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HISTORY OF RAILROAD UNIONS

Railroad unions representing operating crafts were organized in the 1860s. They were formed primarily to provide life insurance to those members who died as a result of the extremely hazardous jobs.

Railroad employees belonged to separate unions along craft lines. The Brotherhood of Locomotive Engineers (BLE) originally represented engineers only. The Brotherhood of Locomotive Firemen & Enginemen (BLF&E) represented firemen and enginemen; the Brotherhood of Railroad Trainmen (BRT) represented trainmen; the Order of Railway Conductors and Brakemen (ORC&B) represented conductors and brakemen, and the Switchmen's Union of North America (SUNA) represented switchmen.

At the time these organizations were formed, conditions for employees were horrible. Wages averaged $1.00 per day and 70 percent of all train crews could expect injury within five years of service. In 1893, over 18,343 railroad workers were injured and 1,657 were killed. Insurance was not available to railroad workers because of the hazards of the job. In addition, railroad workers did not have the following:

- Seniority rights for employees;
- Discipline Agreements – employees were fired at the whim of officers;
- Laws requiring safety in the railroad industry;
- The Railway Labor Act, and
- The Federal Employers' Liability Act.

In fact, employees who attempted to form or belong to a union were fired with no recourse. Many employees were required to sign so called "yellow dog" contracts at the time of hire. These so-called agreements meant immediate discharge to an employee who joined a union.

Progress was slow and hard fought. However, in 1893, one of the first victories for unions was won with the passage of the Safety Appliance Act. Among other things, the Act outlawed the "old man-killer link and pin coupler." There were other victories for the union such as, but not limited to:

1898: The Erdman Act provided for mediation and voluntary arbitration on the railroads. It made it a criminal offense for railroads to dismiss employees or to discriminate against prospective employees because of their union membership or activity.

Legal protection of employees' rights to membership in a labor union, a limit on the use of injunctions in labor disputes, lawful status of picketing and other union activities, and requirement of employers to bargain collectively.

1908: Federal Employers' Liability Act passed on April 22nd.

1910: Accident Reports Act passed on May 6. A 10-hour work day and standardization of rates of pay and working conditions were won by the Railway Brotherhoods.

1911: Locomotive Inspection Act passed on Feb. 17.

1916: Hours of Service Act passed on Sept. 3. The Railroad Brotherhoods won an 8-hour day.

1918: Eight-hour day becomes law in Canada on Sept. 1.

1920: Rail employment reached a high of two million workers. Control of the railroads by the government, a wartime measure, ceased in 1920.

1926: Railway Labor Act passed May 20th. It required employers, for the first time and under penalty of law, to bargain collectively and not to discriminate against their employees for joining a union. It provided also for mediation, voluntary arbitration, fact-finding boards, cooling off periods and adjustment boards.

1935: Wagner Act passed July 5th. The National Labor Relations Act of 1935 followed the example of the Railway Labor Act, and clearly established the right of all workers to organize and to elect their representative for collective bargaining.

1936: Washington Job Protection Agreement, May 21.

Early on, it was obvious to many that a single union representing all operating employees or even all railroad employees would be much stronger and more effective. However, there was much resistance along craft lines.

Around 1890, Labor Leader Eugene V. Debs founded the American Railway Union (ARU) as an all craft organization. The ARU, however, was destroyed by management, government collusion and the use of federal troops during the Pullman Strike in 1894.

Other unity attempts included proposed mergers between the BLFE and BLE in 1942 and 1953. Both attempts failed due to BLE's refusal to merge.

In January of 1968 the presidents of the BLE, BLFE, BRT, ORCB and SUNA were invited to meet in Cleveland, Ohio, to discuss a merger. Of the five invited, all participated except the BLE. Presidents Charles Luna (BRT), H.E. Gilbert (BLF-E), C.F. Lane (ORCB) and N.P. Speirs (SUNA) built a solid foundation of mutual trust and understanding in their initial discussions aimed at forming a single organization.

In May of 1968, each of the four unions selected a 10-man committee to draft a unification agreement and constitution suitable to all. The group labored five months before the agreement and constitution were believed to be acceptable.

One of the most important parts of the unification agreement was "craft autonomy." The agreement provided that each craft would be autonomous and that none of the crafts could interfere with another craft's working conditions.

A merger plan was submitted to every eligible member for a vote. The members voted overwhelmingly for the largest union merger ever in the railroad industry.

The merger created a powerful new union which enjoys greater respect in the industry and increased strength at the bargaining table. UTU's voice is stronger among labor organizations and in government in both national and state legislative activities.

Unity has bound our members into a wiser, more-stable organization. Old craft jealousies and barriers are disappearing. Closer association developed more communication, discussion and constructive criticism to the benefit of all members.

The purpose of the UTU is to represent transportation service employees and to promote their general welfare, social, moral, intellectual, economical and political interests.

The UTU is governed by a Constitution that details the laws of the union and how they are applied. Regular conventions have been held quadrennially commencing in 1971 and every four years thereafter. Delegates from each local are elected to attend the convention and the delegates elect International officers and revise the Constitution as deemed necessary.

UNITED TRANSPORTATION UNION - STRUCTURE

(1) INTERNATIONAL LEVEL

The "International (Union)" is located in Cleveland, Ohio, and consists primarily of the president, assistant president, general secretary and treasurer, national legislative director and vice presidents located throughout the U.S. and Canada.

The president heads all union affairs and activities, presides at conventions, supervises officers and employees, interprets union laws, decides all disputes and exercises general executive and administrative control of daily activities of the union.

The assistant president is a representative of the president and assists the president in carrying out all policies and programs of the union.

The general secretary and treasurer is the chief financial officer of the union and shall receive and collect all monies due the union, pay all bills, countersign all checks and drafts requiring his or her signature, and such other papers as may be necessary in the transaction of the business.

The national legislative director is the chief legislative and political officer. He or she shall devote his or her efforts to secure the enactment, modification, or repeal of laws in accordance with the legislative policy of the organization and handle all legislative matters referred to him/her by the International president.

The vice presidents maintain headquarters at different locations throughout the country. They act as field agents, assisting general committees and locals at the direction of the president.

(2) **INTERMEDIATE LEVEL**

The general chairperson and state legislative director serve at the intermediate level of the union.

The general chairperson heads the general committee of adjustment and handles all claims, grievances and discipline matters on a regional basis, with authority to make and interpret contracts (consistent with Article 85 of the constitution) on work rules and rates of pay.

The state legislative director heads the legislative board in his or her state. The board is made up of the elected legislative representative of each local. The state director attends sessions of the state legislature and keeps in close contact with state lawmakers to promote political and legislative interests of the members.

(3) **LOCAL LEVEL**

At the local level the primary officers include the local president, local secretary, local treasurer, local chairperson, and local legislative representative. To most members these officers are the UTU. They see the UTU as they look at these officers. The actions or inactions of these officers are what the members will judge the UTU to be.

The local president acts to lead and direct the local. He presides over meetings, supervises the local's affairs, decides disputes, appoints committees, etc.

The local secretary records minutes of meetings, handles correspondence, signs and seals documents. The secretary also furnishes officers with a current list of members, both active and retired.

The local treasurer collects dues, disburses funds, keeps accurate records and files all reports required by law. The treasurer's job has been simplified by the use of payroll deduction, UTU's new direct receipts and the treasurer's Web application. Prior to dues being deducted from a member's payroll check, collection was a problem.

Local legislative representatives attend state legislative board meetings and work under the direction of the state legislative director, and make proposals for legislation to remedy any unsafe and unsanitary working conditions.

LOCAL COMMITTEES OF ADJUSTMENT

Each local shall elect a local committee of adjustment, consisting of a chairperson, one or more vice chairpersons and a secretary. The International president may grant dispensation for the establishment of separate local committees of adjustment for the members of a local working in one of the various crafts represented by the United Transportation Union. Each local committee shall be maintained by dues and/or assessments set by the members under the jurisdiction of such committee.

Compensation and expenses for members of the local committee shall be determined by the members of the local under the jurisdiction of the committee. The local chairperson, when authorized by the general chairperson to perform service in connection with general committee matters, shall be compensated from the general committee fund.

When required, it shall be the duty of the chairperson of the local committee of adjustment to furnish the treasurer of the local and the interested general chairpersons the names of non-members and members who have been taken out of service, or who have been returned to service. Additionally, the chairperson of the local committee of adjustment will assist in furnishing information to the treasurer as to the names of employees working under the jurisdiction of his/her committee.

It shall be the duty of the vice chairperson to handle matters referred to the local committee when so directed by the chairperson. The vice chairperson of the local committee shall act as chairperson when the chairperson is unable to perform his/her duties, and in case of a permanent vacancy in the office, he/she shall act as chairperson until the office is filled as provided in Article 57. When more than one vice chairperson is elected to a local committee of adjustment, the local committee shall designate the vice chairperson who shall act as required by this paragraph.

Local committees shall not take grievances to the general officers of an employer, except through the general chairperson, and will not be permitted to enter into any agreement or understanding or change an agreement or understanding unless approved and signed by the general chairperson and the designated carrier representative.

LOCAL CHAIRPERSON

It shall be the duty of the local chairperson to promptly handle claims and grievances when presented in accordance with Article 79. He/she shall be authorized to file claims and grievances including those where time has not been claimed, or where claims were incorrectly filed. He/she shall report on the handling of all claims and grievances at the next local meeting.

Should the local chairperson fail to satisfactorily adjust any case presented, he/she may refer it to the general chairperson with the complete facts and history of the case, including copies of correspondence exchanged with local carrier officials.

The local chairperson is the "chairperson" of the local committee of adjustment. He/she is the cornerstone of the "Union." Upon his or her shoulders rests the grave responsibility of enforcing the agreement, knowing his or her members, knowing management, knowing agreements, public law board awards, and federal and state laws. The job encompasses a tremendous amount of work and common sense.

As local chairperson of the UTU, the chairperson is the key person in the relationship of UTU to management, and of UTU to its members. The success or failure of the handling of claims and grievances rests on the local chairperson's knowledge of the agreements. You, as local chairperson, will be doing this on a day-to-day basis.

Without you, and others like you, even the best agreement is meaningless. You give it life. You make it work. The wisest union leader, the most effective administrator, cannot build the union and make it function efficiently without your help. The UTU depends on you and your fellow local chairpersons for future leadership. Do what you know is right. Be fair in your judgments and you will win the respect of all concerned.

You are to the UTU what an officer is to the company. It is your responsibility to protect the rights and interests of your brother and sister union members. In order to carry out your responsibilities, you must train yourself to be a skillful:

NEGOTIATOR

Your constituency expects you to present their grievances to the carrier officers. Your success as a negotiator will determine your success as a local chairperson.

