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## **You Are Hereby Notified to Present Yourself for Investigation**

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### **The Role of the Representative**

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***By Duane Beeler***

**Art and illustrations by**

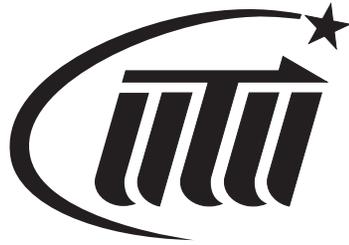
***James Phillips***

***Walter Belding***

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## The Role of the Representative

*By Duane Beeler*

Art and illustrations by

*James Phillips*

*Walter Belding*

The text of this booklet was prepared by the late Duane Beeler, a member of the United Transportation Union and the faculty of the Industrial Labor Relations Department at Roosevelt University, Chicago, Ill.

We wish to express our appreciation to Mrs. Duane Beeler for her permission to reproduce her husband's work for the benefit of rail employees. Portions of the original text and illustration have been updated.

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## INTRODUCTION

A successful representative should:

**1. Know the defendant's rights as they have been defined in arbitration.** (For the operating chairperson we suggest our *Investigations: An Interpretative Index of First Division Awards* as presenting material for a thorough study.)

**2. Understand the principles basic to the investigation rule, so that you can evaluate new situations as they arise.**

Later in this introduction we will suggest major influences upon the railroad hearing.

**3. Combine this knowledge, together with a practical ability to handle people and situations with mastery, so that you can accomplish your purpose.**

This is at once the most important and the most difficult to explain. This volume is dedicated to the task.

Some chairpersons object to minor defects of the hearing and allow major defects to pass unnoticed. During the investigation, other chairpersons have successfully employed certain practices that have no basis in rights. While we do not wish to discourage success in any form, it is true that some of this success can be charged to the fact that the carrier actually understands the standards of a fair hearing far less than does the representative, and it is sufficient that we label proper and improper practices for what they are.

As chairpersons of two operating brotherhoods, we have in this book used the figures and figures of speech familiar to us, but no section of this book is limited to a particular schedule or craft, and the conclusions are applicable to any railroad employee covered by a hearing provision in his or her schedule.

### Judicial Influence

**“...nor shall any person...be deprived of life, liberty or property, without due process of law.”**

This excerpt from the Fifth Amendment to the U.S. Constitution (later repeated in the Fourteenth Amendment as binding upon the states) is a remarkable personal guarantee that has become part of our heritage known as the Bill of Rights.

The Constitution has not further defined “due process,” and of necessity the courts have had to set the standards as well as apply

them. The courts are constantly defining what is arbitrary and what is reasonable, as the phrase “due process” is subjected to myriad situations.

In 1921, the Railroad Labor Board, in Decision 119, suggested a set of principles to guide the carriers and employees in their deliberations, and principle No. 8 concerned the hearing procedure:

No employee should be disciplined without a fair hearing by a designated officer of the carrier. Suspension in proper cases pending a hearing, which should be prompt, shall not be deemed a violation of this principle. At a reasonable time prior to the hearing, he is entitled to be apprised of the precise charge against him. He shall have reasonable opportunity to secure the presence of necessary witnesses and shall have the right to be there represented by a counsel of his choosing. If the judgment shall be in his favor, he shall be compensated by the wage loss, if any, suffered by him.

When the National Railroad Adjustment Board so excellently and concisely states the principles of a fair hearing as in First Division Award 5197 with Judge Carter, this should be regarded, not as an improvisation, but as accepted tenets of justice:

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 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.

Thus we see a remarkable similarity between a fair trial in the courts and a fair hearing on the railroad, with certain changes being necessary because the defendant, in the “inner hearing,” is an employee.

## Judicial Difference

The legislative, executive and judicial branches of our government are formed under the philosophy of “separation of powers,” but modern life has necessitated a combining of some powers, and so we have seen develop – slowly and with judicial approval – legislative authorization of administrative agencies, within the executive department, that exercises powers known as “quasi-judicial” rather than judicial. Early agencies were Immigration and Interstate Commerce Commission, but emergency legislation and the war years increased these agencies until currently the courts are deciding as many administrative cases as judicial cases.

While it is true that a railroad hearing is not bound by the rules of any administrative agency hearing, the standards closely parallel those applied to these agencies, and in fact the National Railroad Adjustment Board, to which our investigations may be appealed, is itself an administrative agency.

The administrative hearing functions differently from court procedure in various respects. This is lucidly explained in President Roosevelt’s veto message of 1940, when court procedure was advocated for the administrative agencies, under the Walter-Logan bill:

Court procedure is adapted to the intensive investigation of individual controversies. But it is impossible to subject the daily route of fact-finding in many of our agencies to court procedure. Litigation has become costly beyond the ability of the average person to bear. Its technical rules of procedure are often traps for the unwary and technical rules of procedure often prevent common sense determination on information which would be regarded as adequate for any business decision. The increasing cost of competent legal advice and the necessity of relying upon lawyers to conduct court proceedings have forced all laymen and most lawyers to recognize the inappropriateness of entrusting routine processes of government to the outcome of never-ending lawsuits.

The administrative tribunal or agency has evolved in order to handle controversies arising under particular statutes. It is characteristic of these tribunals

that simple and non-technical hearings take the place of court trials and informal procedures supersede rigid and formal pleadings and processes. A common sense resort to usual and practical sources of information takes the place of archaic and technical application of rules of evidence, and an informed and expert tribunal renders its decision with an eye that looks forward to results rather than backward to precedent and to the leading case.

The presenting and considering of evidence in a hearing procedure are drastically revised from recognized court procedure. Justice Brandeis has pronounced this dicta:

Moreover, a hearing granted does not cease to be fair, merely because rules of evidence and of procedure applicable in judicial proceedings have not been strictly followed by the executive; or because some evidence has been improperly rejected or received. To render a hearing unfair, the defect, or practice complained of, must have been such as might have led to a denial of justice, or there must have been absent one of the elements deemed essential to due process. *U.S. ex rel. Bilokumsky v. Tod*.

The reasonable doubt theory of the criminal trial is not present in the railroad hearing. A typical court decision that has shown influence on the consideration of hearing evidence is a case involving a village firing a janitor for drunkenness:

In case of dereliction of an employee in the performance of duty, the determination upon the facts is for the Town Board, and such determination will not be set aside by the courts unless it is unsupported by proof sufficient to satisfy a reasonable man of all the facts necessary to be proved in order to authorize the determination, or unless there is such a preponderance of proof against the existence of any of the facts necessary to be proved as would require the setting aside of the verdict of a jury. *284 N.Y 377, 31 N E 2nd 495*.

The hearing officer, in his dual role as prosecutor and judge, has

invited the main criticism directed at administrative agencies in their quasi-judicial functioning, as it has been felt this left little opportunity for impartiality.

