter of procedure. Award No. 4929 notes that a representative ordinarily "would be restricted to asking questions apart from summing up. . . . No summing up was indulged on either side and that was merely a matter of procedure."

V. The Right to Be Present

A. *The Right to Be Present—General*

An accused employee has the fundamental right to be present at the hearing. "The rule providing that an employee will not be suspended or dismissed without a fair and impartial trial contemplates that the accused . . . shall have an opportunity to be present in person. . . . Witnesses were examined when the accused had no opportunity to be present. . . . By these acts, the carrier deprived the accused of substantial and valuable rights guaranteed in the Engineer's Schedule. The requirements of a fair and impartial trial as herein defined 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. The failure of the carrier to comply with these requirements nullifies the action taken and the penalty imposed."[1]

The right to be present during the examination of all witnesses is a necessary requirement of a "proper investigation."[2] The employee has the right to be present "during the entire investigation."[3] An employee, accordingly, has the right to be present, if he so desires, at the investigation or testing of a signal or apparatus whose functioning is in question and concerning which testimony is introduced into the hearing.[4] In Award No. 15656 the First Division found that an accused "was deprived of fundamental rights" when "he was not present when testimony was taken which was used in the consideration of his case and was thereby deprived of the right to confront his accusers and cross-examine them when they testified." Although in this case the carrier later gave the accused a transcript of the witnesses' testimony and allowed him to question them, this did not cure the vital defect. The right of the accused to be present is a "fundamental requirement of a fair trial, i.e., confrontation of witnesses" and, where denied, the discipline "will have to be vacated."[5] The merits of a case are not open to consideration where it is found that testimony against an employee

[1] Award No. 5197.
[2] Awards Nos. 2397, 2398, 2399, 2400, 2401, 2419, 14262.
[3] Awards Nos. 12156, 14798, 15512.
[4] Award No. 15100.
[5] Awards Nos. 2153, 4596.

"was taken in his absence."[6] Where, in one case, "claimant and his representative were not permitted to 'hear' the testimony of, and interrogate, the one principal witness against him," the Division declared: "This proceeding did not vaguely approach that 'fair and impartial hearing' contemplated."[7]

"An accused subject to a penalty is, under fundamental law, entitled to be present during taking of testimony if he so desires," and it is not permissible to substitute the representative of the employee for the employee himself in meeting the requirements of this rule, for "Such a construction of the rule would make it absolutely void."[8]

B. *Absence of Employee on Taking of Nonprejudicial Statements*

When the statement of a witness is taken in the absence of an accused employee, and such statement is deemed to be nonprejudicial because it did not and could not have any effect whatsoever upon the finding of fault, the discipline may not be disturbed.[9] Also, where the discipline rested on the employee's own admissions and not on the statements of witnesses taken in the absence of the accused, the discipline need not be disturbed.[10]

C. *Estoppel and Waiver of Right to Be Present; Time Limitation*

Where jurisdiction of the subject matter and the person has been obtained and all necessary procedural requirements have been met, the accused must appeal within the time prescribed if he feels aggrieved at the result; otherwise he will be deemed to have acquiesced in it.[11] An employee has the right to waive investigation where the investigation is deemed to be for his own benefit.[12] An accused subject to a penalty is, under fundamental law, entitled to be present during testimony if he so desires. He can waive that right and be satisfied with representation but the option is his and cannot be taken away from him.[13] However, where the employee waives his right to be present and acquiesces in

[6] Award No. 3509. Also see Awards Nos. 1445, 14687, 14863, 16157.
[7] Award No. 14987.
[8] Award No. 4306. Also see Awards Nos. 2153, 2399, 3298, 3509, 4597, 5197, 5404, 5555, 6329, 7395, 8268, 8301, 8361, 8376, 9600, 10312, 10372, 12147, 12626, 13576, 13577, 13633, 14798.
[9] Award No. 12147. Also see Award No. 14767.
[10] Awards Nos. 4848, 13157.
[11] Award No. 5217. Also see Awards Nos. 5218, 10459, 13574.
[12] Awards Nos. 3321, 12975.
[13] Award No. 4306.

the procedure, he may not complain as to fairness after an unfavorable result.[14]

Where an employee is ill and not able to attend an investigation, and the carrier has reason to be aware of this fact, a hearing conducted in the absence of the employee is a "nullity, and without force and effect" and the employee is not estopped by his failure to appeal within the time limitation rule.[15] Of course, absence at an investigation is not deemed a waiver where proper request for postponement has been made.[16] But it is clearly too late for the employee to contend that the investigation was improper when he informs the carrier, for the first time, in his 'Position of Employes' presented to the First Division, that he was not present at the investigation on account of being too ill.[17] It should be recognized that failure of an accused to act in good faith when requesting hearing postponement may operate to defeat the employee's contention that he was denied the right to be present at the investigation, and, in effect, the employee's bad faith may be deemed a waiver of his right to be present.[18]

D. *Duty of Employee to Respond*

While an employee retains his employment status with the carrier, he is in duty bound to respond concerning a matter under investigation, and failing therein, he subjects himself to possible discipline.[19] Where, however, the circumstances do not permit the holding of a fair and impartial hearing, the employee is not under a duty to appear.[20]

[14] Award No. 5251. Also see Awards Nos. 4597, 15614.
[15] Award No. 12380. Also see Award No. 11199.
[16] Award No. 14435.
[17] Award No. 16702.
[18] Award No. 15509.
[19] Award No. 2327. Also see Awards Nos. 9562, 15237, 15509.
[20] Awards Nos. 3321, 11501.

