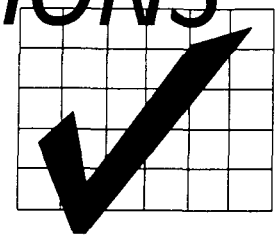
# PROCEDURAL OBJECTIONS

## *In Disciplinary Hearings*



**Unlike claims, where facts can be added at any time during handling on the property, arbitrators in the rail industry have consistently ruled that in discipline it is the transcript of what occurred at the investigation upon which they base their decision. *Statements made after the hearing may not be considered.***

Your job as the employe's representative is to place into the written record of the investigation your defense of the employe. You only get one chance, and that's at the hearing. To effectively represent a charged employe you must be familiar with the standard procedural objections and what to do if the Carrier violates the employe's due process rights.

Over the years in the railroad industry, arbitrators have developed a series of fairness criteria for disciplinary cases. They know that the hearing officer works for the company and he'll always rule for the credibility of the company witness and against the claimant. Accordingly, arbitrators impose certain due process safeguards. Some are spelled out in our agreements, but many are not. Some of our agreements call for a "fair and impartial" investigation, some do not. Some specify time limits, some do not. However, despite these variations, railroad arbitrators generally agree that certain due process rights are universal. A company violates them at their peril. Over the years we have had thousands of discipline cases reversed because of these procedural errors. It is important that you become familiar with each of these due process rights, and how to handle them when they occur.

Let's start with events that occur before the hearing even begins. **When you receive a statement of charges, the first thing to look for is whether the charge was brought within the agreement-required time limit.** In most agreements the time limit is within thirty days of the company having knowledge of the alleged offense.

But even where agreements do not impose upon the Carrier a specific time in which to bring charges against an employe, arbitrators still require that charges be brought *within a* reasonable time of a Carrier having "knowledge" of the alleged offense. As stated in Third Division Award 19423:

> "Claimant received the notice on the day of the hearing. Absent circumstances not present here this does not constitute notice at a 'reasonable

*This article will discuss the standard procedural objections to look for in every disciplinary bearing. But first we should look at the disciplinary process in general. There are a few significant differences between discipline handling and claims writing. In a discipline case the burden of proof is on the Carrier. But, as you know, a disciplinary bearing is like a kangaroo court--no matter how well you present your defense the carrier will most likely find the employe guilty. While you have the opportunity to appeal the Carrier's decision (often we're successful at getting the discipline overturned or at least modified), you only get one chance to make your case, and that is at the bearing.*

time' nor did it give him 'reasonable opportunity' to secure the presence of necessary witnesses."

It is important to know that the timeliness of charge trigger is not when the offense took place, but when the Carrier had "knowledge" of it. In other words, arbitrators do not interpret timeliness of charge provisions to constitute a "statute of limitations," whereby an employe is home free if her or his transgression is not discovered within a certain time frame. Take for example a case where an employe falsifies a time card. Thirty days go by and nothing happens. If a subsequent audit later discloses the infraction, it may be that the time of discovery will be the time that "knowledge" of the event to be investigated occurs.

We do prevail, however, when the Carrier clearly had knowledge of the offense but failed to issue charges within the time limits. Often the Carrier will try to get around this mistake by arguing that the rule means knowledge by someone with the authority to impose discipline. In our example, they might argue that it wasn't until the auditor brought it to the employe's supervisor's attention that the clock started running. Arbitrators have gone both ways on that one, depending on the unique facts.

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**After you consider whether the charge was timely, the next thing to look at is whether the charge was precise.** This objection will be known as the "specificity of the charges." The reason that this is so important is that an employe has the right to know with what he/she is being charged so he or she can defend him/herself. The Board in Second Division Award 6612 stated:

> "As a minimum, an employe being investigated for a disciplinary infraction has an absolute right to be informed prior to the hearing as to the particular incident complained of: the date, time if possible, and act in question. Without these basic elements in advance, an employe's ability to prepare an adequate defense is irreparably impaired. As the NRAB previously said: "No man can defend himself against a charge unknown to him."