ORGANIZER

You must win the willing support of a great majority of the group. Successful labor-management relations require an equal balance of power.

EDUCATOR

Your local and International have definite policies and programs. They expect you to understand them and transmit these ideas to the members.

LEADER

A leader gets things done with the minimum of friction. He/she sparks the enthusiasm and enlists the cooperation of his/her fellow workers.

A local chairperson's salary (if any) and all expenses of the local committee adjustment are supported by a portion of each member's dues. In accordance with Article 81 of the UTU Constitution, each local committee of adjustment shall be maintained by dues and/or assessments set by the members under the jurisdiction of such committee.

Local chairpersons have a definite responsibility as provided for in Article 81 of the UTU Constitution which states in pertinent parts:

> *"It shall be the duty of the Chairperson of the Local Committee of Adjustment to promptly handle claims and grievances when presented in accordance with Article 79. He/she shall be authorized to file claims and grievances including those where time has not been claimed, or where claims were incorrectly and/or improperly filed. He/she shall report on the handling of all claims and grievances at the next local meeting.*
> *"Should the Local Chairperson fail to satisfactorily adjust any case presented he/she may refer same to the General Chairperson with the complete facts and history of the case including copies of correspondence exchanged with local officials."*

Therefore, the local chairperson must also be a good manager of money to ensure there are adequate funds available to represent the membership.

Local chairpersons also hold a position on the general committee of adjustment. On many committees, local chairpersons elect the general chairperson.

It is readily apparent the local chairperson has a huge responsibility and must be armed with a great deal of knowledge about the union, the agreements and applicable laws in order to be effective. Without question, the local chairperson is the "cornerstone of the UTU."

The two most important roles of a local chairperson are: 1.) defending the contract on the local level, i.e., handling time claims and grievances, and 2.) preserving the right of the membership to a fair and impartial investigation.

AUTHORITY TO PRESENT

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The Railway Labor Act, as amended, provides for labor organizations to be duly designated and authorized to represent employees on any U.S. rail carrier or carriers.

Section 152. Fourth.

> **"Fourth. Organization and collective bargaining; freedom from interference by carrier; assistance in organizing or maintaining organization by carrier forbidden; deduction of dues from wages forbidden**
>
> "Employees shall have the right to organize and bargain collectively through representatives of their own choosing. The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for

the purposes of this chapter. No carrier, its officers, or agents shall deny or in any way question the right of its employees to join, organize, or assist in organizing the labor organization of their choice, and it shall be unlawful for any carrier to interfere in any way with the organization of its employees, or to use the funds of the carrier in maintaining or assisting or contributing to any labor organization, labor representative, or other agency of collective bargaining, or in performing any work therefore, or to influence or coerce employees in an effort to induce them to join or remain or not to join or remain members of any labor organization, or to deduct from the wages of employees any dues, fees, assessments, or other contributions payable to labor organizations, or to collect or to assist in the collection of any such dues, fees, assessments, or other contributions: *Provided,* That nothing in this chapter shall be construed to prohibit a carrier from permitting an employee, individually, or local representatives of employees from conferring with management during working hours without loss of time, or to prohibit a carrier from furnishing free transportation to its employees while engaged in the business of a labor organization."

Section152. Ninth.

"Ninth. Disputes as to identify of representatives; designation by Mediation Board; secret elections

"If any dispute shall arise among a carrier's employees as to who are the representatives of such designated and authorized in accordance with the requirements of this chapter, it shall be the duty of the Mediation Board, upon request of either party to the dispute, to investigate such dispute and to certify to both parties, in writing, within thirty days after the receipt of the invocation of its services, the name or names of the individuals or organizations that have been designated and authorized to represent the employees involved in the dispute, and certify the same to the carrier. Upon receipt of such certification the carrier shall treat with the representative so certified as the representative of the craft or class for the purposes of this chapter."

UTU CONSTITUTION

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The United Transportation Union Constitution sets forth requirements that designate subordinate bodies within the organization to provide representation for employees where the United Transportation Union is the duly designated and authorized representative. In addition, such employees grant United Transportation Union complete authority.

Article 44 of the Constitution provides: Authority To Represent

> "Every member of the United Transportation Union grants complete authority to the United Transportation Union and any of its constituted representatives to act in said member's behalf for the purpose of disposing, in any manner, of any and all of said member's claims, complaints, or grievances against their employer; and to submit such claims, complaints, or grievances for determination to any person, board, or other tribunal provided by law or otherwise as may be deemed to be necessary. The United Transportation Union shall have authority to receive notice of hearings, or to waive hearing, and to appear for, represent, and act for its members before any person, board, or other tribunal in connection with consideration and determination of claims, complaints, or grievances, subject to the right of appeal in accordance with the provisions of this Constitution, except where the member involved serves reasonable written notice on the United Transportation Union to the contrary.
>
> "Decisions reached disposing of or settling claims, complaints, and grievances referred to herein shall be furnished in writing, within thirty (30) days after such decision, to the Local Chairperson and Secretary of the local submitting such claims, complaints, and grievances."

GRIEVANCE HANDLING

There is no more important function to our union than the proper handling of time claims and grievances. To successfully prevail in the handling of claims and grievances, there must be solid facts and data that not only explain the violation, but also contain information that will support the union's position. This information can only be developed by the local chairperson.

Many instances occur where a general chairperson will receive a file on a claim or grievance from the local chairperson that lacks sufficient information and data to support the union's position. While both the local chairperson and the general chairperson may be fully convinced an actual violation occurred, there may be an instance where sufficient information was not properly developed at the local level. This places the general chairperson and the union in a no-win situation.

If the general chairperson progresses the violation to arbitration without sufficient data, he/she no doubt will receive a denial award. If the denial award only affected the one claim or grievance, the situation would not be so serious. However, in most situations, a denial award could have the effect of losing an important provision in the collective bargaining agreement. If the provision was part of a system agreement, it could result in an adverse effect on the members

working under the contract on the railroad. If it was a provision under a national agreement, it could have an adverse effect on our entire membership subject to such national agreement.

Why Violations Occur and Grievances Are Filed

Many contract violations occur as a result of an oversight or complete disregard by a local carrier officer of the provisions in the collective bargaining agreement. But others occur because of greed of the carrier and/or its dislike of a particular provision in a contract, especially if an arbitrary is involved. In these types of situations, the carrier will try to drag out the process as long as possible for several reasons. If the carrier has any feasible argument whatsoever in favor of its position, the longer they drag out the dispute, the more likely the members will become discouraged and tired of submitting time claims for the violations. In the meantime, each time a member fails to file a time claim, that is money in the carrier's pocket if the carrier is eventually found to be in violation of the agreement. The carrier can also create discontent among the members toward the union for taking so long to resolve the dispute.

Many members think the purpose of filing a time claim is simply to increase their earnings. This is not so. A grievance is filed for the purpose of enforcing the collective bargaining agreement.

If one goes back into railroad labor history, he or she will find railroad employees in the late 1800s engaged in bitter struggles to obtain agreements that would prevent the railroads from acting in an arbitrary and capricious manner. The employees sought elimination of favoritism in the assignment of workers – and eventually established the seniority principle in the railroad industry. Similarly, to protect craft rights, the employees fought for and obtained a scope rule. Railroad employees of today have a **responsibility** to maintain these principles. Thus, when a carrier violates the seniority or scope rules, for example, the railroad employees have an obligation to file a time claim not for the purpose of increasing take-home pay, but rather for the purpose of enforcing their rights under the contract. And the penalty should be severe enough so as to make it unprofitable for the carrier to repeat the violation.

Essentially, then, the grievance is filed to enforce the contract. And enforcement of the contract is not only for your benefit, but for the benefit of your fellow union members.

Knowledge of Schedule Agreements

It is extremely important that the local chairperson be knowledgeable of the collective bargaining agreements his/her membership is working under. Carriers will often test new local chairpersons in order to determine how knowledgeable they are concerning applicable agreements.

If the carrier officers find a local chairperson who does not fulfill his/her obligations, they will take advantage of them. They will intentionally violate the provisions of the agreements. The longer such violations occur unchallenged, the more damage is done to future attempts to police the agreement with respect to identical or similar violations of the agreements. The carrier will build a record relative to the application or practice of applying the agreement. Over time,

the carrier will expand its application to other districts on the system. When time claims or grievances are progressed the carrier will then take a position "past practice" prevails.

The collective bargaining agreement encompasses much more than the printed agreement book. Many documents have application to the rates of pay, rules and working conditions of the members. For example:

1. Since the schedule agreement book was last printed, it is possible additional Memoranda of Understanding have been entered into between the general committee of adjustment and the carrier.

2. At times, agreements covering certain local conditions exist. These, too, are part of the overall collective bargaining agreement.

3. National agreements frequently contain clauses which modify or add to the agreements covering the system, and these clauses are also part of the contract.

4. From time to time disputes committees, established pursuant to national agreements, are given the responsibility to interpret these national agreements. Their interpretations have the same effect as an agreement.

5. The Washington Job Protection Agreement of 1936, which covers rail consolidations not covered by the Interstate Commerce Act, is also used to protect employees required to relocate as a result of interdivisional service.

When discussing grievance handling, it is important to recognize there are different types of grievances. In general terms, any complaint from the members pertaining to the rates of pay, rules and working conditions is commonly referred to as a grievance. Any grievance arising from application of specific provisions of the collective bargaining agreement generally is handled through the time-claim procedure mandated by the schedule labor agreement or practice in effect on your property. Complaints arising from the provisions of the law, such as the Hours of Service Act or Interstate Commerce Act, are also grievances, but must be handled in a different method simply because their foundation lies in legal regulation, not in the collective bargaining agreement. In most cases these types of grievances must be enforced by the regulatory agency having jurisdiction and remain outside the scope of the time-claim procedures and adjudication pursuant to the Railway Labor Act.

There will be many times that a member will approach the local chairperson about a contract violation or grievance that the local chairperson does not have the answer to. Be honest with the member. Advise the member you will investigate the matter and get back to him or her with the answer. Then follow through. If you cannot find the answer to the member's question, consult with your general chairperson for his/her expertise. The worst thing to do is to tell the member what he or she wants to hear. Be honest with the members.

The most respected local chairperson, by both the membership and the carrier, is the local chairperson who is knowledgeable of the agreement and handles time claims and grievances with merit and factual information to support them. To handle claims lacking merit or insufficient

information sends the wrong message to the membership and carrier alike. The members will be given false hope thinking the claim or grievance will produce satisfactory results, when in fact, it will not. Additionally, handling claims with no merit bogs down the system, creating unnecessary work for both the local chairperson and the general chairperson.

Time Claims (5 Important W*s*)

As previously stated, probably the most essential element in the handling of a grievance is getting the facts.