The Fifth Circuit Court has said:

The rigidity of the requirement that the trier be impartial and unconcerned in the result applies more strictly to an administrative adjudication where many of the safeguards which have been thrown around court proceedings...have been relaxed.

It is our belief that the hearing officer is the weakest link in the railroad hearing, and that continual probing by the representative as to the hearing officer's bias, involvement, prejudice, etc., will force a higher standard of conduct upon this most critical person in the hearing.

Thus, while the burden of proof is upon the carrier, the carrier has a wide latitude, as compared to the courts, in the admitting and considering of evidence, and the degree of evidence necessary to convict. The hearing officer, intrinsically a partisan of the company (for it is said a person interested in a trial cannot judge it), must engage your constant vigilance.

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*They are calling you in because you disregarded my repeated admonitions that your having wives at both ends of the division was contrary to company rules.*

## 1. Examine the notice

Notice by charges is an integral requirement of due process of law, and since it is the base of the hearing to follow, the hearing may be invalidated if the notice and the charges are not adequately stated.

The most essential part of the notice is the charge – personally charging the accused of the offense so that he knows definitely he should prepare a defense. This has been a frequent carrier oversight in the past, resulting in many decisions being reversed, but it has been overcome by inclusion in the notice of a phrase similar to the following: “to determine your responsibility,” “to determine responsibility for your alleged failure,” or “You are hereby charged.”

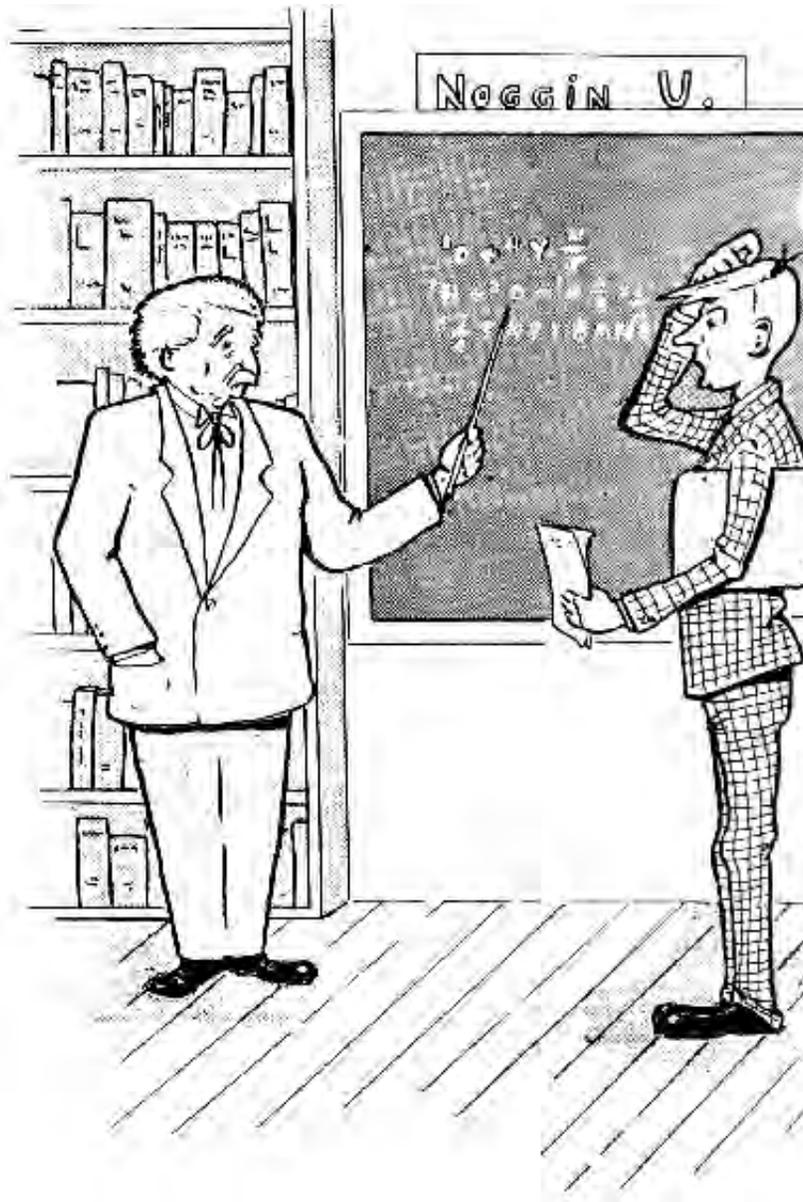
It is often that rule infractions should be enumerated in the charge, but this is only necessary under a rule requiring *specific charges*. If you cannot adequately prepare a defense from the information contained in the notice, rules allegedly violated may then be necessary.

The notice should conform to the time limitation of your investigation rule.

The notice should be received a sufficient time in advance of the hearing so the accused can arrange for representation and necessary witnesses. Two days is ordinarily considered sufficient. (If you request an extension, you also waive the particular time limitation of your rule.)

The accused should be notified with sufficient certainty in what manner he has been guilty of the conduct charged, and it has been regarded adequate if the notice contains the time, the place, and the occurrence of the matter under investigation. Any error in the notice concerning dates, time, tracks, persons, etc., are proper cause for objection.

The notice should concern only one incident or a series of closely related events. The notice, with the following investigation, should be the basis for the discipline; in other words, the discipline should not be based on something not contained in the charges.



*But...but...professor! All the notice says....*

## 2. Review defense with defendant

A lawyer will spend weeks in preparation for a case that will last only a few days in trial. And the lawyer is an adept person, poised during the involvement of the court.

The local chairperson is not concerned with precedents as is the lawyer, but he should not slight an opportunity to study the facts of the case with the accused and analyze the merits of the case and determine the future strategy.

At the first meeting this will require a full and frank explanation by the defendant of the part he played in the incident, and the part played by the various principals and the witnesses.

The defendant should be warned at this time that if he is required to make a written statement upon the company's orders, the statement should be limited to facts of record and not a discussion about individuals concerned.

The defendant should be advised as to the danger of admitting he did not comply with certain rules. He should be warned of the danger of proffering information at the hearing. An understanding should be reached that he should not ask questions – or at least until cleared with his representative.

Of course there are Monday-morning quarterbacks on the railroads, but on the railroad this avocation is not limited to one day of the week. To forestall this second-guessing, we sometimes tell our people that they acted with wisdom and diligence at the time, even though in the light of later developments they would have acted differently. This is stated in the following award:

It is a well settled principle of law that no fault can be predicated on an error of judgment unless the error of judgment is brought about by prior neglect on the part of the actor. *NRAB 1st Div. 9924.*

And finally, some defendants go “blank” or panic on the stand, so it is wise to have a system such as shin kicking or handkerchief-on-hand sign to assist them in their answers.