Generally, the awards supporting this proposition call for a "precise charge." What constitutes a precise charge may vary from case to case but it could be paraphrased as that which would enable the accused to be informed of the nature of the charge made against him or her in a form definite enough so that he/she may adequately prepare a defense.

Over the years Carriers have pretty much learned how to avoid this mistake. If anything, charges nowadays are over specific, sometimes giving us the chance to defeat them by

showing that they are factually wrong — perhaps a wrong date, or an incorrect time.

**The third thing to look at before the hearing starts is the timeliness of the hearing itself.** Some rules specify that an investigation must be held within so many days of the date an employe is charged, or from when the employe was removed from service. If not spelled out, arbitrators still have ruled that the Carrier has an obligation to hold the investigation within a reasonable time.

In a case involving a rule which had a specific time limit, (Third Division Award 28927), the arbitrator ruled:

> "The time limit as set forth is clear, unambiguous and mandatory. It has not been met by the Carrier in this case. We will not, therefore, examine the merits of the discipline inasmuch as the Investigation was not timely held. This Board has ruled in many cases, too numerous to require citation here, that time limits such as those found in Rule No. 25 are meant to be complied with. When they are not complied with, we will sustain the Claim of the Organization."

In Third Division Award 22464, involving a rule that did not set forth a specific time limit the Board held:

> "Assuming, arguendo, that the Carrier's interpretation of the rule is correct it would still be incumbent upon it to provide the hearing within a reasonable time. Fifty-two days between the hearing request and the hearing is an unreasonable length of time. The hearing was not timely held."

*You must determine whether the charge is timely, whether it's precise, and whether the hearing itself is timely.*

Sometimes the Carrier tries to get around this requirement by postponing the hearing without agreement by the Union. They've even been known to convene the hearing at the last second without the Union present, and then unilaterally "recess" it, or, if the Union was present, "recess" it over the Union's objections. Often they use the excuse that their witnesses are unavailable. This violation, known as a "unilateral postponement', was addressed in Special Board of Adjustment 1020, Award 59:

> "...The parties negotiated the time provisions in Rule 19—they must therefore live with their agreements. Just as the Organization is required to strictly comply with the time limits set forth in Rule 19 for appealing of disciplinary actions, the Carrier must also be held to the same standard of compliance.
>
> "Our conclusion is consistent with a long line of authority requiring that hearings must be held

within the negotiated time limits and that unilateral postponements do not avoid application of the negotiated time requirements."

On the other hand, the Union does have the right to a reasonable postponement, particularly when it is not possible for the accused to arrange for proper representation due to his representative being out of town or on vacation or the like. Where the accused received a letter informing him of an investigation to be held the following day and he requested, but was denied, a postponement, the referee held in Second Division Award 720 1:

> "We are constrained to find that the action of the Carrier in refusing to grant postponement of the hearing for a reasonable period was arbitrary and deprived the Claimant of a fair hearing to which he was entitled under the controlling agreement."

The final due process area to look at before the hearing occurs is your right to demand that the company make available witnesses at the hearing who have relevant knowledge of the charges. Make that request in writing beforehand. Outline why the witness should be called. In most cases, the company will respond by saying that you have the right to produce the witnesses yourself, and that they will not. If that's their response, object immediately when they introduce the witnesses at the start of the hearing. Get your written request on the record. In your closing statement, state what these witnesses would have said had the company called them. The referee, in Second Division Award 8345, upheld this right as follows:

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> "The hearing officer has considerable discretion in the conduct of the investigation, and the calling of witnesses. He must, however, have good reason for denying a witness for a claimant."