VI. The Right to Have Evidence Presented at the Hearing

A. *Right to Have Evidence Presented—General*

An accused employee has the fundamental right to produce evidence in his own behalf at the hearing. "The rule providing that an employee will not be suspended or dismissed without a fair and impartial trial contemplates that the accused . . . shall have the right to produce evidence in his own behalf. . . . The requirements of a fair and impartial trial as herein defined 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. The failure of the carrier to comply with these requirements nullifies the action taken and the penalty imposed."[1] An accused employee must be "afforded the opportunity of giving testimony" as a necessary requirement of a "proper investigation" or "fair and impartial hearing."[2] Award No. 14476 observes: "It is the decision of this Board that the claimant was not afforded a fair, impartial hearing. He was deprived of a right when his representative was not permitted to attempt to bring to light facts which might have had a direct bearing on the actions of the claimant in the present matter." "Certainly it is the essence of a 'fair and impartial investigation' that a person shall be heard before he is condemned."[3]

B. *Duty to Develop All Facts Material to the Charges*

The purpose of an investigation is to develop all facts material to the charges, both for and against the employee.[4] The carrier's representative in charge of the investigation is under the responsibility of being fair and impartial. He should use a sound discretion in seeing that the rights of the employee are fully protected. The employee has a right to have witnesses to testify in his behalf. This is a valuable right and should not be treated lightly. Its denial is not in harmony with a fair

[1] Award No. 5197.
[2] Awards Nos. 2370, 2397, 2398, 2399, 2400, 2401, 2419.
[3] Award No. 12379.
[4] Award No. 10348.

and impartial investigation. "There is no question but that all facts material to the charges, both for as well as against the employee should be developed."[5] If facts exist upon which to base a finding in support of discipline, such facts "should have been presented so that claimant had opportunity for explanation in the face of such facts and of understanding the basis of his condemnation."[6]

The purpose of the hearing is fairly and impartially to inquire into all the facts connected with the matter under investigation. The hearing is not an adversary proceeding. "Presumably, the investigation and trial are for the purpose of determining the facts; not just a prosecution of the individual who is alleged to have violated a rule."[7] The investigating officer should be impartial, neither interested in proving the charges nor in disproving them. He should keep his eye singled on the one and only purpose, and that is, to develop the truth, regardless of the result to either party.[8]

Some investigation rules expressly provide that "all evidence in the case will be submitted," and thus expressly impose upon the carrier the duty to present at the hearing all material evidence of which it has knowledge bearing upon the question under investigation.[9] In this connection, Award No. 16333 states: "We feel that the Carrier, having agreed to Article 41, should conduct the hearing impartially, using all means at its disposal to obtain all testimony pertinent to the hearing. If the parties to the agreement are to benefit from Article 41, they must accept the interpretation placed on rules of this kind in Award 12500."[10] As has been noted, even though investigation rules may be silent on the submission of all evidence, the simple requirement of a hearing "implies the development of all pertinent evidence."[11] In a practical sense, while it is the carrier's obligation "to build its case and make the charges stick,"[12] the investigation, to be fair and impartial, "should include all material witnesses who could be had" and the refusal of the carrier to require the attendance of a material employee witness "vitiates the impartiality of the investigation."[13] In an appropriate case,

[5] Award No. 10382. Also see Awards Nos. 4670, 4929, 11844, 12772, 14354, 14358, 14406, 14729, 14985, 15661.

[6] Award No. 14493.

[7] Award No. 14354.

[8] Award No. 12500. Also see Awards Nos. 16411, 16699.

[9] Award No. 5248. Also see Awards Nos. 1347, 5298, 5301, 5555, 8260, 8261, 10348, 11364, 11820, 12287, 13633, 14354, 14358, 14729, 16333, 16699.

[10] Also see Award No. 15505.

[11] Award No. 16890.

[12] Award No. 17369.

[13] Award No. 16802.

however, where the failure to call certain material witnesses would have been deemed fundamental error, the accused may knowingly choose to waive the appearance of such witnesses.[14]

The carrier is without power to abridge the legal right of an employee witnessing an accident to communicate truthfully to the injured fellow employee or his representative such facts as he may have witnessed. Such an attempt by the carrier would be deemed contrary to public policy and unenforceable. The carrier, however, may in certain circumstances deal with ambulance chasing.[15]

C. *Duty of Carrier's Official to Testify*

It is the duty of the carrier's official to submit to an examination by the representative of the employee where the examination is directed to the official's knowledge of material facts or issues under investigation. This includes the right to examine the official as an expert witness.[16] It is possible, of course, that prejudice or bias may develop where most of the carrier's witnesses are supervisory officers; but the fact that they are mainly supervisory officers does not require a finding by the Board that this was necessarily or in fact prejudicial to the interests of the accused.[17]

D. *Duty of Employee to Testify; Fifth Amendment*

While an employee retains his employment status with the carrier, he is in duty bound to respond and give testimony in a matter under investigation, and failing therein, he subjects himself to discipline.[18] "The rules of the agreement, which assure employees the right of investigation and hearing when their conduct is brought into question, should be construed to require employees to submit to investigation on the question raised."[19]

An accused employee has the constitutional right, under the Fifth Amendment of the United States Constitution, to decline to testify at his investigation. First Division Award No. 15574 states: "Claimant did not testify at either of the hearings involved, but rested on his Constitutional rights. He was advised that it might prejudice his case then pending in Federal court, and he, therefore, quite within his rights, declined to testify." Such silence on his part, however, does not afford him immunity from a finding by the carrier that he has violated a rule

[14] Award No. 15904.
[15] Award No. 3624.
[16] Award No. 5297.
[17] Award No. 16411.
[18] Award No. 2327. Also see Award No. 14469.
[19] Award No. 9562. Also see Awards Nos. 12627, 15237.

making him subject to discipline.[20] It would seem, under prevailing law, that an employee may be required, where accused of Rule G intoxicating beverage violation, to submit to an appropriate blood test.[21]

E. *Where Testimony Is Not Material*

A reasonable latitude in the scope of questions should be permitted in order that the fairness of the investigation may not be open to question. However, where the proposed testimony is not material and does not pertain to the charges, and would not aid in determining whether the employee is guilty of the charges against him, the investigating official may object to the investigation entering into that field.[22]

F. *Witnesses—Responsibilities of the Parties Incident to Obtaining*

It is the duty of the carrier, so far as it is able, to notify and arrange for the presence of each witness who is known by it to possess any essential facts. It is the duty of the carrier to have present any of its employees, able to attend, whom the defendant desires as a witness, provided defendant has so notified the carrier prior to hearing. "If developments at the formal investigation hearing make it desirable to defendant to have additional witnesses, the defendant shall make such fact known, and if such witnesses are not available without a recess of the hearing, the defendant should request such recess, stating what is expected to be developed from such absent witnesses. The recess should be granted unless it appears that the request is frivolous, or made for delay only."[23] "The burden was upon the claimant and his representative to request the appearance of a particular person if they desired to question him as a witness."[24] Where sufficient witnesses are called by the carrier fully to determine the facts, if the employee desires to question any additional persons, the burden is upon him to request their appearance.[25] The accused may bring in his own witnesses where additional witnesses are not necessary to develop essential facts, and the carrier in good faith believes that such witnesses are not necessary.[26] It is not prejudicial error—and an accused's complaint is without merit—not to have additional witnesses when all material facts at issue are ad-