*And thar we were!  
Horn a-honkin'  
Flag a-wavin'  
And a-prayin' to Heaven!*

### 3. Visit the scene

The chief advantage that the local representative has is his familiarity with working conditions of the employees he represents. When one of his employees is called to a hearing, it is likely the representative has had personal experience or has knowledge of other fellow employees that have been involved in comparable experiences in the past. It is inexcusable for the representative not to know all the facts before the start of the hearing.

Thus, advice to visit the scene is often unnecessary in the literal sense, but it is most important to realize from the outset that the success of the representative will depend largely upon his superior knowledge of all the facts and background of the case at issue.

For example, the scene of the accident will furnish many ideas in track curvature, grade, clearances, visibility, etc., that will be integrated in the defense. Then when these matters are discussed during the hearing, the representative can pounce on any discrepancy of physical fact.



*Methinks Superintendent Wigglebottom will be having open house in a very few days.*

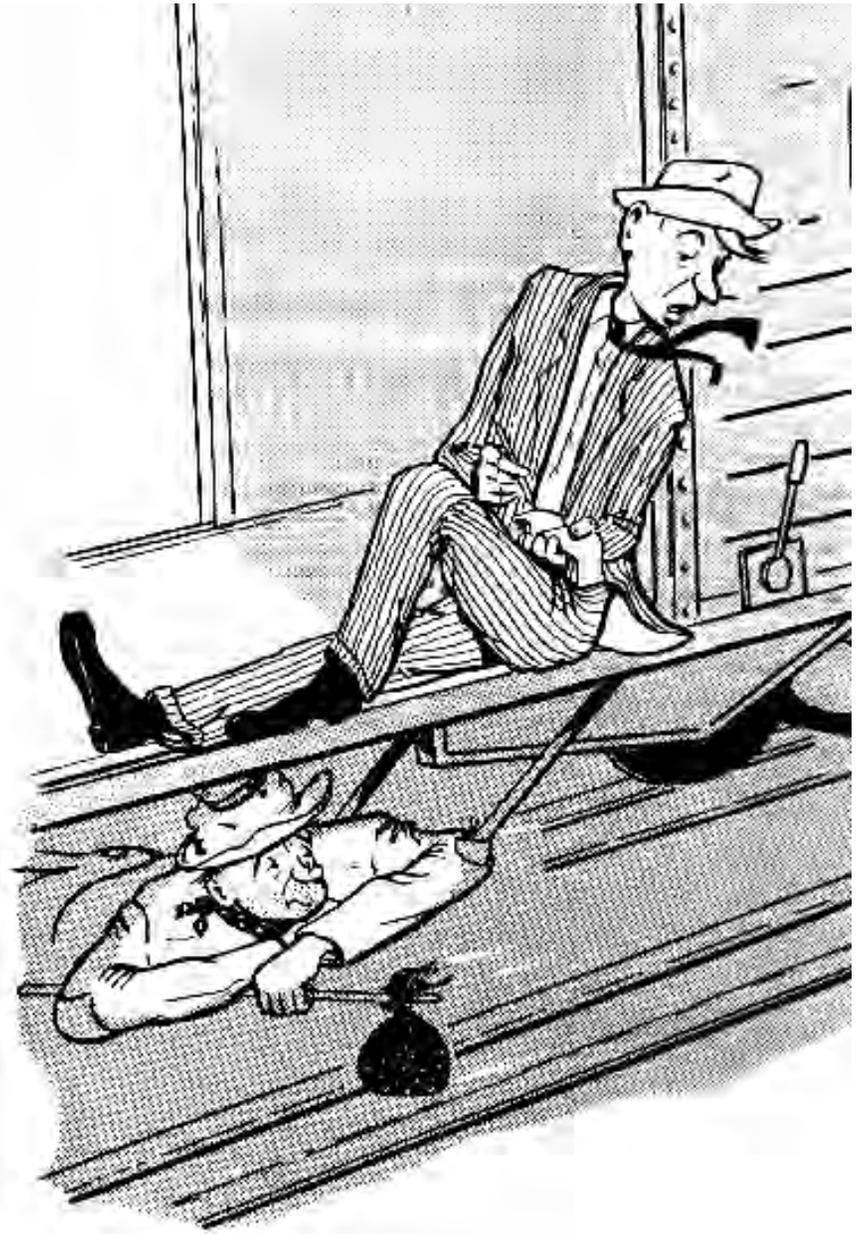
#### 4. Interview principals and witnesses

It is axiomatic in personal injury cases to take statements immediately from the witnesses. There are many reasons for this, some that cannot be confined to paper. Witnesses tend to be sympathetic toward the person you are discussing and an early talk with the witness magnifies his importance and favors your case.

Witnesses favor employees as against employers, and while most are reluctant to sign statements, they will often make favorable oral statements that the representative may introduce into the hearing through cross-examination, such as “Didn’t you state when I interviewed you that the train was going at least 40 miles an hour?” or “Didn’t you reply, ‘The railroad policeman caused all of the trouble’?”

You cannot get the truth of the incident until you get the testimony of all the principals and witnesses: the whole story then becomes the truth. The employee you represent may have told you the truth so far as he knows it; like the three blind men who felt variously of the elephant, you will not find what actually did happen until you fit all the pieces together.

By interviewing key principals and witnesses before the hearing, you know the entire trend of the testimony. This not only enables you to tighten your defense before you enter the hearing, but to immediately refute during the hearing testimony that is at variance with the facts as you know them.