All the violations discussed so far have dealt with occurrences prior to the hearing itself. **If you perceive that the Carrier has committed one or more of these violations, you should immediately place objections on the record at the time the investigation begins.** Many arbitrators will rule that unless these objections are raised at the hearing, the Union will not be permitted to raise them later on appeal. In this regard, consider the opinion of the Board in Second Division Award 7933:

> "None of the several procedural objections raised by the Organization either in its submission or rebuttal statement were raised at the trial. It is a well established principle that the trial proceeding is the proper forum in which such procedural issues should be raised. However, since the

> Organization failed to assert the procedural issues in question at the trial in the instant case, the Board is left with no alternative other than to rule these several objections as not having been timely filed. Silence on these procedural issues at the trial, the Board concludes, constituted a waiver by the Organization of their right to raise such mat. ters at a later time."
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> And, in Third Division Award 23082:
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> "It has been often held that objections concerning notice of charge, the timeliness of the investigation, and similar issues, must be raised prior to or during the course of the investigation or they are considered waived."

*Hearing officers are supposed to conduct the investigation fairly and with objectivity. Their purpose is not to prosecute or convict the employe, but simply to "develop the facts."*

**The second set of valid objections relate to events which occur during the hearing itself.** Generally, these relate to how the hearing officer conducts the investigation. A discipline investigation is not bound by the same rigid rules that govern the conduct of a criminal trial in a court of law. However, there are standards to which arbitrators have held hearing officers accountable. Hearing officers are supposed to conduct the investigation fairly and with objectivity. Their purpose is not to prosecute or convict the employe, but simply to "develop the facts." They should be courteous, evenhanded, and never argumentative.

In the real world, however, the hearing officer's conduct has to be egregiously unfair, or extreme, for an arbitrator to question the decision. Award No. 6 of PLB No. 1802 stated that:

> "A study of the transcript of the investigation herein reveals that the hearing officer mistakenly perceived his role to be that of a prosecutor. His conduct borders on the verge of obvious bias and pre-judgment in his persistent cross-examination of Claimant and repeated attempts to trip him up; his role of a fact finder was clearly subordinate to some pre-conceived goal."

Do not be afráid to object to the hearing officer's conduct and do not be afraid to request that he remove himself from the hearing and for the Carrier to appoint one that is unbiased. **If you believe the hearing officer is acting unfairly, make sure you get it on the record during the hearing.**

A common due process violation by a hearing officer is to restrict your ability to cross-examine the company's witnesses. Sometimes the Carrier doesn't even have the witness, but instead simply has someone enter a written statement. Clearly, you cannot cross-examine a written report. You should

always immediately object to this kind of evidence as hearsay. Will you win? It depends. Generally, arbitrators have ruled that if the witness is under the control of the Carrier, the Company has an obligation to produce that witness at the hearing to testify and be cross-examined, as the Board held in Third Division Award 29009:

> "The Organization is correct in its assertion that it was denied the right to cross examine the individual who had first hand knowledge of what occurred the night in question. This witness, an employe of the Carrier, was available and should have been called.
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> "If the witness had been called and his testimony withstood cross-examination then it would have been up to the Claimant to refute the evidence presented. Her failure to so would have settled the matter. Without the regular employe's testimony, however, there was nothing for the Claimant to refute except hearsay evidence."

*The key is for you to be able to explain on the record how your questions are related to your defense.*

However, if the witness is outside the Company's control -like a customer or vendor-arbitrators usually rule that a written statement or letter is sufficient, on the grounds that the Company does not have subpoena power.

When the witness is present, the employe has the right through you, his representative, to cross-examine the witness on all relevant matters. Often, the hearing officer tries to protect the company witness by limiting your questions to particular dates and subjects. Here's what the arbitrator wrote in one such case (Award 129, PLB 2971):

> ". . .Additionally, the hearing officer himself acted in a wholly biased improper fashion in that he restricted and denied Claimant the right to examine witnesses in a fashion most helpful to his case..."