In the handling of time claims, the claim should contain the specific facts involved in the grievance as well as reference to the specific rule which allegedly has been violated. Such facts include what actually happened, the date of the occurrence, the yard or run involved, the engine number, train number, etc.

Remember the Five W*s*:

> **Who** is involved in the claim or grievance? Name(s) of person(s) involved – anyone who can furnish information concerning the claim or grievance. (Don't forget the supervisor or management representative who might have caused the claim or grievance.)
>
> **When** did the claim or grievance occur? On what day and at what time did the act or omission take place which created the claim or grievance?
>
> **Where** did this occur? Exact location – mile-post number, yard, industrial track, terminal, etc.
>
> **Why** is this a claim or grievance? What has been violated? Agreements? Supplement? Local agreements? Past practice? Law? Rulings or awards? In order to have a legitimate claim or grievance, there must be a violation of something. This "W" directs your attention to that specific something which has been violated.
>
> **What** are the demands? What adjustments are necessary to completely correct the injustice and to place the aggrieved member in some position he or she would have been in had the grievance not occurred?

It is important to remember that many people cannot clearly distinguish opinion from fact. <u>It is important to examine all facts, and make certain they do not contain opinions</u>.

In the handling of disciplinary cases, getting the facts becomes even more important. In such cases, the aggrieved employee is frequently emotionally involved in the grievance – and for good reason, since the employee's job might well be at stake. But it is in the interest of the employee the facts in the case be carefully checked. There is no substitute for thorough preparation of a

case prior to investigations involving the discipline of employees. Read and study *You Are Hereby Notified* for a closer review of how to prepare for a disciplinary hearing.

Gathering Information

The duties of a local chairperson are awesome. The membership frequently does not understand the burdens of the local chairperson's duties. Many of our members are of the opinion it is the local chairperson, and not the member, that is responsible for developing information on contract violations. In some instances, it will be necessary for local chairpersons to inject themselves into the fact-finding process. However, this does not excuse the claimant from furnishing as much information as possible with regard to a claimed agreement violation. The claimant is in a much better position to know the pertinent facts involving violations in which they are personally involved. They, not the local chairperson, stand to gain monetarily should the union be successful in defending their claim. **We must all work together**.

Time Limits

The handling of disputes is generally governed either by time limit rules established by national agreements, such as the time limit governing the negotiating and arbitration of interdivisional service issues, or by time limit rules established in individual system agreements between the parties. **These time limit rules apply not only to the period within which a grievance can be filed, but also to the period within which a grievance can be appealed by our Union**. The time limit rules also apply to the periods in which the carrier must respond to a union grievance. In other words, both parties are bound by the limits established in the agreements, whether national or local.

What is the purpose of time limit rules? They are essentially designed to expedite the handling of grievances. This is based on the idea that if there is delay in handling of grievances, the facts surrounding the grievances become blurred. The expeditious handling of grievances is essential for good labor relations. When it is recognized the purpose of a grievance is to enforce both the contract and protect the membership as a whole, it then becomes quite clear why it is essential to have time limits on grievances.

How Do You Count the Days in Relationship to the Time Limit?

At times a question arises as to just how one counts the days to determine whether or not time limits have been adhered to by the parties. For example, what is day number one if a yard employee starts his shift on 11:00 P.M., July 1, and violation of the agreement takes place on 1:00 A.M., July 2? Similarly, when is the last day on which a carrier can reply – is it the date of mailing the letter or the date of receipt? To be on the safe side, **both** the first and last day of the time limits should be counted.

These are technical questions on time limits, and it is important, from the UTU's point of view, that grievances not be lost because the time limit rule has not been followed. The best procedure is to make **absolutely** certain the time limit rule is being complied with. **One should avoid technicalities in handling grievances.**

As far as conferences are concerned, the Railway Labor Act contains a specific provision. When a conference is requested by either party – union or carrier – the other party must agree to a conference and set a date within 10 days after such request. The conference itself must be held within 20 days after the receipt of the notice.

Rights of Claimants Involved in Continuing Violations

All rights of a claimant involved in alleged continuing violations of the agreement are under this time-limit rule, fully protected by **continuing to file a claim or grievance** for each occurrence (or tour of duty). With respect to claims and grievances involving an employee held out of service in a discipline case, the original notice of request for reinstatement with pay for time lost is sufficient. However, all subsequent handling of the request for reinstatement must be in accordance with the applicable time limits set forth in the time-limit rule on the property.

As previously mentioned, in order to protect the claim or grievance within the time limit period, please keep in mind the right of representatives of the UTU to file and prosecute claims and grievances for and on behalf of the employee they represent. We all must work together to protect our agreements by filing and handling claims and grievances within the time limits specified.

PAST PRACTICE

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Past Practice Under Ambiguous Agreements

Under labor agreements, past practice has developed as an important factor in the interpretation of these agreements.

Past practice or custom is an outgrowth of the principle of interpretation by the parties. Some referees and arbitrators do not distinguish between practice and interpretation by the parties, and use the terms interchangeably. Other referees, as the early awards held, pay little attention to past practice unless it was approved by the authorized union representative. **In several incidents in recent years, carriers have successfully argued that if a local chairperson was aware of a practice and made no attempt to stop or take exception to the practice, then the local chairperson places his/her approval on the practice.** Important rules have been lost as a result of a local chairperson failing to act on a violation. Most referees will consider past practice when faced with ambiguous agreement provisions. Weight will be given the practice depending upon its generality, duration and mutuality.

Under labor agreements, management uses the prerogative of instituting practices. The union may not have protested the practice for a variety of reasons: the individual member(s) were ignorant of their rights, or fearful of protesting, or the matter was never brought to the attention of the official union representative. However, if the carrier can show where the local chairperson was aware of the practice and made no effort to stop it, then we have problems.

The following wide selection of decisions illustrates the variety of weight given the contentious principle of past practice in the interpretation of agreements:

"Practice, except as agreed upon, is obviously the creature of management since it alone has power to impose it, but it may not properly exercise this power to make changes in agreed upon or existing practice with respect to which the schedules were adopted, except by agreement. Of course, no amount of practice in direct conflict with the written rules of operation creates a innovation of the agreement, unless shown to have been consciously acquiesced in by authority as high as that which agreed upon, or is authorized to agree upon modification of, the schedule." (Award 4061) – First Division, NRAB

"Apart from this, as has been repeatedly held by this Division, no amount of practice contrary to schedule rights will justify violation thereof. The rule is frequently invoked that operation under a contract is evidentiary of the intent of parties making it. That rule has no application here. The practice is determined by one party–the management–not by the action of both parties to the contract." (Awards 4839 through 4844) First Division, NRAB

"The contention of the parties cannot be settled by the language used in this rule, and the rule is ambiguous on this point. It must be governed by the interpretation put on this rule by the parties as evidenced by past practice at this point." (Award 8642) First Division, NRAB

"Where the language of an agreement is ambiguous and is therefore open to two constructions, it will be given the construction adopted by the parties to the agreement, and such construction cannot be changed except by mutual consent of both parties." (Award 8779) First Division, NRAB

"The rule that confronts us is ambiguous and susceptible to two meanings, and following awards of this Division, we must take in consideration the interpretation placed upon this rule by the parties without objection for a long period of years. For better than twenty years this established and universally accepted practice on this property, covering rule and dispute, was interpreted by the parties contrary to that contended for by claimant." (Award 9033) First Division, NRAB

"It is a universal tenet of construction of contracts that the interpretation which the parties gave to the contract by their conduct will ordinarily be controlling. This tenet of construction has not the same force in the railroad industry as it has where the parties have equal freedom of contract. The railroad industry is quasi-military in the sense that an employee must generally obey orders of his superior and make complaints afterwards if he thinks the rules have been violated. Repeated violations cannot establish a right on the part of the carrier to continue them, nor work a modification of the rule. But where there is an ambiguity in the rules or, as in this case, more than ambiguity, i.e., a direct conflict, failure to complain over a period of

time has great probative value in resolving the conflict." (Award 9217) First Division, NRAB

"In any event, conceding a certain amount of ambiguity in the agreement because of seeming conflict arising on account of the wording of the Combination of Service Rule, Article 14 and Article 26, Section 4, of the agreement, the past practice of 30 years of compensating firemen in the same manner as the claimant was compensated (which practice is asserted by carrier in its submission and not denied by employees in their rebuttal) would be controlling as to the intent of the parties." (Award 14859) First Division, NRAB

"In view of the conflict of authorities on the issue, it would seem that the interpretation placed upon the agreement by both thereto, as evidenced by long years of practice there under, should govern. The parties to contract know best what is meant by its terms and are least likely to be mistaken as to its intention. Each party is alert to protect its own interests and to insist on its rights. Whatever is done by them during the period of the performance of the contract is strong evidence of the meaning of its terms as they understood and intended they should be."

"In the light of these principles, it must be held that the practical construction placed upon the agreement by the parties thereto should govern, and that the services described be held within the duties properly required of claimants on the dates in question." (Award 13688) First Division, NRAB

Past Practice in Absence of Rule

In the absence of a rule or agreement provision, boards have consistently held that past practice is determinative of the rights of the carrier. This is indicated in the following awards:

"The practice of having the conductor deliver train orders in such a case had been followed for many years and we look to past practice in cases of ambiguity and instances where a rule is not set out in full detail." (Award 14950) First Division, NRAB

"No rule is cited in the applicable agreement, and no established practice appears implying agreement, that carrier may not handle cars of through freight on its switching local, to be picked up as here shown, by scheduled trains for moving on to their destination. In the absence of rule the manner of moving traffic rests in managerial discretion." (Award 15190) First Division, NRAB

"The record shows that over a period of many years it was not unusual for a [suburban] trainman to work with more than one conductor within a day's assignment. No rule has been cited providing that a trainman be assigned to work his entire tour of duty with only one conductor. The evidence is that although attempts had been made through negotiations to secure a crew consist rule, the applicable agreement clearly does not contain such a rule. In the absence of a rule

this Division has no authority to determine the number of men to be used in a crew." (Award 15321) First Division, NRAB

DOCTRINE OF LACHES

Even where there is no failure to comply with time limits, sometimes carriers assert the Doctrine of Laches in an attempt to defeat a claim or grievance, although this happens very rarely. While there have been a few decisions that support the Doctrine of Laches in railroad disputes, the majority of the decisions find the Doctrine of Laches is not applicable in railroad disputes.

The Doctrine of Laches is an equitable doctrine in the courts that can foreclose a request for injunctive relief the same way statutes of limitations foreclosed requests on legal damages. Its elements are: (1) undue delay; (2) unexplained delay; and, (3) injustice to the other party.

While in the courts laches is similar to statutes of limitations, there is a substantial difference between them. Statutes of limitations are concerned with the fact of delay in bringing an action within a specific time period. Laches is concerned with the effect of delay. The mere lapse of time does not constitute laches. Laches demands more than delay. It requires a lack of diligence.