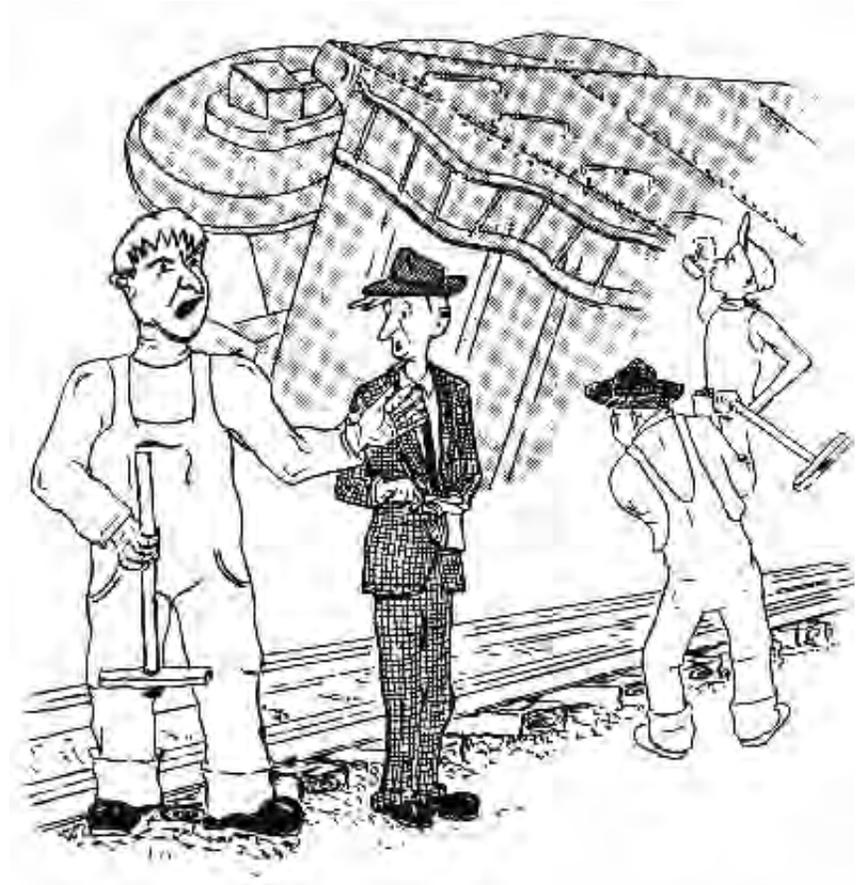
*Would you say the coupling was a “normal” coupling?*

5. Discuss incident with persons familiar with the situation or having technical information

When you ask people for knowledge, you flatter them. Information is easily obtainable on the railroad. You know the employees, and they know and respect you.

Tower personnel, station masters, even the track walkers are encyclopedic in their particular knowledge involving incidents of long ago that may shed light on the present incident. Perhaps the section foreman had suggested to the roadmaster an increase in the incline of the curve; maybe a past derailment occurred under similar circumstances; could the tower have previously reported the crew for excessive speed?

As local chairperson, you know better than anyone on the railroad what facts are questionable and require investigation, and the prestige of your office enables you to obtain information which the officers of the company may not be able to obtain.



*Wham! Boom!  
Then everything is in the ditch!*

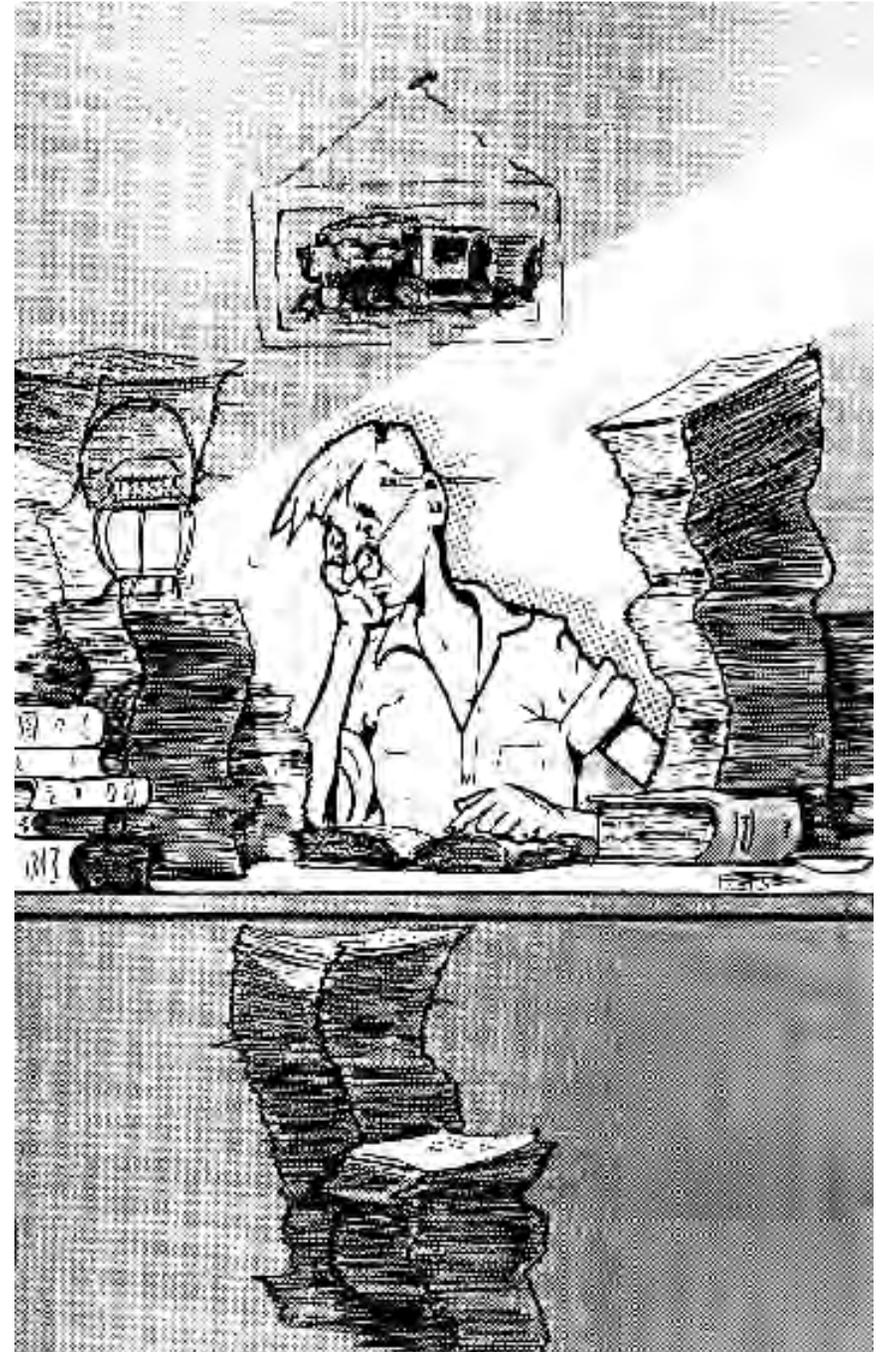
## 6. Study book of rules, special instructions, timetable and safety rules

Don't rely on memory! This is an excellent opportunity for you to review the written matters applicable to the incident being investigated.

When the superintendent said, "The Book of Rules wasn't written to run the railroad, but to fire men," he was more serious than jestful, for every day at work each of us probably violates some rule, as rules are general and cover many situations.

If the investigation is not a serious one, a meeting may be held prior to the investigation so that the local chairperson can explain to the defendant the safety rules and operating rules involved. The defendant may then realize that his or her actions at the time of the incident were consistent with the written requirements of the company.

A thorough study of the rules may disclose that the defendant did not comply with one rule because he or she was observing another rule.



## 7. Read your investigation rule carefully

We would like to conduct an investigation under this rule:

*No employee will be disciplined, suspended, or discharged without a fair and impartial investigation; requiring specific charges; specifying all interested parties will be notified to attend; and concluding no entry will be made if reasonable doubt exists.*

But each of us has to conduct a hearing under his own rule, and one should be cognizant of the benefits and especially the restrictions of his rule.