[20] Also see Awards Nos. 17029, 17149, 17158.
[21] Award No. 16852. Also see Award No. 16537.
[22] Award No. 10382. Also see Award No. 16996.
[23] Award No. 12287. Also see Awards Nos. 15169, 15170, 15656, 15661.
[24] Award No. 13207. Also see Awards Nos. 13204, 15904, 16056, 17507.
[25] Award No. 13846. Also see Awards Nos. 13204, 13207, 13606, 14443, 14769, 15367, 16026, 16135, 16269, 16411, 17266, 17435, 18185.
[26] Award No. 16125.

mitted or where a witness desired by an accused could not supply evidence which in any way could change, modify, or explain the undisputed facts which support discipline.[27]

The burden to provide the witnesses may fall upon the employees where the applicable rule provides that employees have the right to "bring such witnesses as they may desire to give testimony."[28] Of course, the carrier is not excused from its basic obligation to provide a "fair and impartial hearing" by ensuring that all facts material to the charges, both for as well as against the employee, are developed. If the employee desires to obtain the presence of witnesses, he must notify the summoning officer of the carrier of that fact prior to or at the opening of the hearing.[29] "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 officer to make inquiry of such persons. . . . Where it is made to appear that the investigating officer fails or refuses to call to his assistance witnesses whom he has been informed have personal knowledge, he has failed to carry out the true intent of the inquiry."[30]

Where the carrier has the obligation to call witnesses, this duty includes the obligation to bear whatever expenses may be involved and not to impose such expenses upon the employee. In one case, it is observed that "The Company declined to call them [witnesses] except at claimant's expense" and the Division held that the carrier's failure to call the witnesses deprived the claimant of "the impartial investigation contemplated by the rule."[31] Award No. 14729 states: "It is the duty of the carrier to conduct investigations on the property that will bring out the true facts. In order that such an investigation be realized it follows that all witnesses to an incident in question, whose testimony can throw light on the matter should be called and compensated by the carrier according to the terms of the current agreement. An employee accused, as the result of an incident which requires an investigation, may request that the carrier call certain witnesses believed by the accused to be material and necessary to develop all of the pertinent facts. The carrier, acting 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

[27] Awards Nos. 15511, 16542. Also see Awards Nos. 10380, 14766, 15169, 15370, 17910.
[28] Award No. 15505.
[29] Awards Nos. 10380, 13606, 13842, 13983, 14252.
[30] Award No. 12500. Also see Awards Nos. 14356, 16333.
[31] Award No. 5248.

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."

G. Evidence—Duty to Present at Time of Hearing

Hearings or investigations are held for the purpose of determining the guilt or innocence of employees with respect to the charges made against them. Necessarily the official in charge thereof must base his decision on the evidence produced at that time and render it accordingly.[32] The duty of the carrier to base its decision and discipline upon facts developed at the investigation is more than a technical requirement, for failure to do so may deny to an employee fundamental rights. As stated in Award No. 14466: "Rule 131(b) requires a 'full investigation.' Concededly that was not had here. Obviously the discipline must rest upon facts developed at the investigation. Just as obviously the carrier cannot rest its decision and discipline on 'important points' not developed at the investigation nor upon assumptions of fact not established at the investigation or elsewhere. It undertook to do that on the property. It undertakes to do so here. To permit it to do so is to deny the claimant the benefit and protection of the 'full investigation' which the rules assures to him." It is declared to be implicit in the investigation rule and "fundamental" that "full investigation requires that all material evidence to be used in judging guilt or innocence of the accused . . . shall be adduced at the hearing or investigation."[33]

Statements made by an accused to government officers prior to hearing may be brought into evidence at the hearing when such statements were not required by nor secured at the instance of the carrier.[34] The conducting of an investigation ex parte and considering it in weighing the evidence against the accused is improper. Thus, one case declares: "It also appears from the record, however, that a supplementary ex parte investigation was made at the instance of the management, consisting of having someone ride the locality where the accident occurred with a view to testing the possibility of seeing the car at the location where the derailment first occurred. The conducting of such an investigation ex parte and considering it in weighing the evidence against the accused was improper. For this reason the discipline will be vacated."[35] The Division has consistently held that evidence not shown at the in-

[32] Award No. 13606.
[33] Award No. 14798.
[34] Awards Nos. 15577, 15578.
[35] Award No. 4597.

vestigation and not contained in the record upon which the carrier officer made his decision is improper and may not be considered by the Division in appeal to it, as a general rule.[36] Award No. 17903 observes: "Subsequent written statements taken ex parte by carrier and submitted in the record cannot be accepted as part of the investigation, which must be upon notice and afford the employee opportunity to question the witnesses as well as the carrier."

[36] Awards Nos. 1116, 5555, 6329, 9561, 10312, 10372, 10374, 11726, 13633, 13844, 14445, 14466, 15319, 15512, 16301, 16563.

VII. The Rights of Confrontation and Cross-Examination

A. *The Rights of Confrontation and Cross-Examination—General*

An accused employee enjoys the fundamental rights of confrontation and cross-examination. Award No. 14987 states: "Claimant and his representative were not permitted to 'hear' the testimony of, and interrogate, the one principal witness against him. This proceeding did not vaguely approach that 'fair and impartial hearing' contemplated.... However good the motive of carrier and however great the provocation presented, fundamentals of a rule so important to the claimant and his security as an employee cannot be so lightly by-passed, whatever the occasion otherwise demands.... It is much better that a case of the most clearly desirable discipline fail for want of proof than that it rest upon such a hearing as was here attempted...." If the claimant and his representative had had an opportunity to face and interrogate his accuser, the witness "might have told a different story. Upon that, however, we do not need to speculate. We are not required to. Claimant had the right to rest upon the protection his contract gave him for a fair and impartial hearing, and this he did not get." Award No. 13577 declares: "The right to confront opposition witnesses and be afforded the privilege of cross-examination is a prerequisite to the fair and impartial hearing." Further, "The rule providing that an employee will not be suspended or dismissed without a fair and impartial trial contemplates that the accused... shall have... the further right to cross-examine witnesses testifying against him.... When the accused was present, he was denied the right of cross-examination. By these acts, the carrier deprived the accused of substantial and valuable rights guaranteed in the Engineer's Schedule. The requirements of a fair and impartial trial as herein defined 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. The failure of the carrier to comply with these requirements nullifies the action taken and the penalty imposed."[1]

It is a "glaring deficiency" not to afford an accused "the opportunity

[1] Award No. 5197.