Laches has two basic elements: (1) inexcusable delay in commencement of action; and, (2) prejudice or injury to the respondent as the result of the inexcusable delay.

A party invoking laches must show a delay by the opposing party in asserting a right or claim, that the delay was not excusable, and that there was undue prejudice to the party against whom the claim is asserted. For one to successfully assert the defense of laches, it must be shown that there was a passage of time combined with some prejudice to the party asserting the defense of laches, because laches is an equitable doctrine.

The National Railroad Adjustment Board has on numerous occasions held that laches is a principle of equity, and the board does not have equitable powers.
For example:

> *"The Railway Labor Act contains no provisions limiting the time within which claims may be filed by employees. Nor does the parties' agreement applicable to the instant case contain any such statute of limitation. In the absence of such formal prescriptions, should this Board be persuaded by the facts of this case to create one?*
>
> *"We think not. Under the circumstances as above set forth, such action by us here would amount to our writing a time limit rule for the parties. And this we are not empowered to do. Accordingly, we found that a sustaining award is in order."*

In First Division Award 19145, Referee John P. Sembower held:

"Some four years elapsed between the final exchange of correspondence between the parties on the property and the filing of claimant's ex parte submission here, but as we noted under similar circumstances in Award 16346, Referee Carroll R. Daugherty, 'the Railway Labor Act contains no provision limiting the time within which claims may be filed by employees. Nor does the parties' agreement applicable to the instant case contain any such statute of limitation,' so we must consider the claim, despite Carriers' objection that laches has run."

In Award 17930, Referee Thomas C. Begley of the First Division held:

"The Board further finds that the effective agreement does not contain a clause limiting the time for the filing of time claims.

Therefore, these claims presented in the letter of July 11, 1947, will be allowed."

In Award 8362, Referee Robert F. Simmons of the First Division held:

"The Carrier next states that it denied this claim on May 12, 1937, and that it was not again presented until barred by inaction. It is not shown that there is any time limitation fixed by contract on the presentation of these matters; the Railway Labor Act fixes none applicable here. The Carrier does not assert that it has been prejudiced by the failure to prosecute the claim; the facts of the claim are agreed to jointly; the only factual question undetermined is the above discussed of what holidays are within the understanding of the parties, and as to that the Carrier makes no contention that its records are not available. Under these circumstances we are unwilling to invoke laches or estoppel against the claim of the employee."

In Award 12126, Referee Clifford W. Potter of the First Division held:

"The Employees here did not protest individually when the work in question was performed, but their duly authorized representatives had the right to raise a question later, when they learned of the facts and circumstances. There is no limit for the presentation of claims growing out of alleged contract violations in the Act."

In Award No. 14 of Public Law Board No. 382, Referee N.H. Zumas held:

"Finally, with respect to Carrier's defense of 'laches' the Board finds it is without merit. The doctrine of 'laches' has its genesis in the courts of equity and evolved as one of the many remedies created by the equity chancellors as a means of rectifying the 'action at law' deficiencies. It was and is a unique and seldom applied concept utilized only in extraordinary circumstances."

PRACTICAL APPROACH TO TIME CLAIMS AND GRIEVANCE HANDLING

The present grievance procedures in the railroad industry are governed by the Railway Labor Act. One of the purposes of the Railway Labor Act 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 concerning rates of pay, rules or working conditions."

How is this objective to be carried out? The law requires that "all disputes between the carrier or carriers and its or their employees shall be considered and, if possible, decided with all expedition, in conferences between representatives designated and authorized so to confer, respectively, by the carrier or carriers and by the employees thereof interested in the dispute."

The law provides further, "the dispute between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules or working conditions…shall be handled in 'the usual manner' up to and including the chief operating officer of the carrier designated to handle such disputes…"

What is meant by "the usual manner"? This means simply in accordance with practices under the agreement on the property. It is quite clear that the Railway Labor Act sought to maintain the procedure of handling grievances on the properties, and in no way sought to bypass such procedure. In other words, the Railway Labor Act in no way sought to impose any specific grievance procedure for the union or the railroad system except to insist the grievance be handled in a prompt manner and in conference.

In the normal course of any grievance procedure, not all the grievances will be disposed of satisfactorily between the parties, and some procedure must exist to resolve such disputes. To meet this problem, the Railway Labor Act provides for a tribunal, called the National Railroad Adjustment Board, which was designed to handle grievance cases on appeal. In later years, an amendment was placed in the Railway Labor Act to provide for the establishment of Public Law Boards on individual properties.

<u>It might be noted at this point, failure to abide by the grievance procedures of the contract and failure to abide by the requirements of the Railway Labor Act with respect to the holding of conference might provide the basis for the rejection of a grievance by the National Railroad Adjustment Board or a Public Law Board</u>. In this situation, it would more likely involve the general chairperson rather than the local chairperson; however, both should be familiar with the requirements of holding a conference. For example, suppose you have a situation where the general chairperson calls the carrier officer on the telephone, contending the telephone conversation is the required conference. There is very little chance a telephone call would hold up as a "conference."

Factors in the First Step of Claim and Grievance Handling

1. **Key Person vs. Key Person** – In most instances, the immediate supervisor is the key person in the carrier's collective bargaining set-up, just as you, the local chairperson, are the key person in the UTU set up.

2. **Company Policy** – The division carrier representative is in a difficult middle position, between employees and top management. Most cannot decide company

policy; orders come down to them from top officials, and whether they agree with them or not, their job is to see that they are carried out.

3. **Carrier's Area of Decision** – There is a small area of decision where the division carrier officer does interpret policy, and it is in this area that the UTU can gain by establishing a cooperative relationship.

4. **Working Relationship** – The secret of successful day-by-day bargaining lies in a good working relationship between the local chairperson and the division carrier officer.

5. **Equal Footing** – The local chairperson is on equal footing with division carrier officers when it comes to dealing with working conditions and other contractual issues affecting the employees.

6. **Antagonism and Personal Rivalry** – Develop the kind of relationship whereby the carrier officers are willing to cooperate with you and to handle claims and grievances quickly and *fairly.* You can't get this by going out of your way to antagonize them. Never go over the head of the immediate supervisor, or any other carrier officer, without telling them that you intend to do so. If you plan to appeal their decision, tell them so.

7. **Cooperation** – Like all "machinery," the claim and grievance procedures must be properly used to obtain the best possible results, if the number of unresolved claims and grievances in a given district, yard or division reaches such proportions that serious delays occur in disposing of meritorious claims and complaints, the machinery is not performing the task for which it was developed. When this occurs, steps must be taken by both parties to reduce the claim and grievance load to a reasonable level.

8. **Making Empty Threat** – If you have a real claim or grievance and have the facts to back it up, there is no need to bluff. If you haven't, bluffing won't win.

9. **Making "Deals"** – A local chairperson should never do so-and-so if the carrier officer will do this-and-that. Such "dealing" makes a sound claim and grievance procedure impossible. Once a local chairperson is personally obligated to the carrier, he or she is no longer in a position to do a decent job.

10. **Talking Too Much** – Be a good listener. Many local chairpersons talk themselves out of a case. By knowing when to listen and when to talk, you can keep the discussion on the facts in the particular case.

11. **Losing Your Temper** – A local chairperson who blows up and threatens to shut down the railroad is asking for trouble. If a wildcat strike is pulled, he or she may be subject to discipline from both the UTU and the company, and possibly subject

to prosecution. All reasoning and common sense are lost when your dander is up. You don't mix claims and grievances with lost tempers.

12. **Keep Your Mind On Your Work and Don't Be Sidetracked** – Stick to the point. When you talk, stick to the issues. If the carrier knows it doesn't have a valid argument, it may bring up subjects that have nothing to do with the case and get the discussion away from the claim or grievance. Agree on all the facts and then explain carefully the exact issue on which you disagree. Stay away from discussing personalities as much as possible. Avoid general arguments and belittling remarks which have nothing to do with the case at hand.

13 **Disagree With Dignity** – If you can't reach a satisfactory settlement, don't think the world will end. That's what the other steps of the grievance machinery are for. Concentrate on the situation you are trying to correct and keep the personal element out of the picture as much as possible.

14. **Sticking Together** – Keep a united front. When you go into a conference with several members or union representatives, never disagree before the carrier officers. If you quarrel among yourselves, you will immediately lose the respect of the carrier. The carrier officers will take advantage of your differences. If you see that some real differences of opinion have developed among the members or union representatives, ask for a recess and straighten out your differences in private.

Summarizing Your Case at the Claims or Grievance Conference

1. Avoid personal rivalry; don't antagonize or ridicule the carrier representatives.
2. Cooperate, but don't be conciliatory.
3. Keep personal elements out of the picture.
4. Hold your temper; be calm; don't shout, keep your head.
5. Use a positive approach and stick to the point.
6. Don't be sidetracked; keep your mind on the job to be done.
7. Have the carrier take the burden of proof especially if it is a discipline case.
8. Learn to ask "why."
9. Listen to the other side of the story.
10. Don't bluff
11. Don't talk too much.
12. Don't make deals.
13. Demand the same respect from the carrier officers as you have given them.
14. If you intend to appeal, tell them so.
15. Disagree with dignity.
16. Stick together when dealing with management representatives.

<u>HOW LOCAL CHAIRPERSON CAN HELP THEMSELVES TO BETTER HANDLE</u>

CLAIMS AND GRIEVANCES

We shall deal with the handling of grievances in two parts. First, with the handling of time claims:

1. Familiarize yourself with the local chairperson's records when you assume office.

2. Know your contract and any local or special agreements, interpretations, etc., modifying or revising rules.

3. Each local chairperson should study each time claim for schedule agreement rule violations. They should then support the position of the committee, by citing the schedule agreement rules considered violated, in the appeal to the carrier.

4. Check for prior settlements of identical or similar claims in your files.

5. **Do not** advise members that time claims not supported by schedule agreement rules can be collected. You will only force yourself into admitting later the time claim is not valid. If you know a time claim lacks support, tell the member that the claim does not have merit under the schedule agreement rules and explain the reasons for lack of support by quoting the rule or rules to the member. **Do not** just merely state the claim is no good.

6. When in doubt, give your general chairperson all of the facts, cite your rules, agreements, prior settlements, and respect his/her greater experience and judgment.

7. Keep other local chairpersons posted on significant changes or developments that may help them in their work.

8. In negotiating with the carrier, stick to the language of your rules and settlements, and insist upon compliance with them, while doing the same on your part. This will gain you the respect of the carrier officer, and bring you better results.

9 If you find material necessary to fulfilling your responsibilities is not furnished you, contact your general chairperson and determine what can be done to fill in the gaps.