The Adjustment Board has said with one voice:

*It is to the best interests of both parties to comply with such an important rule as the Investigation Rule in every respect.*



*...and every man is presumed innocent until proven guilty.*

## 8. Realize the many unwritten benefits

Any person on the railroad, entitled to a fair hearing by written contract, is entitled to many guarantees that are not written. These guarantees have evolved from the Constitution, court decisions, accepted custom and Adjustment Board decisions.

The **accused** is entitled to:

- proper notice (with its many facets);
- the representative of his choice present at the hearing, and
- the right to confront and cross-examine all witnesses.

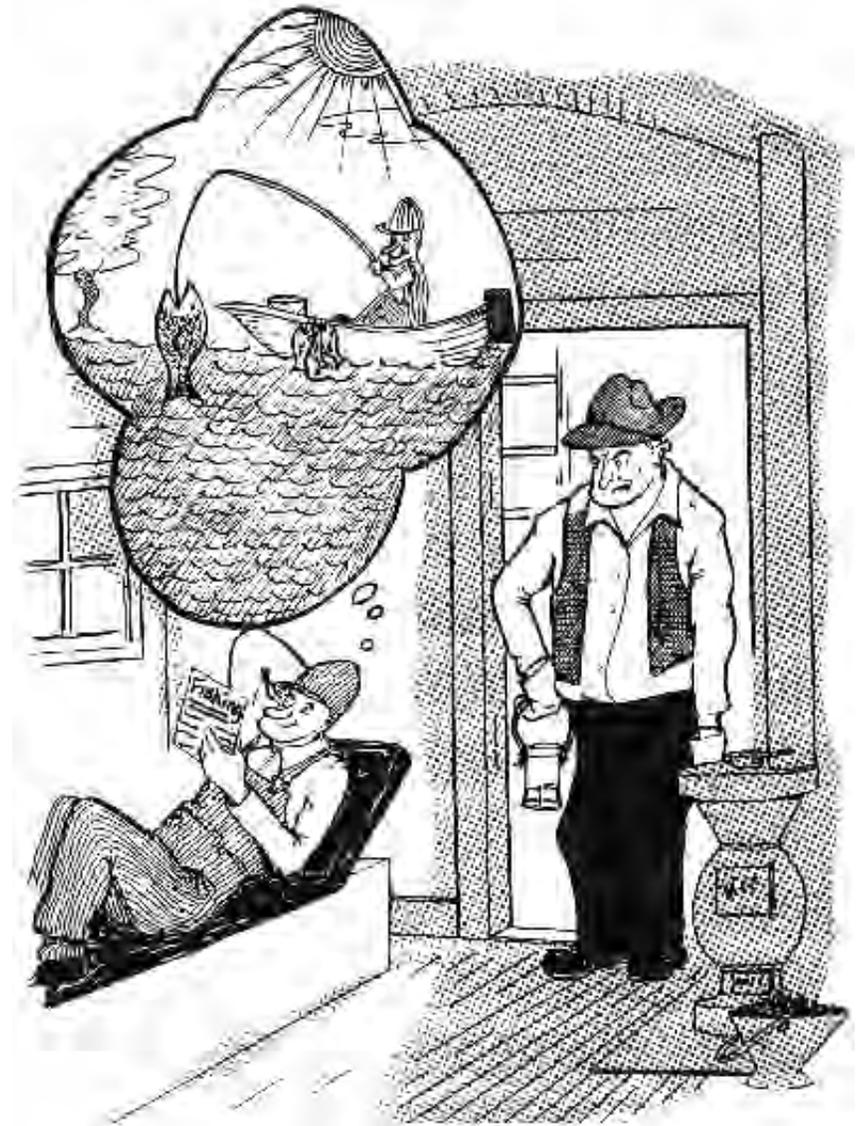
The **carrier**, in its investigation of the incident, is obligated to:

- hold a thorough hearing into all the facts, and
- furnish principals and witnesses to develop these facts.

The **carrier official sitting in judgment** at the hearing:

- should not have prejudged the case;
- should not conduct the hearing in a prejudicial manner;
- should not be a witness to the affair, and
- should testify, if requested, as to his knowledge of facts and issues.

**The burden of proof is upon the carrier.**



*If you showed one-half the interest in switching these industries that you show in that schedule, we wouldn't be getting hog-lawed every other day.*

## 9. Prepare written protest and questions

The representative approaches the practice of preparing written protests and questions as being not quite cricket, as a conductor who looks furtively at a switch list so the rest of the crew won't know his source of knowledge.

If a defense is worth preparing, it should not await the uncertainties of the hearing, but should be outlined in advance. In important hearings and on important protests, it is wise to have the exact language of your documented protest entered into the record just as you have composed it, by handing a copy to the stenographer at the beginning of the investigation.

Questions to be asked of each principal and witness may be listed under his name, and during the course of the hearing additional questions may be added.

We offer as a case study an investigation wherein four objections were placed in the record in this manner:

1. We find, not present, three witnesses who we feel will be necessary to develop the full facts about the matter under investigation. These are: Yardmaster S., Towerman J., and Head Switchtender Q. It may develop that one or more of these witnesses are not essential if there are no disputed facts, but we ask, to insure a full investigation, that these three men be called to attend this investigation, and that we continue the investigation and be allowed to question these three men when they arrive, upon facts in dispute.

2. We call now to your attention the July 1, 1950, schedule between the engineers and our company. Article 33(a) first sentence reading, "Engineers will not be disciplined or discharged until they have been given a fair and impartial investigation." [We then argued that this rule prohibited men from being removed from service before such a hearing, and that his procedural defect invalidated the hearing.]

3. We now ask Mr. E., our hearing officer, if on Friday night, June 18th, about 10:15 p.m., Trainmaster H. called you at your home, and upon your request to learn all the facts, Mr. H. so explained them, and you then advised him the engineer and fireman were insubordinate and to remove them from the engine, or words to that effect?

\* \* \*

Mr. E., we ask that you disqualify yourself as hearing officer.

[As a result of arguing this protest, the hearing officer made the following prejudicial statements confirming our accusation of prejudgment:

"...inasmuch as both engineer and fireman had refused to obey his orders, they were to be removed from the engine"; ... "to workmen who refuse to do what they are instructed to do by their superiors"; and "I am basing my statement on what I have been told by witnesses at the time of the occurrence."]

4. With regard to the charges, we regard as a minor defect that the person or persons to whom the engine crew were allegedly insubordinate – "the switch crew," "yardmaster," and "trainmaster" – were not mentioned by name. We have had difficulty – in fact we have not succeeded – in preparing a defense for this reason. This defect may remedy itself as the investigation progresses, and for this reason we ask that the witnesses developing the charges give their testimony first, as is customary in our courts, so that we may consider a defense.