The key is for you to be able to explain on the record how your questions are related to your defense. You cannot successfully use this tactic to ask harassing, irrelevant questions.

The accused is also entitled to make his defense. This includes the right to call his own witnesses, cross-examine the Carrier's witnesses, and to call witnesses in the order he wants to:

> "Despite objection, the hearing officer precluded relevant cross-examination, refused to allow the Organization to call witnesses in the order it wished, and inappropriately instructed witnesses not to answer questions posed." (Third Division Award 2268 1)

Likewise, Second Division Award 6728 held:

> "This Board is mindful of Carrier's right to hold and conduct disciplinary hearings in such a manner so as to develop the pertinent facts as expeditiously as possible. Yet in doing so the employe must be given latitude to represent his defense in a manner which enables him to refute the evidence produced against him. To deprive him of this right is to deprive him of the due process requirement of a fair and impartial hearing."

In an effort to introduce relevant evidence, you, the representative, should not be deprived of reasonable latitude. An eminent referee had this to say about the Union's right to present their side of the story:

> "Carrier's actions in restricting the cross-examination of Carrier's witnesses by Claimant as well as the restriction placed on the testimony of Claimant and the introduction of exhibits, all as set forth aforesaid, prevented Claimant from receiving a fair and impartial hearing, and we will sustain the claim." (Third Division Award 18963)

**Remember, these objections have to be made during the hearing so they can be included in the transcript.** You are trying to engrave these events on the mind of the arbitrator and to do so it is good to repeat them, just to make sure they are in the transcript. **Repeat all your procedural objections in your closing statement.**

One last note about the hearing. Often the hearing officer will ask the charged employe at the end, "Did you receive a fair hearing?" If the employe answers yes, all the procedural objections you've worked so hard to get in the record are considered waived. Make sure you prepare the accused to refer that question to you, or even more simply, to just say no. This is illustrated by Second Division Award 7452, in which the Board held:

> "As to the contention that he was denied a fair hearing, that too has no merit because claimant himself answered 'yes' in the hearing record to the question 'Has this investigation been conducted in a fair and impartial manner in accordance with your scheduled requirements?' He cannot now contend that it was not fair."

When the hearing is over you still have the issue of whether the decision is rendered in a timely and proper manner, and whether the transcript is accurate. If no discipline is issued, you have the right to congratulate yourself for a job well done. Unfortunately, that does not happen often so you may as

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well be prepared to address the objections or discrepancies that follow the hearing.

Again, arbitrators have held that the Carrier must advise an employe of the result of the investigation within a reasonable time or, in many agreements, within a specified time frame. This point is illustrated by Third Division Award 21996: "When it agreed to a rule which stated that a DECISION WILL BE RENDERED, Carrier assumed a mandatory obligation. Employers are quick to assert that the Employes are without a remedy if they fail to comply with a contractual time limit."

**Remember, it is up to you to ensure that the employe you are representing is given a fair and impartial hearing. Make sure your procedural objections are entered into the record and repeat those objections in your closing statement.**

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## Family Medical Leave Act Goes Into Effect April 6

On April 6, American workers will finally secure a protection enjoyed by most workers in the industrialized world.

That's when the labor-backed Family Medical Leave Act (FMLA) is scheduled to go into effect. The Department of Labor has issued a final set of rules and procedures with which companies must be in compliance. (For answers to many questions about the FMLA, refer to *The Winning Edge,* Summer 1993, page 85.)

The law allows workers to take up to 12 weeks of unpaid leave each year for the birth or adoption of a baby or a personal or family illness.

The FMLA covers companies which employ more than 50 people. Two recent studies show that the cost of implementing the program has been minimal.

A majority of companies responding to a study conducted by the Labor Policy Association say that they spent less than $500,000 to come into compliance.

The only possible glitch: there's a Republican-sponsored move under way to establish a moratorium on all new regulations, retroactive to November 9, 1994.