10. The most important thing to remember is: Appeals must be made in writing in order to be a matter of record under existing time limits. Do not fall into a trap set by a carrier officer who says, "Don't appeal that claim, I will check it for you." If you wait for the reply and the time limit expires, the claim will be procedurally dead under the time limit provisions.

Claims Erroneously Stated

If in the handling of a claim, it is found to have an insufficient agreement basis after initial presentation, the claim should be rephrased to the proper basis and formal notification given the carrier. An outright denial may result if the claim is permitted to remain pending on an incorrect

basis, for reason the claim as made is not supported by rules relied upon. See First Division Awards 1383, 3603, 6626, 17091 and 17429.

In other cases, the particular claim may not be valid, but the rules support the claim on a slightly different basis. For example, a claim may be made for an additional day at the yard rates to a road crew, where the agreement provides for payment of an arbitrary for terminal time, or for local rates under the conversion rule; or, a claim may be presented for lost earnings of the assignment and the agreement provides for payment of a run around, or vice versa. In a large number of awards, the First Division has made a correct application of the rules to award payment different from that claimed. See First Division Awards 19239, 19240, 19315, 19421, 19501, 19673 and 19830.

Eight Basic Steps in the Initiation and Progression of a Time Claim in the "Usual Manner," on the Property

(NOTE: The following are only suggested steps. The labor contract always applies.)

1. Presentation of claim or grievance in first instance.

(a) By individual member or crew;
(b) By the local chairperson if a violation occurs and no claim made by a member.

The first step is the presenting of the claim or grievance by the aggrieved person. It should be noted; however, a local chairperson can file a claim or grievance on behalf of an individual without consent of the individual involved, if such local chairperson believes the agreement is being violated. Most, if not all, time limit rules read in part, "all claims or grievances must be presented in writing by or on behalf of the employee involved..." This point or provision emphasizes the need to recognize all claims or grievances are designed primarily to protect the contract. A claim for a violation should be for eight (8) hours or one (1) basic day.

2. Get the facts clearly and comprehensively stated.

Lack of facts, or a conflict or error in the facts, can defeat a claim. See First Division Awards 19337, 19456, 19603, 19684 and 19774.

The claim or grievance must include the specific facts involved and state the schedule rules to support the claim, The claim is then submitted to the carrier in the normal and usual manner of submitting time claims. A copy of the claim or grievance and all supporting documentation should be retained by the claimant or local chairperson.

Under the time limit on claims rule, all claims or grievances must be presented in writing by or on behalf of the employee involved, within a stated amount of time, which is set forth in the collective bargaining agreement on each property. To avoid losing a claim because of delay in filing, **the day on which the violation(s) or grievance(s) occurred should be counted as day number one.**

3. Claim is either allowed or rejected.

Obviously, the claim or grievance is either allowed or disallowed within a stipulated time period set forth in the collective bargaining agreement on the property. The carrier is required to decline the claim in writing, setting forth the reasons for declining the claim. If the claim is disallowed, the employee should refer such time claim to the local chairperson immediately after receiving the rejection notice from the carrier. Should the carrier fail to decline the claim within the stipulated time limit, the claim or grievance is then considered valid. However, settlement of a claim on this basis cannot be considered as a precedent or as a waiver of the rights of the railroad on similar claims in the future. If denied, the claim should be given to the local chairperson, along with any and all information relating to the claim.

4. Appeal to the designated officer of the carrier.

On most railroads, the local chairperson would normally appeal the claim or grievance to the superintendent. However, with the changing structure in the railroad industry, on some railroads, this may no longer be the case. Each local chairperson should be aware of the designated carrier representative to whom they must make their initial appeal. **The appeal must be made within the stipulated time limit set forth in the collective bargaining agreement.** Each claim or grievance should be identified by number. The file identification system should be decided by the general committee of adjustment. It is suggested that a code be set up which would contain the local number, a symbol to identify the craft, i.e. (E, F, C, T&Y), the number of the claim or grievance, and the year. In addition, a copy of the appeal should be sent to the claimant and a copy retained on file with the local chairperson.

What should the appeal letter contain? Essentially three things:

1. Statement of claim – The particular agreement provision upon which the claim or grievance is being made should be clearly stated. The name of the claimant and date of occurrence should also be included.

2. Statement of facts involved in the case – This would include names, dates, location of occurrence, train number and engine number, etc.

3. The employee’s position. It should be clearly stated, setting forth all relevant arguments and evidence, submitted in exhibit form, quoting the agreement or rules involved, if any.

The decision of the carrier officer should be rendered within the stipulated time limit set forth in the collective bargaining agreement. If the claim or grievance is disallowed by the carrier officer within the time limit, and his/her decision is to be appealed, the local chairperson should notify the carrier officer in writing the decision is not acceptable. The local chairperson may want to request a conference on the claim on the local level. This should be done in writing, and in the letter, the local chairperson should request a waiver of all time limits until such time as a conference is held. Should the carrier fail to agree to a waiver of the time limits in writing, the local chairperson should send the claim or grievance to the general chairperson so that he or she may continue handling **within the stipulated time limits.**

5. Conferences.

Claims or grievances must be conferenced before they can be taken to arbitration. On receipt of notice of a desire on the part of either party to confer, the parties must specify a time and place at which such conference shall be held. The time and place shall be specified within 10 days after receipt of notice, and the date of conference shall not exceed 20 days from receipt of such notice. The Railway Labor Act does not specify at what stage of handling claims or grievances a conference must be held. This requirement of the act is usually at the time the claim or grievance is handled by the general chairperson and the highest officer of the carrier, but it is not necessarily limited thereto. The time limits governing the holding of conferences run concurrently with the time limits specified in the Time Limits on Claims Rule of the collective bargaining agreement, and **do not in any way alter, change, or extend those time limits without an agreement to that effect between the parties.**

It is recommended that notice of conference be made in accordance with Section 2, Sixth of the Railway Labor Act at the same time the claim or grievance is appealed. This will ensure the conference will be held within the stipulated time limit in which the carrier officer has to render a decision on the claim or grievance. If the time claim is not settled, the carrier officer to which the appeal was filed, must reject the appeal in writing within the time limit provisions to the local chairperson.

6. Appeal to the general chairperson for further handling.

Should the local chairperson be unsuccessful in resolving the claim or grievance on the local level, then it will be necessary to forward the claim and/or grievance to the general chairperson. The local chairperson must advise the carrier officer rejecting the appeal that the decision is unacceptable, and that the time claim will be appealed by the general committee for further handling under the provisions of the agreement. This should be done without delay so the general chairperson is able to present an appeal to the highest carrier officer **within the time limits stipulated in the collective bargaining agreement.**

In forwarding the file to the General Chairperson, include, but not be limited to, the following:

- Copy of service time slip.
- Copy of penalty time slip.
- Copy of reject or cut slip.
- Copy of appeal letter.
- Copy of conference notes, if conference was held.

- Copy of letter from carrier officer declining appeal.

- Copy of letter advising carrier officer his/her decision will be appealed, if required by schedule agreement rules.

- Copy of fact sheet which includes names of witnesses, name of carrier officer issuing instructions, copy of wheel reports, copy of computer date, copy of messages, location, train or assignment number, engine number, on-and-off duty point(s), time of violation, copy of train orders and names of crew members.

The local chairperson should appeal separate time claims for each violation, except where such time claims are identical in nature and facts. All files should contain the latest correspondence at the top of the file, building the file from the oldest piece of correspondence upward. When forwarding the file to the general chairperson, the local chairperson **<u>should maintain a copy of the complete file</u>.**

7. Appeal to the highest carrier officer.

This step is the appeal by the general chairperson to the highest designated carrier officer, which must be made within the stipulated time limit. The time limit starts from receipt of first notice of disallowance by the local carrier officer. This normally is the date stamped on the rejection slip. In the appeal, the general chairperson should state specifically, "the following claim or grievance is being appealed from the decision of the local carrier officer (superintendent)," and set forth in the appeal the statement of claim, statement of facts, and the organization's position.

8. Final conference with carrier.

If this appeal is denied by the highest carrier officer, the general chairperson should again notify the carrier in writing that the decision is not acceptable. At this time, the general chairperson should request a conference to handle the claim further.

At this conference, the general chairperson should have on hand not only all of the facts in the case, but also a knowledge of procedures and settlements on the property, awards of the National Railroad Adjustment Board, awards of Public Law Boards, and decisions of any committee (or tribunal) on the same or similar issues which will support the claim. The Railway Labor Act requires at least one oral conference be held on the property before a case can be listed for arbitration. The time limit for initiation of the request for a conference is normally 60 days, or as set forth in the collective bargaining agreement.

Until this point, the appellate procedure must be made in strict accordance with the applicable time limits. Should the organization fail to make a timely appeal or reply at any one of several steps, the case is considered "dead on time limits" and may not be pursued further by either party. If the carrier fails to respond timely to any of the required written appeals,

agreements require the claim be allowed regardless of the merits. If the claim is not settled in conference and the organization wishes to pursue the case further, the final step is arbitration.

The highest designated carrier officer must render a written decision on the results of the conference, again within the stipulated time limit. If the carrier officer again denies the claim, the general chairperson should notify the carrier officer that the decision is not acceptable and that proceedings are being instituted before a tribunal having jurisdiction pursuant to law or agreement. The date of the initial decision rendered by the highest carrier officer, either prior to conference or following a conference, normally establishes the initial date of the time limit within which to progress the claim to the First Division of the National Railroad Adjustment Board or to a Public Law Board. Most agreements require that the claim or grievance be handled by a tribunal no later than six (6) months from the highest designated carrier officer's decision.

Normally after a claim conference, the general chairperson will wish to progress several denied cases to arbitration. In order to do so, the organization may appeal the matter directly to the National Railroad Adjustment Board or may reach a mutual agreement may with the carrier to establish a Special Board of Adjustment. Also, the organization may simply request that a Public Law Board be established.

Today, approximately 90 percent of all cases are arbitrated by Public Law Boards. Therefore, a discussion of the establishment and jurisdiction of these boards will be the primary focus of the next step.

The General Principles of Fair Representation

1. Because of the exclusivity of the union's representative status where it is certified for a craft or class, the courts have held that the employees represented are owed a "duty of fair representation." The duty applies whether the employees belong to the union or not. Where there is a union shop or agency provision in the contract, of course, payment is required. But where rail employees exercise their statutory right to satisfy their union shop obligation by belonging to BLE, UTU still owes them the duty of fair representation if they are employed in a craft UTU represents.