This case was settled solely on the evidence without appeal on these protests, and we are happy to state the engine crew was reinstated with pay. (One of the chairpersons, whose name appears on this book's title page, appeared as defendant and the other chairperson served as representative.)



*Most honorable judge! It is my intention to refute the testimony of my learned colleague, Trainmaster Ofenrong.*

## 10. Study hearing officer for prejudgment and involvement

The only branch of law that compares with the railroad investigation is the administrative procedure that was developed during the Roosevelt administration to deal with governmental employees.

The Administrative Procedure Act of 1946, Section 5(e), provides that “no such (hearing examiner) shall consult any person or party of any fact in issue unless upon notice and opportunity for all parties to participate; nor shall such officer be responsible to or subject to the supervision or direction of any officer, employee, or agent engaged in the performance of investigative or prosecuting functions for any agency.”

In the minds of some, many railroads have made no attempt to encourage impartiality in their hearing officers, except those that have created special hearing officers with a theoretical disinterestedness in charge of the investigation.

The smaller the railroad and the smaller the division, the more likely you are to get as hearing officer an officer who has been involved in or prejudged the case, since the operating officer and the hearing officer are the same and the operating officer has passed a decision or opinion on the case previously to the hearing. It is up to the representative to ferret out this prejudgment.



*You may be assured, when I call you in for hearing on this little incident, that you will get a fair and impartial investigation.*

## 11. See if all principals and witnesses are called

The first thing the representative should do at the start of the hearing is to identify all the persons and have their names, and the capacity in which they are appearing at the hearing, entered into the transcript. Present may be principals (persons charged with responsibility), witnesses, expert witnesses, representatives, examiners, the hearing officer and observers.

It is important to establish the status of the various persons as each class is allowed certain privileges and denied others; for example, the representative can ask anybody questions but cannot give testimony, while the witness can give testimony but cannot ask questions.

The carrier is obligated to conduct a full investigation into all the facts, not a partial hearing merely to gather sufficient information to prove the accused guilty. The carrier must call the principals – that is, the persons involved in the incident. The carrier must further call essential witnesses – that is, all persons who can contribute information to develop the facts. You may choose to call additional witnesses at your own expense.

Carriers will often refer to the schedule provision allowing you the privilege to call witnesses, but you have no compulsory process to call witnesses, whereas the carrier has the investigative power and personnel, and authority, to compel employees to attend as witnesses.

Since the representative, in his previous investigation, knows all the witnesses who can develop information favorable to his client, he should notify the carrier previous to the investigation if he suspects the carrier will not call them. If the witnesses are not present at the hearing, he should enter into the transcript his repeated request that certain witnesses be called, and the information that he would like to develop by their presence. Further, that the carrier's failure to call essential witnesses is evidentiary of their intent to conduct an adversary proceeding against your client, placing the burden of developing the facts upon you, the carrier thereby evading his responsibility of conducting a *full* and impartial investigation.



*We've got the Hogger, the Tallow Pot, High Pockets, the Big Switch and Second Guesser – but, er ... er ... where's the Head Shack?*

## 12. Request prosecution to testify first

Most often, the hearing officer will call the witness to develop the testimony before he calls the principals, and this is proper.

There is an advantage to this, as most employees and some officials are reluctant to go on record as making derogatory remarks against a fellow employee, and it may not be necessary to resort to your defense in depth as you originally conceived it, and the accused will have to answer only to those charges that have been developed.

If the hearing officer insists upon calling your defendant early for his testimony, you could advise that the accused was called as a carrier witness and as such, statements of the accused would be binding upon the carrier.

Or the following argument would be cogent: “You’re serving the charges. Make out your own case on your own witnesses. It is not our duty to make out your case. It is not consistent with ‘due process.’”

The most valid argument is contained in the following objection:

*The accused would be prejudiced in his right to take the stand at this time, not knowing the full import of the charges.*



*We welcome this opportunity to question the road foreman of engines.*

### 13. Have you received proper notice?

There are three phases to a hearing in the eyes of the carrier: the notice, the investigation and the discipline. If the carrier can be assured that there will be no cause for complaint in the notice and the hearing, the carrier can then proceed to the discipline with impunity. A question similar to, "Were you properly notified?" has been included in the list of essential questions to be asked of each accused person, so that the carrier can foreclose any future protest on this point.

The defendant must be forewarned of this question so that he may parry it by replying, "I received this letter to attend the investigation" or "I do not understand the technical requirements of proper notice."

However, such an extremely important question can be met and overpowered by the following objection by the representative:

*Were you properly notified? is a leading question calling for affirmative conclusion which amounts to a waiver on the part of the accused of any irregularity in the substance and form of the notice.*

If the notice is faulty, it is propitious to enter such protest in the record at this point, as in the following protest because of indefinite notice:

Mr. K. has consulted with me as his representative, and I have examined the notice to see what charges have been placed against Mr. K.

The notice reads in part "for investigation in connection with your alleged violation of Transportation Rules 700 and 701, by your actions while on duty as yardmaster, and while on company property in the Taylor Street yardmasters' office on Tuesday and Wednesday, April 5th and 6th, 1955."

Rules 700 and 701 are familiar to us. The time, April 5th and 6th, covers 48 hours, and is limited by the phrase "while on duty as yardmaster." I have examined the work register with care and have found that Mr. K. was on duty during this 48-hour period from midnight to 7 a.m. on April 5th, and from 11 p.m. to midnight April 6th.

The notice contains no information enabling us to ascertain what incident is subject to investigation. If an approximate time during this 48-hour period were specified, this would help. If the act or occurrence were mentioned, this would help. If the persons involved were enumerated, this too would help.

We are asked to stand investigation on a notice that:

1. Does not specify which hour or hours of the 48-hour period is subject to review.
2. States Mr. K. was "on duty as yardmaster" – this being questionable to us.
3. Makes not the feeblest attempt to state the act under complaint.
4. Mentions no person to whom Mr. K. was discourteous, so that he can identify the incident.

This notice in no single aspect approaches the minimum standard of notice, and in fact is no notice at all, since we can fashion no defense based upon the information contained in the notice.

Proper notice is the first requirement of due process of law, and since we have not been honored with the fundamental requirement of a fair hearing, the ensuing hearing, if it is held, is void and a nullity.



*Hey, Doc! Any defects in this notice?*

## 14. Follow the hearing officer for prejudice

Prejudicial conduct is that conduct on the part of the hearing officer that defeats the concept of fair play and the object of an impartial hearing.