to cross-examine the witnesses whose testimony the carrier used against him."[2] An accused has the right to assist his representative in questioning witnesses on direct or cross-examination, and he may assist by counseling and advising with his representative whether sanctioned by rule or not.[3] Award No. 13576 states: "Without entering into a discussion on the probative adequacy of such evidence to establish cause for the instant discharge, it is sufficient to say that neither claimant nor his representative was afforded any opportunity for cross-examination. Under these circumstances, the attaching of weight to these documents would make a mockery of the 'fair hearing' requirements in Rule 7."[4]

If the conclusion of experts is relied upon by the carrier, such evidence must be offered at the investigation so that the accused employee may question the witnesses and answer the evidence.[5]

B. *Written Statements*

Written statements are not to be used against an accused in lieu of a personal examination and cross-examination of the witness, in which the accused has an opportunity not only of testing the recollection and sifting the conscience of the witness, but also of assisting the officials in charge of the hearing to judge by the demeanor and the manner in which the testimony is given whether the witness is worthy of belief.[6] Award No. 15656 held an employee to be "deprived of fundamental rights" when "he was not present when testimony was taken which was used in the consideration of his case and was thereby deprived of the right to confront his accusers and cross-examine them *when they testified.* Giving him a transcript of their testimony later and allowing him to question them does not meet the rules requirements." An accused may, however, waive his rights of confrontation and cross-examination, and where he has effectively waived his rights, it may be proper to accept written statements from an absent witness.[7] The carrier, if it chooses, may accept a written statement from an absent witness and waive cross-examination.[8]

[2] Award No. 15508.

[3] Award No. 15507.

[4] Also see Awards Nos. 3509, 11601.

[5] Award No. 10373. Also see Awards Nos. 3088, 4306, 4733, 4929, 5301, 5404, 5406, 5522, 8261, 8301, 8376, 9561, 10312, 10382, 11726, 11839, 11844, 12379, 12500, 17903.

[6] Award No. 13576. Also see Awards Nos. 4733, 11726, 12379, 12500, 14987, 16699, 16850, 17149, 17903.

[7] Awards Nos. 14863, 18119.

[8] Award No. 15169.

C. *Limitation on the Right of Cross-Examination*

The right of cross-examination does not embrace the asking of irrelevant questions. As stated in one case, "The record reveals that what such representative desired to interrogate such witnesses about was as to what brought about the alleged emergency which would require Fireman . . . to work on the mainline lead and whether in fact an emergency existed. If such facts were relevant to the question of whether Fireman . . . was guilty of insubordination or the question of whether the assessed discipline was unjust, then it would follow that a full investigation was not had. We, however, are of the opinion that they were, in fact, not relevant."[9] The hearing officer is not under the duty to "permit the questioning of witnesses to wander into fields unrelated to the matter under investigation" but he must not exercise "any high-handed limitation upon a line of questioning directly related to the matter at issue."[10]

[9] Award No. 11839. Also see Award No. 10382.
[10] Award No. 15159.

VIII. The Hearing

A. *Conduct of the Hearing—General*

If an investigation is to be conducted in a fair and impartial manner, an atmosphere and setting of decorum and justice must prevail. Award No. 15159 observes: "The officer charged with that duty should be mindful of the weight of his responsibility. He has the right and duty to require orderly procedure and the observance of decorum. 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 and impartial hearing and an opportunity to make a complete defense." 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 room; but calmness, objectivity, reasonableness, considerateness, uprightness, and a sense of fairness and justice should permeate the atmosphere of the proceedings.

B. *Union of Functions of Prosecutor, Witness, and Judge*

The same person cannot assume the roles of prosecutor, witness, and judge. As stated in one case, "There is another and possibly more fundamental reason why this claim must be sustained. The trainmaster was the person who was engaged in the altercation with the claimant, he filed the complaint, at the hearing he was the only witness who offered any pertinent testimony to support the charge, he then sat in judgment on the truthfulness and weight of his own testimony, and imposed the sentence of dismissal. Such a procedure would be condemned by every court in the land, and the impropriety of it has been pointed out in awards of this Division. Awards 8259, 8785. The Carrier's justification for such procedure, as set forth in its rebuttal, is that it 'is universal in hearings of this kind,' that the hearing is not a trial as conducted by a court, and that technical rules are inapplicable. But the rule of law, which forbids one person to assume the role of prosecutor, witness, and judge, is not a technical rule. It is an incorporation by courts into this procedure of the ordinary principles of fair play

which men customarily adopt in their dealings with one another."[1] The trier of fact should not also be a witness.[2]

C. *Union of Functions of Prosecutor and Judge*

It is a "well settled and long established rule on railroads the same individual may act in the dual capacity of judge and prosecutor."[3] The Division has observed, however, that "the mere fact that the official presenting the complaint determines the question of guilt and imposes the penalty, though not an ideal practice, does not without more invalidate the proceedings."[4]

The carrier in disciplinary investigations occupies the conflicting positions of interested party, prosecutor, and judge. In one case, the Division noted that "Management, claimants' adversary in this proceeding, served as investigator, examiner, judge, and jury" and elements of prejudice were found to exist in the conduct of the hearing. Because of these roles assumed by the officials of the carrier, the carrier must in good conscience observe a burden of care that the spirit of the rule and justice to the employee be not violated in the conduct of the investigation.[5] Where the conduct of an investigation was in charge of a trainmaster whose handling of the hearing indicated "a detached and impartial attitude," it was not a violation of the investigation rule for the Road Foreman of Engines to act as an interrogator.[6] In investigations where the hearing is ex parte, initiated and conducted by the officer who sits in judgment, his findings and conclusions are entitled to some weight but cannot possibly be of the same character and have the same persuasive value as the verdict of a jury or the findings of a trial judge.[7]

D. *Presiding Officers to Conduct Hearing in Impartial Manner, Without Prejudging*

The carrier's representative in charge of the investigation is "under the responsibility of being fair and impartial. He should use a sound discretion in seeing that the rights of the employe are fully protected."[8]

[1] Award No. 10616. Also see Award No. 8376.
[2] Award No. 8785. Also see Awards Nos. 6481, 8259, 8376, 10616, 11910, 14140, 14766, 15656, 17149.
[3] Award No. 13354.
[4] Award No. 10649. Also see Awards Nos. 5301, 10616, 11726, 14965, 16411, 17304, 17910, 18119.
[5] Award No. 10372.
[6] Award No. 14865.
[7] Award No. 10293.
[8] Award No. 10348.