2. The courts have made it clear that the union does not have a duty to take every case – not even every discharge case – to arbitration. It does not have a duty to do "everything possible." It does not have the duty to supply excellent, superior or even inspired representation to a grievant. It does, however, have the duty to evaluate a grievance and determine whether it is worthless or improper. If it concludes that a grievance should not be progressed, it should explain why to the aggrieved employee. While the union has no duty to "fight" every case, it does have certain duties which may make it legally responsible. Those duties are to be honest, to act in good faith, to be non-discriminatory, and to have a rational basis for making a decision. This is the duty of "fair representation" the union owes to all those in the crafts it represents.

3. The union is accorded considerable discretion in the handling of grievances – in other words, the union is permitted "a wide range of reasonableness" in deciding whether to prosecute and how to prosecute a grievance.

4. The latitude afforded a union under the law, however, is "subject always to complete good faith and honesty of purpose in the exercise of its discretion."

5. No individual member has an absolute right to insist that his or her claim or grievance be pursued through any particular step of the procedure. A union may screen claims and grievances, and press only those it concludes should be pursued in terms of benefit to the craft as a whole, and take into account such matters as time, expenses and other legitimate considerations.

6. A union may not drop a claim or grievance based on hostility, discrimination or arbitrariness. It may not arbitrarily ignore a meritous grievance, or investigate or handle it in a perfunctory manner – that is, by merely going through the motions.

7. In other words, a union may abandon a claim or grievance, as long as there is a rational basis for doing so. Mere whim or no reason at all will not support a contention that the union official merely exercised judgment.

   A. The following are some examples of conduct which might lead to an allegation the union breached the duty of fair representation:

      1) **Discrimination** – An all-male local committee decides not to appeal a meritous discharge grievance of a female within the local that is hostile to the incumbent administration.

      2) **Arbitrariness** – A general chairperson or a local chairperson withdraws a meritous grievance but, when asked why, can offer no reason.

      3) **Hostility** – The general chairperson or local chairperson has a personal grudge against the grievant and withdraws a meritous claim or grievance.

      4) **Dishonesty** – The general chairperson or local chairperson misleads the grievant, or lies to him or her.

   B. The following are examples of conduct which do not violate the union's duty of fair representation:

      1) The local chairperson honestly, but mistakenly, believes the company has not violated the agreement, as he or she interprets it, and withdraws the grievance.

      2) In a merger, a seniority arrangement is agreed to that is in accord with union and industry practices in light of apparently applicable law and the

facts as the union sees them, although a number of employees are adversely affected.

8. Courts generally require the exhaustion of all effective internal union remedies before legal action can properly be taken by the grievant. In order to rely on a defense of non-exhaustion of such remedies, the union must take care not to mislead the member or place obstacles in the way so that the internal remedy can be said to be meaningless.

9. In these litigious times, the union must strive to avoid even the appearance of bad faith, hostility or arbitrary conduct.

10. Obviously, the local chairperson should recognize the difference between minor and serious grievances. A reprimand or short actual suspension is less likely to lead to litigation than a discharge or the loss of seniority.

11. In the case of a discharge, the presumption must be in favor of appealing and only compelling facts involving the actual case should excuse an appeal. A union representative is, first and foremost, an advocate. Where there are factual disputes, the local chairperson who represents the grievant should accept that person's version of the facts, if credible.

12. Remember, the five W's – "Who? What? Where? When? Why"? The local chairperson should remember to get and record this basic information promptly. We all need to continually keep in mind the necessity of early and thorough investigation and recording of these kinds of basics in every grievance that is being progressed.

The Duty of Fair Representation in Grievance Handling

1. **Timing in investigations** – Especially in important cases, such as possible discharges, the five W's should be investigated promptly, and notations and evidence should be kept on file. It is important not only that we conduct a good investigation, but also that we can prove we did and refute the carrier's charges.

2. **Non-grievance-filed situation** – If a local chairperson decides he or she can't win a grievance and won't proceed, even if the matter is serious, he or she should try to convince the member. The local chairperson should also make a written record of the reasons why he or she didn't file the grievance and send it to the person, by certified mail, if feasible.

   In unusual cases where there is a discharge, and the local chairperson is unable to convince the member that his or her discharge should not be appealed, then a grievance should be filed at the grievant's insistence, but the local chairperson should always try to avoid filing phony grievances.

3. **The settlement of grievances** – Of course, the union has the right to settle claims and grievances as it sees fit, when it sees fit. What should be avoided are any appearances, however inaccurate, that one grievant got a better settlement than another because of who the parties were. Moreover, there should be no wholesale claim or grievance handling, or

horse trading whereby one member is "sacrificed" in order to save others, nor should there be even the appearance of such action.

Multiple grievances should not be filed against company action, attacking it on a number of grounds, some spurious, with the idea of getting a settlement by offering to withdraw some of the grievances.

Of course, when a grievance is settled, the local and the claimant should be notified, in writing, by certified mail, if feasible.

4. **Where a claim or grievance is dropped or settled** – When it is decided not to press further a very serious matter, such as one involving a large claim or discharge, local chairpersons should:

   a. Make sure they have all the facts; and

   b. Make written notice of the reasons for dropping the matter or settling it, and provide the grievant a copy of the notice.

5. **Advice to members** – Of course, the local chairperson should never mislead, confuse or refuse to inform a dissatisfied member of his or her internal union appeal rights and remedies, or their rights under the contract or law.

   Prompt notification to the member, in writing, of any disposition of the claim or grievance should, as a matter of course, be given, regardless of the seriousness of the claim.

Attitudes and Attributes of a Successful Local Chairperson

Simply stated, a successful local chairperson is one who can most effectively protect the schedule labor agreement and represent the interests of the membership. Accomplishing the most for the membership is the goal. However, the task is not easy and there are no short cuts.

What are the characteristics of a successful local chairperson? There appear to be a number of interlocking factors which make success possible.

Successful local chairpersons must believe the labor movement is essential and beneficial to working men and women, and further, believe he or she is contributing personally to the benefits enjoyed by the members.

The beliefs may be motivated by ambition, personal satisfaction in accomplishment, desire for respect of fellow workers; they may be prompted by opposition to the carrier's attitudes and policies; or they may come from a combination of these factors and others. But it is this overwhelming motivation and interest in his/her work which characterizes the successful local chairperson in handling time claims and grievances, and then following through aggressively on the cases.

These beliefs are also most important during the training years of any local chairperson. During this time, they are faced with many discouragements, making them wonder if they are adequate for the job, if their efforts are appreciated and if the small financial reward can ever compensate for the time and effort involved in representing the membership.

Experience is an important attribute in accomplishing any task. This is especially true in grievance work for two reasons: (1) most rail workers' training has not prepared them for the personal relationship of negotiations with the carrier and the leadership of fellow workers; and, (2) history and application of the agreements and work rules are material which must be obtained from multiple sources. Once this knowledge and material are obtained, the local chairperson's responsibilities no longer seem insurmountable.

With experience and knowledge, the local chairperson is capable of analyzing the consequences of each grievance, identifying the position of the carrier, in addition to adopting his/her own proper position, concluding each case with beneficial, not inferior, results. This ability does not require formal education beyond experience and dedication. Rather than formal education, the ability to think clearly and to analyze a problem, arriving at a proper decision which will be continuously upheld, is required for the job.

Additionally, an understanding of contract principles, knowledge of the applicable schedule agreements, knowledge of the Railway Labor Act, and familiarity with procedures for handling time claims and grievances from inception to final appeal are important skills that require training.

A successful local chairperson is scrupulously proper and fair in his/her dealings with members and with carrier representatives. A local chairperson who conducts himself/herself in this manner will earn the respect of both the members and carrier representatives. Once a reputation for honesty and fairness has been established, the local chairperson will be able to accomplish more because he/she will be preceded by such reputation. A solid reputation for dealing with the facts will aid in settlements of time claims and grievances on the local level. The carrier representatives will know the opinions and positions of the local chairperson have proven correct in the past and if proper weight is not given the local chairperson's views, handling of cases on appeal may discredit the carrier representative.

RAILWAY LABOR ACT

The Railway Labor Act, as it is applied today, is the culmination of over a century of experience with federal legislation governing labor relations of employers and employees engaged in the rail industry. Its primary purpose is to promote and maintain peace and order in those relations as a means of avoiding interruptions in interstate commerce. During this period, Congress developed a comprehensive policy for dealing with transportation labor problems, and the law probably represents the most advanced form of labor relations procedure in this country. While not exactly utopian, the Railway Labor Act imposes positive duties on both carriers and employees alike, defines the rights of the parties and makes provisions for the protection of such

rights. The Act also prescribes methods of settling various types of disputes, and sets up agencies for adjusting differences.

In order to understand the Railway Labor Act, it is important to briefly review the legislation that preceded its enactment.

Arbitration Act

The first federal legislation dealing with railway labor relations was enacted by Congress in 1888. The law provided: (1) for voluntary ad hoc arbitration when both parties to the dispute agreed; and, (2) the president could establish boards of inquiry to investigate labor disputes that threatened to interrupt interstate commerce. The boards of inquiry were to make a public report of the findings and to make recommendations. During the ten years of the law's existence, the arbitration provisions were never used, and the investigation provisions were used only once, and then without effect on a strike which was already in progress.

Erdman Act

The Erdman Act of 1898 was the first law to place reliance upon the policy of mediation and conciliation by the government for the prevention of railroad labor disputes, with a temporary board for each case. The investigation features of the Arbitration Act were repealed, but voluntary arbitration was retained as a second- line resolution procedure if mediation failed. In 1899, a union requested mediation pursuant to the act, but the involved railroad refused to participate. The act was not used again until 1906. Between 1906 and 1913, 61 cases were settled under the act, mostly by mediation.

Newlands Act

In 1913, several changes were made in the Erdman Act which emphasized the importance of mediation. These amendments later became known as the Newlands Act of 1913. The Newlands Act established a full-time Board of Mediation and Conciliation, and definitively placed the main reliance for settlement of disputes upon mediation. The board was also required, if a dispute arose relative to the meaning or application of any agreement reached through mediation, to render an opinion when requested by either party to the dispute. When mediation failed, improved arbitration procedures were available.

Adamson Act

The Adamson Act of 1916 was an attempt to settle a dispute with respect to the basic eight-hour day by direct congressional action, when mediation failed and arbitration was refused and a nationwide rail strike was imminent. The courts have held that the basic eight-hour day may be varied by union contract or individual agreement, if there is no union on the property for the craft involved.

Government Seizure of the Railroads During World War I

During World War I, the federal government took complete control of the nation's railroads. Labor-management relations were placed under the supervision of the Federal Railroad Administration and its director general. National Boards of Adjustment were created to settle, by arbitration, all disputes which arose due to interpretation of existing agreements.

The standard labor unions supported the national boards since grievance arbitration was taken out of the hands of local, company-dominated unions. The carriers did not favor the national boards since they had little control over unions at the national level. During this period there was relative labor-management peace and few arbitration cases.