Prejudice may be in the form of bias upon the part of the hearing officer; a tendency to ignore essential facts or consider new evidence in arriving at a final judgment; a tendency of thought favoring the carrier on any issue; an attitude for or against persons as distinguished from issues and rules; an obvious obligation to carrier personnel.

Prejudice may be in an obvious form, wherein the hearing officer is abusive or threatening, freely expresses his own ideas, is argumentative or shows preconceived opinions.

It may be in a more subtle form of restricting evidence, asking leading questions, making off-the-record remarks or directing testimony toward favored channels.

Even though many of enumerated prejudicial actions are sufficient to disqualify the hearing officer, the representative should carefully document these actions to prove prejudice.



*May it be inferred – since a necessary part of your equipment is a large red flag – that you favor a foreign ideology?*

## 15. Rest on favorable testimony

Many chairpersons, when they hear testimony placing their client in a favorable light, feel that, by asking questions on this testimony, they can place their client in a better position. Such is often not the case.

If favorable testimony cannot be improved by cross-examination, or if there is danger that the former favorable testimony may be qualified, it is indeed wiser not to pursue that line of questioning further.

The art of cross-examination is based on a study of personalities and motives. Often an inexperienced chairperson must restrain himself so that he does not prejudice the handling of his client's defense.

You should know **whom** to question and **how** to question so that you don't get information you don't want.



*Is it your personal opinion that during this entire episode your conduct was exemplary?*

## 16. When witness is evasive, be ruthless

If you have laid your groundwork properly, you will know if any witness or principal is being evasive, and for what reason. Evasiveness is a reluctance to disclose true facts, and since it is a mere half-step from lying, it is often used by an official of the company to cover up actions that he does not wish his superiors to know about.

If the representative asks a question that has a bearing on the investigation, he is entitled to have an answer to his question – not a half-answer. If he doesn't think the answer satisfactory, he can, by rephrasing his questions, probe from various angles to get the truth. He can return later and ask more questions of the witness.

Questioning is an art depending upon what the witness knows, what you want to find out from him or her, and how to get the satisfactory answers.



*Will you swear under oath that you did not deliberately extinguish signal indication 86 B?*

## 17. Enter tempered and judicious protests

The record is the thing, and be sure that every favorable point and every objection is entered into it. By failing to protest you may waive some right which you could refer to on appeal, so it is wise to protest on every matter that you feel improper. Rather safe than sorry is the word.

In presenting a claim, instead of saying, "The foreign crew is not allowed to spot cars," it is better to say "This service deprives our crews of work which they are entitled to perform under our seniority and scope rules." So in protests, instead of saying, "I object," it is better, if you know the basis of the objection, rather to state, "This action by the carrier deprives us of our right to face and cross-examine our accusers."

Each objection, even if sustained, is not necessarily one that will vitiate the proceedings. If you can qualify your objections, and object only on those matters which have validity, your objections will carry weight with the hearing officer and reviewing officer.



*A little something I dashed off last night.*

## 18. Conduct leisurely hearing

While there are certain accidents and incidents which require investigation on the railroad, there are many investigations called that could be disposed of by having the supervisor merely discuss the matter with the people involved.

Some officials take pride in the paperwork they forward to their general officers, and it should be your purpose, as representative, to dissuade them from their eagerness of calling investigations of each minor infraction.

You can do this by awareness of your rights and purposeful handling of these rights, but you can also accomplish your aim by the obvious stratagem of the leisurely hearing.

The officer calls an investigation for a missed call, and allots a half hour of his schedule to dispose of this minor infraction. The testimony and cross-examination of the crew dispatcher, together with protests and argument, finds the investigation still in progress after two hours. No matter what the outcome, the benefit is simply not worth the effort.

The next time the officer considers calling an investigation, he will think of the day wasted, of the day upset, and of his constant parrying with a representative who is vigilant of his rights, and he may say, "I think I can accomplish this just as easily by talking it over on the telephone with the local chairperson."



*Four score and seven years ago, our fathers  
brought forth on this continent...*

## 19. Be sure the entire testimony is transcribed

Records of hearings are transcribed in three ways: tape recorders, direct typing and shorthand. It is with the more frequent shorthand that we are here concerned.

There are three dangers to the shorthand method.

The first is the practice of “off-the-record” remarks. These may be initiated by the hearing officer or by the representative. Off-the-record remarks sometimes develop testimony that should be included in the record while it is being said. During this off-record period, the hearing officer may display a prejudicial attitude that cannot be recaptured for the record.

Secondly, stenographers frequently fail to take the entire testimony when the going gets hot and heavy, either because the proceeding is too fast or because the stenographer becomes enthralled. It is when charges and counter-charges are being hurled that you must keep your eye on the stenographer to be sure testimony is being taken that will benefit your position. It is proper for you to enter into the record the failure of the stenographer to take all testimony. And never hesitate to ask to have previous testimony re-read.

The third danger is the obvious one of errors and omissions in the record, which should be noted as soon as you receive the transcript.



*But I insist the black box printout is not germane to this investigation!*

## 20. Do not hesitate to ask questions of hearing officer

The representative should have no inhibitions about his role in the hearing. In his zeal to represent his fellow employee, he is allowed a great deal of latitude.

But the hearing officer is continually on trial! His dual capacity as protector of the company's interests and dispenser of justice is a precarious and vulnerable position indeed. How better can his impartiality and fairness be tested than under fire?

In many investigations, the hearing officer is an officer (such as superintendent) who has authority to draft rules, interpret and enforce them. The hearing officer is not exempted from answering questions when they are pertinent to the investigation and directed to his knowledge of facts and issues.

If you have prepared a series of interlocking questions, the impromptu answers by the hearing officer might leave the record such that he will not want the general officers to review it. It has been a device of some successful representatives to purposely foul up the record for this very reason.



*As authorized representative of my much-maligned client, I insist that you tell where you were the night of Friday the 13th!*

## 21. If necessary, recapitulate

In writing this chapter, we wonder if it weren't put in just to make 24 steps in the investigation procedure instead of 23.

Yet, you will come to an investigation, as we have in the past, when you wished there were 124 steps, so you could explore more fully all the circumstances and tighten your defense for the critical investigation you must handle.

The apocryphal story is told of Winston Churchill in his famous "We will fight them from the beaches" speech. He is supposed to have turned to a friend and said, "And if that doesn't stop the Nazis, we will hit them over their bloody heads with blooming beer bottles."

You, too, will be driven to desperation, when all conventional arguments are useless, to resort to an unconventional defense as described above.

As long as there is some matter to explore that may benefit your position, keep probing and returning to it.

Unless you choose to protest the conduct of the hearing when your client is asked if he has received a fair hearing (as in the next step), this should be the proper time for you to sum up, clarifying your position for the reviewing officers.