"The purpose of the hearing is to fairly and impartially inquire into all facts connected with the matter under investigation."[9] Where the hearing is conducted in an overbearing manner, calculated to intimidate the witnesses, and is replete with leading questions, and freely flavored with personal denunciation, criticism, and opinion of the hearing official, it manifestly does not meet the requirements of a full, fair, and impartial discovery of the facts.[10] Overreaching and obtaining "forced" admissions would also be improper conduct of a hearing officer.[11]

Prejudging, of course, is not reconcilable with fairness, and the carrier should not simply look "for an excuse to get rid of an employee whom it did not want."[12] It is improper for the hearing to "descend to the level of mere formality or device through which management channels either a preconceived judgment or an arbitrary decision induced by the expediency of fixing blame at some point, where blame appears to have existed, and fixing it seems necessary."[13] In Award No. 14356, the Division observed: "The attitude evidenced by the official who conducted the trial, and his failure in cooperating with the claimant in the calling of additional witnesses raises a serious question as to whether this proceeding met the tests of a fair and impartial trial." In a case of discipline administered by a carrier solely for the violation of a rule which was punishable also as a crime and for which the employee had been acquitted in a court of law, the Division stated that "greater care than in ordinary cases in searching the record would be appropriate. It should appear pretty clearly under such circumstances that the carrier was not actuated by prejudice or bias."[14]

E. *Segregation or Exclusion of Witnesses*

It is a discretionary matter as to whether or not witnesses shall be segregated or excluded. The investigation rule ordinarily does not require a segregation of witnesses, and in the absence of a request, segregation may be considered waived.[15] Where witnesses are excluded from the hearing by the carrier, particularly where there are controverted

[9] Award No. 12500. Also see Awards Nos. 14110, 14351.
[10] Award No. 11820.
[11] Award No. 15099.
[12] Award No. 13633. Also see Awards Nos. 5404, 8376, 8785, 11820, 11844, 14140, 14238, 14406, 15406, 16265, 16334, 16361, 16707, 16750, 17026, 17028, 17160, 17304, 17336.
[13] Award No. 16699. Also see Awards Nos. 5248, 5301, 5555, 8260, 12379, 13354.
[14] Award No. 15578.
[15] Award No. 5301. Also see Award No. 15246.

questions of fact, this may be deemed proper exercise of discretion.[16] It is error to permit a witness to interrogate an accused, but whether or not such error is prejudicial depends upon the facts of the particular situation.[17]

F. *Harmless Error*

Where an error or defect in the proceedings can with fair assurance be said to have had no substantial influence upon the result, and it affirmatively appears from the entire record that it was nonprejudicial and that substantial rights were not affected, such error may be deemed to be harmless. "The suggested irregularities in this investigation and trial if present, and we do not think they were, did not amount to a denial of any substantial right; nor were they of a nature such as could have affected in any material way, the decision reached."[18] It should be observed that failure to grant a fundamental right is not harmless error but constitutes plain error or prejudice. As stated in Award No. 14469, "The carrier contends further that the claimant in any event was not prejudiced. As pointed out herein, he was not granted a fundamental requirement of the rule; because he was not charged, he was not in a position to take advantage of the rights that flow to an accused employe; and he has had discipline imposed in violation of the rule. Those things constitute prejudice."

G. *Failure to Protest or Raise Objection; Waiver; Plain Error*

In the absence of plain error or defects affecting substantial rights, an accused employee cannot complain about the fairness of a hearing after participating in it without objection as to the manner in which it was conducted. It must affirmatively appear from the record that nonsubstantial procedural rights were denied him after request or over objection.[19] Where plain error or defects affecting substantial rights exist, failure to make timely objection at the hearing does not constitute waiver. As stated in one case, "It cannot be that what occurred there was the fair and impartial hearing contemplated by the agreement. It was, in fact, no hearing, and the awards of this Division

[16] Award No. 10373.

[17] Award No. 15576.

[18] Award No. 9600. Also see Awards Nos. 8275, 12500, 13355, 13356, 14443, 14494, 14552, 14555, 14556, 14766, 15239, 15370, 15508, 15565, 15576, 16236, 17012, 17151, 17303, 17643, 17910.

[19] Award No. 5251. Also see Awards Nos. 5254, 11498, 11929, 13604, 13606, 14164, 14262, 14469, 14753, 14769, 14965, 15160, 15246, 15370, 15904, 16134, 16135, 16808, 17435, 17460, 17507.

which hold that objections to methods employed in investigations and hearings must, if later relied on, have been made at the time used, do not apply to cases where there is a total absence of any hearing or proper investigation."[20] In another case, where the claimant and his representative answered, "Yes, Sir," to the question, "Are you satisfied that this has been a fair and impartial hearing and conducted in accordance with the rules of your agreement?" the Division held that such an answer is not "such a waiver that would bar this Division from reviewing the transcript and the entire record to properly satisfy itself that the claimant had in fact received a fair and impartial hearing. That is precisely why the case is now here before us. The waiving of objections of a technical nature to the conduct of a hearing was never meant to include the waiving of claimant's positive fundamental right in being afforded a fair and impartial trial."[21]

H. *Continuance; Postponement*

In the interests of justice, a hearing may be adjourned or continued from time to time within the reasonable exercise of discretion. Grounds for the granting of a continuance may include absence of counsel and absence of witness. "If developments at the formal investigation hearing make it desirable to defendant to have additional witnesses, the defendant shall make such fact known and if such witnesses are not available without a recess of the hearing, the defendant should request such recess, stating what is expected to be developed from such absent witness. The recess should be granted unless it appears that the request is frivolous, or made for delay only."[22] The refusal of an accused's right to a continuance or reconvening of hearing may constitute the deprivation of an accused's fundamental rights.[23]

Should an accused be given an extremely short notice so that he is unable to secure a representative, a reasonable request for postponement should be allowed and this surely should not be used as the basis for an additional charge of insubordination.[24] A request for postponement on grounds of inability to secure the desired representative is valid where the carrier has full knowledge of the request, and the employee's failure to appear at the nonpostponed investigation may

[20] Award No. 9561.
[21] Award No. 17028.
[22] Award No. 12287. Also see Awards Nos. 1120, 4670, 8261, 10380, 14987, 15169, 15170, 15661, 17028, 17520.
[23] Award No. 15656.
[24] Award No. 17028.

not be regarded as a waiver of the employee's right to a proper investigation.[25] In the event the employee contends that he did not receive a fair trial through nonappearance and nonrepresentation at the investigation, alleging that he sought postponement of the investigation by reason of illness, the burden of proof is on him to establish this point by substantial evidence.[26] It is the duty of an accused employee to secure an available representative or to agree upon a certain date for the holding of an investigation; he does not have the right to insist upon an indefinite delay for the securing of a representative.[27] In proper circumstances, where the employee agrees to immediate hearing, he may be deemed to have waived any rights to postponement and "cannot be heard to complain on that ground after an adverse result."[28] Where a court trial is pending and an accused fears that he may be required to testify against himself at the investigation, he may request postponement of the investigation until after his trial.[29] The carrier, of course, has the right to exercise reasonable discretion in quelling a disturbance at a hearing by calling a recess until order and decorum are reëstablished.[30]

[25] Award No. 14435.
[26] Award No. 14403.
[27] Award No. 16238.
[28] Award No. 17520.
[29] Award No. 17158.
[30] Award No. 15505.