The Transportation Act

The Transportation Act of 1920 created the United States Railroad Labor Board of nine members (there to represent, respectively, management, labor and the public) with authority to hear and decide disputes not disposed of in conferences between representatives of the carrier and the employees. Compliance with decisions of the board was not made obligatory, and therefore the board became ineffective.

The Railway Labor Act

The next and last major law enacted to deal with rail-labor relations was the 1926 Railway Labor Act. The act has been amended several times but remains the hallmark of labor relations in the rail industry and the oldest continuous federal collective bargaining legislation in the nation's history.

The Act has five major functions:

1. To prevent the interruption of rail service;

2. To allow employees to organize their own unions;

3. To provide complete independence of organizations by both management and labor;

4. To assist in prompt settlement of disputes arising in regard to rates of pay and working conditions;

5. To assist in prompt settlement of any disputes or grievances which arise as a result of conflicting interpretations or application of existing agreements.

As the various sections of the Railway Labor Act (RLA) are studied, it is obvious it has embodied provisions of the earlier acts that were proven effective through experience.

The RLA mandates certain basic principles as a foundation for sound labor relations.

§152. First.

> *"It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions…"*

The RLA imposes a positive duty upon all carriers and their employees subject to the act to make and maintain written agreements. The relations between the carrier and employees are not to be governed by the arbitrary will or whim of management or the employees, but by written rules mutually agreed upon and equally binding on each.

§152. Second.

> *"All disputes between a carrier or carriers and its or their employees shall be considered, and, if possible, decided, with all expedition, in conferences between representatives designated and authorized so to confer…"*

When disputes arise, the RLA mandates an equal responsibility on the representatives of the parties to the dispute to hold conferences for the purposes of settling the dispute.

§152. Third.

> *"Representatives…shall be designated by the respective parties without interference, influence, or coercion by either party over the designation of representatives by the other; and neither party shall in any way interfere with, influence or coerce the other in its choice of representatives."*

§152. Fourth.

> *"Employees shall have the right to organize and bargain collectively through representatives of their own choosing."*

§152. Fifth.

> *"No carrier, its officers, or agents shall require any person seeking employment to sign any contract or agreement promising to join or not to join a labor organization…"*

The RLA provides that representatives shall be designated by the respective parties without interference, influence, or coercion by either party over the designation of representatives by the other; and neither party shall in any way interfere with, influence, or coerce the other in its choice of representatives. The parties are free to choose their representatives and to make such choices by whatever means the parties deem appropriate.

The RLA further guarantees the right of the employees to organize, and bargain collectively through their representatives.

The act forbids the carriers to require that employees join or not join any labor organization.

§152. Sixth.

> *"In case of a dispute…arising out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, it shall be the duty of the designated representative or representatives of such carrier or carriers and of such employees…to confer in respect to such dispute…"*

As mentioned earlier, it is the duty of each party to exert every effort to make and maintain agreements, and to hold conferences for the purpose of settling all disputes.

§152. Seventh.

> *"No carrier, its officers, or agents shall change the rates of pay, rules, or working conditions of its employees, as a class, as embodied in agreements except in the manner prescribed in such agreements or in Section 156 of this title."*

It is the duty of both parties to give at least 30 days' notice of any desired change in rates of pay, rules, or working conditions embodied in agreements. When a Section 6 Notice has been given, and while conferences are being held, or while a dispute is in the hands of the National Mediation Board, rates of pay, rules, or working conditions shall not be altered by the carrier until the controversy has been finally acted upon.

Under the Railway Labor Act, there are two types of contractual disputes: (1) those that involve changes in existing agreements or implied agreements (practices) are called "major" disputes; and, (2) those that involve interpretation or application of existing agreements or implied agreements (practices) are called "minor" disputes. The Supreme Court has made it very clear that a dispute is not "major" just because the union and the employees are terribly upset about the outrageous behavior of the railroad. All that the courts look at is whether the railroad's position as to why it gets to do what upsets the union is "arguable," and the railroad's argument does not have to be a good one! If the railroad has any argument at all that the agreement(s) or implied agreement(s) (practices) permit the action, the only thing the union can do is take the dispute, in the form of claims denied by the highest designated railroad labor relations officer, to arbitration. The courts will not let the union strike over a "minor" dispute.

When the railroad has no argument at all that its action is permitted by agreement or practice, the union can strike until the carrier discontinues the action, or it can go to court to get an injunction against the railroad's action, because that would be a "major" dispute. In the past twenty years (1985-2005), only seven disputes in which the UTU has been involved (other than fully completed, but unresolved negotiations) have been ultimately found to be "major" disputes. One of them is a good example of what a "major" dispute is in this day and age. The railroad in that case ran a new type of train it was thinking about using half-way across the country with a crew of railroad officials. It did not claim the agreement permitted this. It did not claim the union had let it do so in the past to permit the practice. UTU struck the railroad until the train reached

its destination, and a federal court entered an order prohibiting the railroad from using crews made up of officials.

Of course, even if a "major" dispute exists (which is not likely), no union officer may call a strike without the approval of the International president. In most cases, after a general chairperson requests strike authority, the Field Service Department assigns a vice president to investigate the dispute and report to the International president. Often the Legal Department will be asked for a legal opinion. If a "major" dispute appears to exist, and a vote of the local chairpersons is favorable, strike authority will be granted. The strike activity remains under the control of the International president, and assigned vice president, as his or her agent.

In order to make a record that the International president, Field Service Department and Legal Department can review, the general chairperson should send the railroad a "non-acquiescence" letter. After the railroad responds to the letter, hopefully in writing, setting forth its reasons for taking the action at issue, all concerned will be better able to judge whether the dispute is "major" or "minor" under the Railway Labor Act.

Further responsibilities and obligations are placed on both parties in connection with disputes involving grievances and the interpretation or application of agreements. All such disputes which cannot be settled by the parties in direct conference are referable either to special boards of adjustment set up by agreement (known as "Public Law Boards"), or the National Railroad Adjustment Board, as provided for in Section 3 of the Railway Labor Act. Carriers that fail to comply with awards of the National Railroad Adjustment Board or arbitration boards set up in accordance with the act are made subject to civil suits for enforcement in federal district courts, where attorney's fees are awarded by law upon enforcement. Arbitration findings are by law "conclusive," and court review is not available except in very limited circumstances.

The Railway Labor Act as amended, then, provides definite procedures through which disputes shall be handled.

National Mediation Board

The National Mediation Board was established in June 1934 under authority of the Railway Labor Act as amended.

The National Mediation Board is an independent agency in the executive branch of the government and is composed of three members appointed by the president of the United States, by and with the advice and consent of the Senate. In addition, the Board has a staff of mediators, who spend practically all their time in field duty.

Cases subject to the jurisdiction of the National Mediation Board are of three general kinds:

1. Differences between carriers and employees regarding requests for changes in rates of pay, rules, or working conditions under Section 6 of the Railway Labor Act. ("major disputes" docketed as "A" cases).

2. Disputes among employees as to who shall be their duly designated and authorized representative (“representation disputes” docketed as “R” cases).

3. Interpretation of mediation agreements where controversy has arisen over the meaning or the application of such agreements (involving completed “A” cases).

Interest Arbitration

When the National Mediation Board finds it impossible to bring about a settlement of any “A” case by mediation, it endeavors, as required by the act, “to induce the parties to submit their controversy to arbitration.” However, neither party is compelled to agree to arbitrate concerning an “A” case.

If the parties agree to arbitrate, and the arbitrators named by the parties are unable to agree upon the neutral arbitrator or arbitrators, it becomes the duty of the National Mediation Board to name the neutral arbitrators. In agreeing to arbitrate, all parties to a dispute must enter into a signed agreement accepting whatever decision may be rendered by the Arbitration Board, which becomes the agreement of the parties.

Emergency Boards

Under the terms of Section 10 of the Railway Labor Act, if a dispute between a carrier and its employees is not adjusted through mediation or the other procedures prescribed by the act, and should, in the judgment of the National Mediation Board, threaten to interrupt interstate commerce to a degree such as to deprive any section of the country of essential transportation service, the board shall notify the president, who may thereupon, in his or her discretion, create an emergency board to investigate and report to him or her respecting such dispute. An emergency board may be composed of such number of persons as the president designates (usually three), and persons so designated shall not be pecuniary or otherwise interested in any organization of employees or any carrier. The president of the United States fixes the compensation of emergency board members. An emergency board is created separately in each instance, and is required to investigate the facts as to the dispute and report thereupon to the president within 30 days from the date of its creation. During that period, and for 30 days after issuance of the report, the parties must maintain the status quo. The carrier may not implement changes in the contract, and the union may not strike.

Under the terms of Section 9A of the Railway Labor Act, enacted in 1981, governing commuter railroad disputes, the president of the United States must appoint an emergency board in an unadjusted mediation case if demanded by either party or the governor of the state in which the service operates. The president of the United States must also appoint a second emergency board, if so demanded, and if no settlement is reached, that board must choose between “final offers” of the parties. The same “status quo” provisions apply as in Section 10 emergency boards.

NATIONAL RAILROAD ADJUSTMENT BOARD (NRAB)

The amendments of 1934 added a new section to the Railway Labor Act which created what is in effect an industrial court for the adjudication of disputes involving the interpretation or application of wage and rule agreements of rail carriers. It is known as the National Railroad Adjustment Board with offices in Chicago, Illinois, and Washington, D.C. It consists of 36 members, 18 selected by the carrier and 18 selected by the organizations of railway employees that are national in scope.

The National Railroad Adjustment Board is divided into four divisions, each of which functions and makes decisions separately, similar to the divisions of a court. Each division has jurisdiction over cases involving different classes of employees.

First Division – train and engine service.

Second Division – shop craft employees.

Third Division – clerical forces, tower and signal forces, maintenance of way employees, sleeping and dining car employees.

Fourth Division – yardmasters and all other employees not included in the other three (3) divisions.

The divisions of the NRAB primarily utilized by the UTU are the First Division (operating employees) and the Fourth Division (yardmasters). The First Division consists of two (2) labor members from UTU, two (2) labor members from BLE and two (2) management representatives from the carriers. The Fourth Division consists of one (1) labor member from UTU and (1) management member from the carrier. On many carriers, UTU represents shop craft employees, clerks, carmen and maintenance of way employees. The Second and Third Division of the NRAB will be utilized in the handling of cases involving these employees.

The NRAB operates under Uniform Rules of Procedure that are adopted by each division. These rules are rigid and strict and must be complied with. A party desiring to submit a dispute must file a notice of intent to file a submission within 75 days with the appropriate division. The notice must contain a full statement of claim and a copy must be furnished the respondent by the petitioner. There will be no time limit extensions granted, however, 15-day grace period will be issued. Upon docketing of the dispute by the NRAB, the division will advise the parties to exchange submissions. There are no rebuttals.