*For the benefit of the court, I will recount the events leading up to this harmless incident as they actually occurred.*

## 22. Have you received a fair and impartial hearing?

You should realize by now that a fair and impartial investigation encompasses many written and unwritten benefits to which the defendant and his representative are entitled.

It may be realized then that the question, “Have you been accorded a fair and impartial hearing?” may be the most important question asked at the hearing, especially if the decision of the hearing officer is to be appealed.

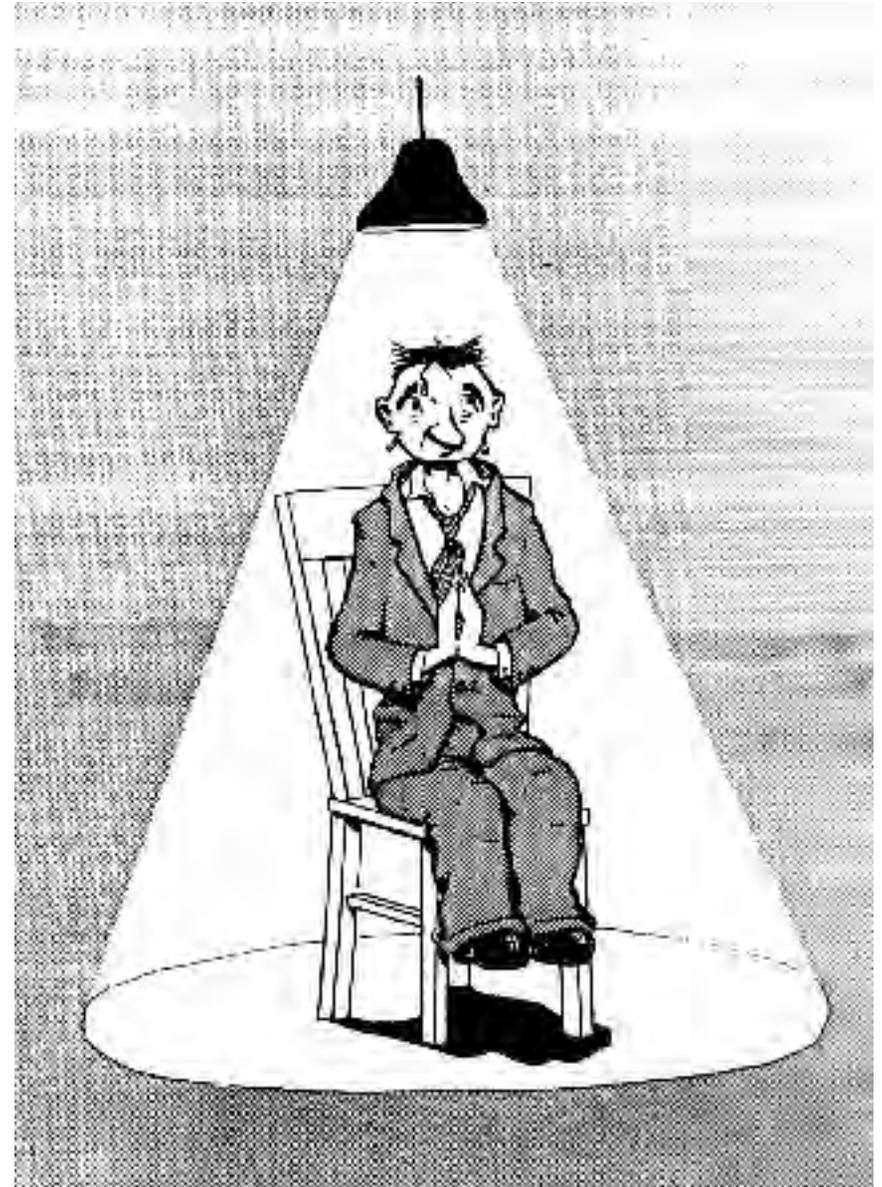
It is true that some authorities do not place significance to this question, witness the following decision:

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. *NRAB 1st Div. 17028.*

Many referees and higher carrier officers have said this, in effect: While it is true, as pointed out by the general chairperson, there are defects to the hearing, we are of a mind they are not sufficiently serious, since the defendant himself admitted he had received a fair hearing.

“Have you received a fair and impartial investigation?” is a loaded question! If the hearing officer should ask: “Have you had opportunity to bring in witnesses? To cross-examine? Have I brow-beaten you or restricted your questioning?” – these are all fair questions deserving of an answer.

Or maybe the conduct of the hearing has been such that you welcome this question. Your written protests, supplemented by oral argument, explain that the hearing has not been fair, since the charges were not sufficiently specific for you to prepare a defense, necessary witnesses (that you had previously requested) were not called, and the hearing officer refused to answer questions pertinent to the investigation.



## 23. Review transcript for errors

While objection to inaccuracies in the transcript is not normally a defect sufficiently serious to reverse the decision of the hearing officer on appeal, it is an objection, when coupled to other objections, that may tip the scale in your favor.

The errors that you point out in the transcript should be shown not simply as errors, but as **significant** errors, showing prejudice on the part of the hearing officer, or an omission of important testimony.

More rarely, omissions or major inaccuracies of the transcript are sufficient to overturn the lower officer's decision. Some few hearing officers have a tendency to edit out of the transcript testimony placing them in an unfavorable light.

It is, therefore, important that the chairperson should receive and review the transcript as early as possible so as to find the discrepancies while the investigation is still fresh in his mind, with the view of establishing the lack of fairness and impartiality.



*I can't recall my client, in referring to Trainmaster Ofenrong, using the exact terminology "Gold Brick."*

## 24. Appeal case promptly

As soon as the investigation is over and it is known the defendant will be censured, efforts should be made to clear the employee's record.

This can sometimes be done by the local representative if he is in rapport with his local officials. He should avoid an early discussion of leniency in writing.

It can better be done by immediately forwarding the transcript, if possible, with comments to the general chairperson, who can immediately discuss the case with the carrier general officers. This has proven so successful on some railroads that, contrary to the requirement favored by most chairpersons that a decision be rendered in three days, these chairpersons favor a longer period before discipline is assessed, so that the local officers will not be precipitated into a decision that will have to be reversed.

The reason for the general chairperson's success in this phase of the appeal is that he is dealing with officers who are not so personally concerned and so are more objective. It is also a recognized fact that the higher the officer in the company, the more liberal his labor policy.

It is dangerous to rest on a case after an investigation is over. If an employee is discharged, his or her livelihood is too important a consideration to jeopardize by dilatory handling. Hearings being what they are, the final outcome cannot be vouchsafed, and discretion is the better part of valor when a person's right to work is at stake.



*Scissorbill! You always were two carlengths behind!*

**...and yet we must, with candor,  
urge that the best investigation  
was the one never held.**



*Just got marked back on the board and got  
a short call for the 5 a.m. CSXT transfer!*