IX. Appeals

A. *Time Limitation on Notifying Employee of Decision*

Where the investigation rule specifies the exact number of days within which the result of the investigation shall be made known, the carrier is expected to comply with such requirement. The effective time of communication may vary with the requirements stated in the rule. Thus, where the governing rule provides that decision must be "rendered" in writing within ten days or case will be considered closed, the term "rendered" means "sent" and not "the making of the decision or even just the writing thereof to the employee involved." The written decision must be dispatched and the "date of postmark" is deemed to be "the only conclusive evidence." The term "rendered" does not mean "delivered" or "received" by the employee.[1] Notice of the decision should be dispatched within the stated time through such channels as may reasonably be expected to actually get notice to the employee: "the carrier should have sent this notice through the regular mails rather than deliver it to the yard office."[2] A short period of delay may subject the carrier to claim for time lost, but may not necessarily vitiate the entire proceeding.[3]

Where the investigation rule provides that the employee will be "promptly" advised of the decision, each case is controlled by its own circumstances and a reasonable period of time may elapse.[4] "Clearly, a delay just short of four months in notifying claimant of the discipline imposed is not in accordance with the applicable discipline rule which provides that employes will be promptly advised of decision. In some instances, a reasonable delay in notifying the employe of the result of an investigation where he is not otherwise prejudiced may not be sufficient to vitiate proceedings against him."[5]

B. *Time Limitations on Appeals*

Where the collective bargaining agreement establishes reasonable and valid time limitations for the bringing of appeals, failure to handle

[1] Award No. 16366. Also see Award No. 10844.
[2] Award No. 16739.
[3] Award No. 13845.
[4] Awards Nos. 8358, 14258, 14278.
[5] Award No. 14215. Also see Awards Nos. 3112, 8018, 8271, 10436, 10445, 11843, 12160, 12912, 14280, 14690, 15579.

an appeal within the time allowed requires that the claim be "outlawed."[6] "While it has been said that a statute of limitations is an unconscionable defense and its application in extinguishing a possible substantial right unduly harsh, it is true that the negotiation of such a rule stemmed from sound and desirable bases. It requires processing of claims in an orderly and prompt fashion in the interests of both carrier and employe. Either party is within his contractual right in urging it as a defense."[7] Thus, the carrier's failure to grant an appeal as provided for in the agreement may constitute a denial of fundamental rights and invalidate any discipline imposed.[8] Time is of the essence and valuable rights may be lost unless there is strict adherence to the requirements of the time limitations rule.[9]

When an employee is charged with a violation of the rules of the company, notice is given, and a trial held, the failure of the employee to appeal within the required time terminates the controversy. Thus, where jurisdiction of the subject matter and the person has been obtained and all necessary procedural requirements have been met, the accused must appeal within the time prescribed if he feels aggrieved at the result; otherwise he will be deemed to have acquiesced in it. Under such circumstances, the result is final even though it may be erroneous.[10] However, where the action taken was absolutely void because of a failure to hold a trial upon which any valid and binding determination could be based, the failure of the employee to appeal within the required time does not preclude him from afterwards appealing.[11] "A failure to appeal cannot validate the void dismissal."[12]

For the purposes of the time limitations rule, a proper appeal may be informal if it has "informed the carrier of an intention to proceed beyond the decision imposing discipline."[13] A letter, however, from the local chairman to the Superintendent that is "only a protest about and statement pursuant to the procedure established" by the schedule and which "does not mention any appeal from the dismissal nor contain any request for reinstatement" does not satisfy the requirement that the carrier be given reasonable notice of what would be requested

[6] Award No. 11425.
[7] Award No. 17008.
[8] Award No. 16705.
[9] Awards Nos. 1206, 11490, 12883, 14405, 14557, 14705, 14763, 15235, 15242, 15243, 15358, 15364, 15375, 15612, 15614, 15663, 15710, and numerous other awards.
[10] Award No. 5217. Also see Awards Nos. 1125, 2153, 4513, 4514, 4675, 4676, 4920, 5269, 10459, 11830, 11837, 11838, 11992, 12134, 12425, 12768, 13051, 13991.
[11] Award No. 5197.
[12] Award No. 5166. Also see Awards Nos. 1055, 6272, 11879, 12380.
[13] Award No. 13051. Also see Award No. 13052.

within thirty days after the dismissal, i.e., that an appeal is involved in the case.[14] The time limitations rule must be observed whether claims for reinstatement and pay for time lost or claims for leniency are involved.[15] A failure to appeal within the time limitations is fatal even though a claimant may have had some difficulty in locating the General Chairman in the matter of perfecting an appeal.[16]

C. *Waiver by Carrier of Time Limitations Rule*

The carrier may waive the provisions of the time limitations rule. "Assuming that the limitation as to time is for the benefit of the carrier, the carrier could waive a provision of the agreement which was for its benefit."[17] Where the record of a case shows that the carrier entertained an oral appeal subsequent to the time limitations rule, such circumstances may be deemed to indicate that the carrier has waived the time limit for appeal.[18] A prompt interposition by the carrier of the time limitation rule, however, is a factor to be considered in determining whether the rule has been waived.[19]

D. *Abandonment of Claim; Estoppel; Leniency*

Although the collective bargaining agreement may contain no time limitation on the filing of appeals to the First Division, the fact of long and unexplained delay can and should be taken into consideration and may operate to bar the claim, particularly where a claimant by his delay builds up a money claim.[20] Approximately ten years' delay in appealing a claim was deemed to be abandonment.[21] The failure of an employee to appeal promptly in certain circumstances may be deemed to be concurrence in the carrier's decision. "Where local officials knew about the suspension, subsequent unquestioned disciplinary action was taken, and ten months was permitted to elapse before challenging the earlier suspension and then only under the stimulus of the accumulated bad record charge, a justifiable inference arises that the employees concurred in the carrier's earlier action."[22]

[14] Award No. 14522.
[15] Award No. 14468.
[16] Award No. 14405.
[17] Award No. 10616. Also see Award No. 3211.
[18] Awards Nos. 3321, 3631, 4675, 4676, 10616, 15368.
[19] Award No. 14468.
[20] Award No. 9600.
[21] Award No. 3510. Also see Awards Nos. 3262, 3511, 3750, 4972, 5300, 8277, 12291, 15241, 15504.
[22] Award No. 14164.

A request for reinstatement on a leniency basis is not the same as an appeal. There is a distinct difference between a contention that the dismissal is illegal and unjust and a petition for leniency. Leniency presupposes a determination of discipline the correctness and finality of which are not questioned. Leniency does not call for reopening of the investigation or for setting aside of the finding of guilt. It recognizes the finality of that determination and asks for the remission of the penalty as an act of administrative grace.[23] A claim for reinstatement and pay for time lost "does not include a claim for reinstatement on a leniency basis. The two claims are inconsistent."[24] Failure to appeal may result in abandonment of the claim even though the matter is handled with superior officers of the carrier on a leniency basis.[25]

E. *The Record*

"The last word under the processes of the Railway Labor Act is the word of this Division. The Division has the right to review the action of the carrier for at least the purpose of determining the question of whether or not the carrier acted without warrant, or unreasonably or arbitrarily. This Division could not determine this question intelligently in the absence of a record of full investigation."[26] The record should "contain a transcript of this investigation" and should "show upon what charge discipline was assessed."[27] Importance of the transcript of testimony is emphasized in language of the Division: "This docket fails to disclose any legal proof by way of a transcript of testimony concerning the propriety of claimant's discharge. The carrier thus failed to sustain the burden of proving the truth of its charges and the claimant cannot properly be subjected to discipline."[28] Moreover, "this Division must be controlled, as must the carrier in assessing demerits, by the record which it makes at the investigation."[29] "The only question we can determine in that respect is whether or not the decision of the carrier finds sufficient support in the evidence produced at the hearing to say that the carrier did not act unreasonably or arbitrarily in arriving thereat."[30] Section 3(i) of the Railway Labor Act

[23] Award No. 5300. Also see Awards Nos. 12503, 13052, 14261, 14421, 14468, 14487, 14734, 14862, 15366, 15579, 15892, 16245.

[24] Award No. 14468.

[25] Awards Nos. 5300, 10251, 15316, 15317, 15318.

[26] Award No. 11364.

[27] Award No. 12424.

[28] Award No. 12140. Also see Awards Nos. 14351, 15745, 16952.

[29] Award No. 10374. Also see Awards Nos. 15319, 16134, 16301, 16411, 16751, 16955, 17308.

[30] Award No. 13606. Also see Awards Nos. 3211, 10312, 14493, 16890.

and the rules of the National Railroad Adjustment Board require the parties to include in their submissions to the Board a full statement of the facts and all supporting data bearing upon the dispute. Failure by either party to submit a full and complete copy of the record of investigation may result in a decision adverse to such party.[31]

The official conducting the hearing and the reviewing agencies are precluded from considering, for the purpose of determining guilt or innocence of the offense charged, "evidence" developed subsequent to the investigation and the authentication of the record. The authentication of the record is required for the obvious purpose of assuring reviewing agencies that they have before them the evidence submitted at the trial and considered by the investigating officials in reaching a decision.[32] An affidavit submitted subsequent to the investigation may not be given consideration. "That affidavit, of course, had no part in the record upon which the carrier officer based his opinion and under the holding of many prior awards of this Division it may not be considered here."[33] As stated in Award No. 14445, "The question of claimant's guilt must be determined upon the evidence brought out at the investigation, and evidence not so introduced shall not be considered by this Division. In this docket both parties have introduced evidence which was not brought out in the investigation. The Carrier has included in its submission, Exhibit four, evidence not introduced in the investigation. Petitioner has included in its submission evidence of a statement by an officer of Carrier, and has set out correspondence conveying the impression that automatic signals sometimes fail, not introduced at the investigation." In brief, as a basic policy of the Division, "The scope of our review is limited to the testimony . . . taken at the investigation."[34] The record of an investigation, submitted as a joint exhibit, is on its face proper.[35]

The record of the investigation should be authenticated by both parties;[36] but if the report of the investigation is incomplete or inaccurate, the record may be corrected on appeal.[37] It should be recognized, however, that where the official transcript is incomplete, the Division

[31] Awards Nos. 5248, 5301, 5555, 8376, 11364, 12140, 12424, 14351, 15745, 16952, 16955, 17520.

[32] Award No. 5555. Also see Award No. 8376.

[33] Award No. 13844. Also see Awards Nos. 1116, 6329, 9561, 10312, 10372, 10374, 11726, 14466, 14798.

[34] Award No. 15745.

[35] Award No. 16092.

[36] Award No. 8261.

[37] Award No. 11839. Also see Awards Nos. 11847, 16587.

is "not willing to take extraneous and conflicting statements to supply the deficiency."[38] Further, Award No. 14690 points out: "As a part of its submission, petitioner requests a hearing de-novo, in order that the Division may resolve conflicts in testimony and determine credibility of witnesses who testified. Such a hearing is not within the scope of review afforded by this Division. Here we are bound by the record of the investigation, including transcript of the testimony." Harmless and nonprejudicial omissions from the transcript, which could in no manner affect the results of the investigation or outcome of further handling or appeal on the property or before the Division, do not affect the basic fairness or impartiality of the hearing as conducted.[39] Prejudice, however, may exist where the transcript of hearing is made by the hearing officer.[40] Failure to include material testimony in the record may be grounds for setting aside the administration of discipline. As stated in Award No. 15159, "This docket contains a substantiated charge by petitioner that the carrier officer who conducted the investigation denied claimant's . . . representative the right to have inserted in a record a question asked of the witness . . . and his answer on cross-examination. The question and answer were clearly material to the main issue. There was no justification for excluding the testimony and even less for refusing its inclusion in the transcript. . . . [W]e deem it appropriate to comment on the hearing officer's misconduct. We believe it warrants sharp disapproval by this Board and that it can be characterized as nothing short of an arrogant assertion of authority unbecoming a Carrier representative charged with the duty of conducting a fair and impartial investigation."[41]

The employee or his representative is entitled to a copy of the stenographic record of an investigation. A complete transcript of the testimony adduced at the investigation should be furnished rather than only a copy of the individual's own testimony "which is almost useless when there is a discrepancy in the testimony of witnesses."[42] There is no necessity, however, "for furnishing a copy to both the employee investigated and his representative" where the practice for many years has been to furnish only one copy.[43] Where the agreement provides that "The Committee will be furnished copy of investigation on request,"

[38] Award No. 15507.
[39] Award No. 15027. Also see Award No. 17149.
[40] Award No. 17149.
[41] Also see Award No. 15508.
[42] Award No. 1344.
[43] Award No. 5019.

such representatives are entitled to a copy even though the employees under investigation were not held responsible.[44]

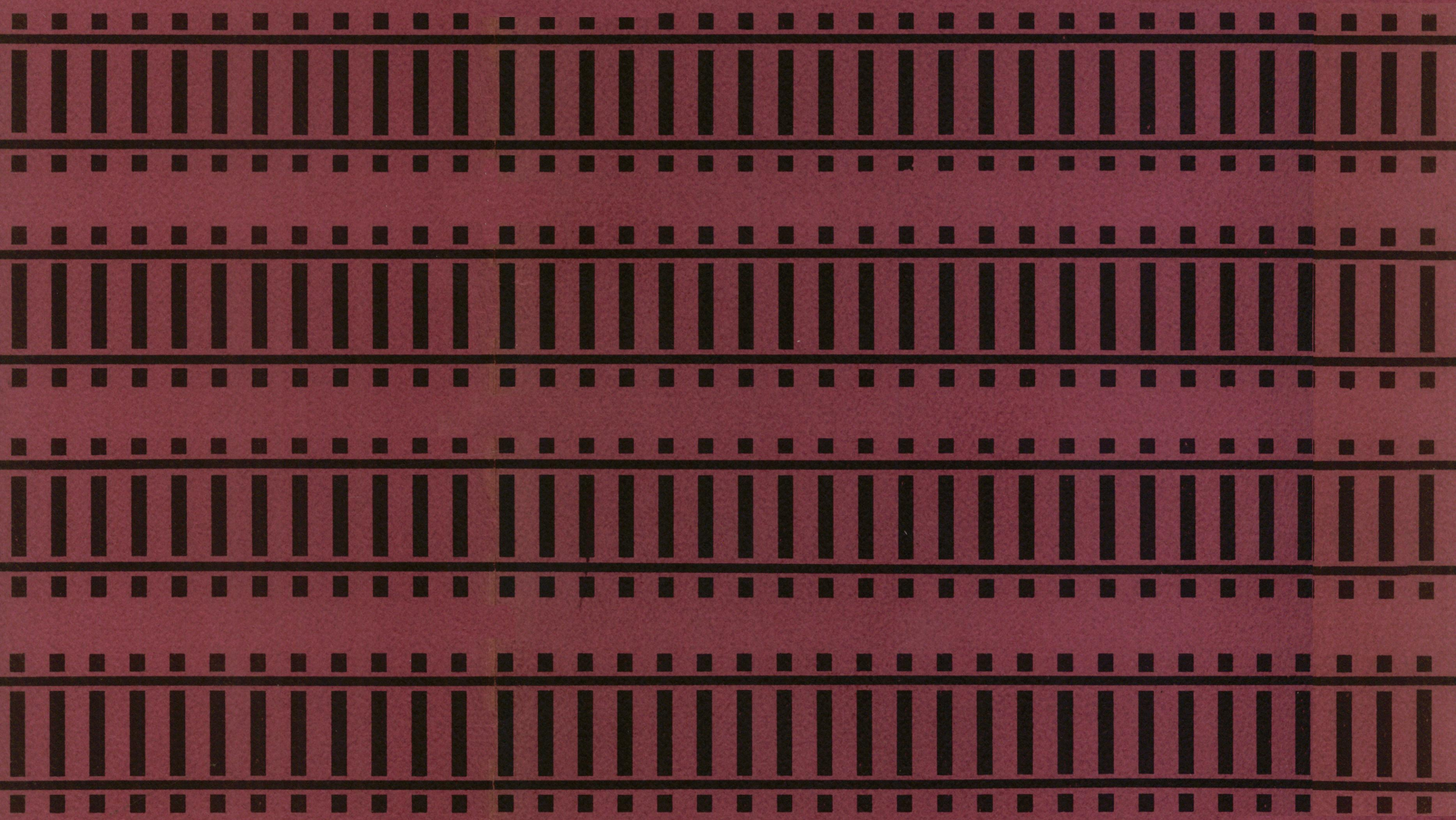
F. *Reinvestigation*

The Railway Labor Act makes final an award of the Division, and where an employee has been ordered reinstated for the lack of a fair and impartial investigation of the charges against him, the carrier cannot rehear the charges and try him again for the specific offense he was previously tried on.[45] The Division, however, may in its original award send back a docket for reconsideration by the carrier.[46] Thus, in Award No. 14445, involving evidence introduced before the Division by both parties, which evidence had not been included in the investigation by the carrier, the Division stated: "It is our opinion that all this evidence mentioned above is of such vital importance to the consideration of the issue presented, that it should be introduced in a further investigation with all parties present. We agree with Award 11726, where it was said: 'Under such circumstances, the case should be remanded for further hearing. Such rehearing to be made for the sole purpose of enabling the parties to fully present their respective cases, for the record, so that this Division may intelligently pass upon the merits of the case.' "

Where an employee properly requests the carrier for reinvestigation under the provisions of the agreement, "the same follows as a matter of right."[47] Should the employee request a reinvestigation, he may not subsequently raise valid objection to the fact of reinvestigation.[48] Moreover, a carrier may be within its rights in calling a second hearing to deal with untruthful responses to questions adduced in the initial hearing.[49]

There must be at some point an end of litigation. Reinvestigations as a general rule are not ordered, for otherwise, as the Division states, "we would authorize proceedings which could defeat the practical efficiency of every investigation."[50]

[44] Award No. 1283. Also see Award No. 11847.
[45] Award No. 6445.
[46] Awards Nos. 768, 11726, 12500, 12626, 15159.
[47] Award No. 13108.
[48] Award No. 3103.
[49] Award No. 13983.
[50] Award No. 12287.



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