When cases are deadlocked by the NRAB, notice will be given to all parties, with the advice that if either party desires a referee hearing before the NRAB (with referee present), they must request same in their submission.

The partisan members of the NRAB usually select arbitrators. If they are unable to agree on a referee, either party may petition the National Mediation Board to appoint a neutral member (referee) to resolve the disputes.

The First Division of the National Railroad Adjustment Board inherited approximately 1,200 unresolved cases when it was established in 1934. Because train and engine service employees have always experienced the largest number of disputes, the backlog of unresolved disputes increased instead of decreased with the establishment of the First Division. In December 1939, the backlog had increased to 3,689 cases awaiting decision. In 1943, the backlog on the First Division had increased to more than 6,000 cases. On March 1, 1965, the backlog of undecided cases at the First Division totaled 4,089. It was not unusual for claimants to wait 10 or more years for their case to be decided.

As the backlog grew on the First Division, the operating crafts and some carriers sought to establish an alternate forum to resolve the pending claims and grievances.

PUBLIC LAW BOARDS

On June 20, 1966, the 89th Congress enacted Public Law 89-456 which amended Section 3, Second, of the Railway Labor Act in order to provide the establishment of Special Adjustment Boards upon the request either of representative of employees or of carriers to resolve disputes otherwise referable to the National Railroad Adjustment Board, or any dispute which had been pending before the NRAB for 12 months from the date the dispute (claim) is received by the NRAB.

Such Special Adjustment Boards, which for identification purposes are referred to as Public Law Boards to distinguish them from Special Boards of Adjustment (SBA) otherwise provided for in the Railway Labor Act, have the same jurisdiction over claims and disputes submitted to them as does the National Railroad Adjustment Board.

Cases That Can Be Submitted to a Public Law Board:

1. Disputes which are referable to the National Railroad Adjustment Board. Such disputes must have been handled in the usual manner on the property up to and including the highest office of the carrier designated to handle such disputes.

2. Disputes that have been pending before the National Railroad Adjustment Board for at lease twelve (12) months.

Cases That Cannot Be Submitted to Public Law Boards:

1. Claims and grievances arising under laws or agreements containing specific provisions for the disposition of such claims and grievances must be handled in accordance therewith. This should be carefully observed when preparing cases for a Public Law Board.

2. Disputes growing out of request for changes in rates of pay, rules, or working conditions.

PROPER NOTICE

When notice is served on a carrier to initiate the establishment of a Public Law Board, the notice should be timely filed in keeping with the grievance procedure, should clearly state its purpose and authority, should designate the employee member of the proposed board, and must include a list of the cases to be handled by the board. A proposed agreement to govern the establishment of the board should be furnished with the notice. The serving of such proper notice will constitute the institution of proceedings for the purpose of satisfying the time limit requirement of the grievance procedure. The notice is to be reviewed by the general chairperson.

In the handling of disputes under the grievance procedure, very often Public Law Boards do not have to be established by mutual agreement between the carrier and organization without the serving of notice by either party. Many times the agreements are entered into by officers assigned to assist a general chairperson. Voluntarily setting up boards in this manner is acceptable, although it is the policy of the UTU to encourage the serving of proper notice by the general chairperson and that he/she also enter into the agreement with the carrier representative. Particularly, if it is anticipated that a carrier may be unwilling to enter into an agreement to establish a board, the general chairperson should serve the notice and execute the agreement ultimately reached in order to avoid a challenge that such actions were not by the certified representative. Secondly, the rules of the National Mediation Board, Section 1207.1, require that requests of general chairpersons or International officers for Mediation Board action (appointment of neutrals under NMB Rule 1207.1) must have the approval of the chief executive of the employee representative. The request to the board must be filed on NMB Form 5, which requires supporting data including date notice for establishing a Public Law Board was made.

If, within 30 days of the serving of the notice for a proposed board, an agreement, along with the cases to be heard is not reached, the carrier refused to enter into a suitable agreement or appoint its member of the proposed Public Law Board, as required by Public Law 89-456, the International office (Field Service Department) should be notified and a request will be made for the National Mediation Board to designate a carrier member or appoint a procedural neutral, as the case may be. The specific issue or dispute preventing an agreement should be provided together with supporting data as required on NMB Form 5.

Rules of the NMB contemplate that when the partisan members of the board are designated, they must confer in an effort to reach an agreement establishing the board. If this should prove unsuccessful, a procedural neutral can be requested to assist the parties by resolving any issues preventing the parties from reaching an agreement.

Technically, under the act, when the partisan members have been designated and an agreement reached, the board is established and is to attempt to agree upon an award to dispose of the dispute or group of disputes. As this would be redundant with handling on the property, it is seldom done. But the parties are cautioned that any cases on the docket that are settled, unless withdrawn from the Public Law Board, constitute awards and must be filed with the National Railroad Adjustment Board along with the record of the cases, which then become public property.

When the agreement establishing the board has been finalized, the partisan members should meet as provided therein and endeavor to select a merits neutral member. NMB rules specify that

"no neutral will be appointed under Section 1207.1 (c) (merits) until the agreement establishing the Public Law Board has been docketed by the Mediation Board." The parties should advise the NMB, preferably by joint letter, of the neutral selected. If the parties are unable to agree on a neutral, the National Mediation Board should be requested to appoint one.

Three (3) copies of the agreement with a list of cases included, should be furnished the UTU International office for approval, two (2) of which will be furnished to the National Mediation Board. Often, upon reaching agreement, the parties may choose to furnish copies directly to the Mediation Board. When this is done, a copy of the transmittal letter with one (1) copy of the agreement and list of cases should be furnished to the UTU International office.

In the event a carrier serves notice to establish a Public Law Board, the general chairperson is obligated to meet with the carrier and endeavor to reach a suitable agreement. The law applies equally to management and the organization insofar as the establishment of a Public Law Board is concerned.

CASES WITHDRAWN FROM THE NATIONAL RAILROAD ADJUSTMENT BOARD

Cases can be withdrawn from the National Railroad Adjustment Board if they have been pending before the tribunal for at least 12 months.

The withdrawal of such cases will be under the terms established by the NRAB for withdrawing cases, should be identified in the notice for a Public Law Board, and when the Public Law Board agreement is consummated the NRAB must be notified of their withdrawal to avoid the cases being reheard by that tribunal. The cases cannot be resubmitted to the NRAB. The presentation and hearing of these cases should be limited to the record before the NRAB as that would constitute the record of handling on the property.

A sample paragraph for use in such instances to be added to paragraph (G) of the proposed agreement would be:

> The cases that have been withdrawn from the National Railroad Adjustment Board shall be decided upon the record of the case before the NRAB consisting of employees' ex parte submission, carriers' answer, employees' reply, and interpretation, if any.

After a board has been established, cases may be added to the docket by agreement between the parties to the board, subject to approval by the National Mediation Board and with the concurrence of the neutral member. One or the other party may not unilaterally add cases to a board. The addition of cases to a docket must be authorized by the NMB prior to hearing or considering such cases. An award on an unauthorized case would have no legal standing. However, it is not the intent to encourage or solicit additional cases; on the contrary, it is policy to discourage the establishment of "permanent" boards. Also to be avoided is establishing a board with a large docket of cases. In such instances, the NMB may delay establishing the board while requesting that the cases be grouped under issues to expedite handling and reduce expense of neutrals. When the proposed docket of cases contains a number of discipline or reinstatement

cases, it may be advisable to establish a separate board to expedite such cases, particularly, at those times when the NMB is short of funds and must curtail activity of neutrals.

THIRD PARTY INTEREST JURISDICTIONAL WORK DISPUTES

Where a true jurisdictional work (or job) dispute appears to exist in cases referred to a Public Law Board, such determination should be made by the board with the neutral member participating as one of the majority considering and making the decision. If it is found that a third party may have an interest, such party should be notified and invited to participate in the manner provided by the agreement. The neutral member shall be one of the two or more members of the board rendering an award in a dispute where notice of hearings has been given to third parties.

CRAFT AUTONOMY

Craft autonomy was a condition of acceptance of unification by the four former organizations creating UTU. Therefore, all concerned must carefully protect this inherent right when handing cases before a Pubic Law Board. Special attention should be given by consolidated committees.

Disputes arising from interpretation and application of collective bargaining agreements of the separate crafts that prior to unification may have been handled by tribunals established by law or agreement, may now become an intra-union matter.

When disputes involving more than one collective bargaining agreement within the UTU are to be progressed to a Public Law Board, consideration should be given to whether separate boards should be established. But if handled by an officer before the same Public Law Board, the cases should be listed separately insofar as possible under the agreements involved. When separate general committees are involved, extreme care must be observed to permit the general chairperson of the UTU having jurisdiction over the agreement to appear in person before the board to give his/her interpretation of the agreement, or to submit a written interpretation, or concur with the interpretation of the UTU partisan member of the board.

Care must be exercised when handling enginemen’s cases to guarantee the UTU’s right to progress claims or grievances arising under another engine service agreement. This right under the Railway Labor Act has been clearly upheld in the courts and there should be no relaxation of the right to handle such cases to a conclusion.

EXECUTIVE SESSION

When the members of the board first meet, the board may desire to organize itself and adopt rules and procedures for guiding its own function, set future hearing dates if necessary, the order and priority for handling cases on the docket, the handling of cases requiring notice to the grievant of date, place, and time of hearing of his case, handling of proposed awards, executive sessions, furnishing record to NRAB and such other matters deemed appropriate by the board members. Any change in time limits or waiver of time limits for handling cases as set forth in the agreement must be documented by notice to the NMB.

When the board is meeting with a procedural neutral, only the decision of the procedural neutral is necessary; when meeting with a merits neutral, an award requires a majority vote of the members.

It is preferable that proposed decisions of a board be considered in an executive session with only the principals in attendance to review proposed decisions with the neutral member before they are finalized for signature by the respective members. This may an absolute requirement where a third party is involved. However, where there are many cases, or where cases may be added to the docket after the board commenced functioning, or if reinstatement cases do not require such meeting, executive sessions can be inconvenient and require unnecessary expense to all parties, including the NMB. Common practice, therefore, is for the board to recess to allow the neutral member time to prepare proposed decisions and submit them to the carrier and employee members for review and concurrence with his determination. However, there should be an understanding with the neutral member that when proposed decisions are distributed in this manner, should either party object, the neutral's signature is not to be considered valid until he entertains the objection and submits a final award. All awards should be dated and signed by the parties. In the event the employee member feels a decision is erroneous, he should so indicate by signing his name and writing "dissent." In a few cases where the decision is so contrary to past practice or precedent decisions, a written dissenting opinion may be found necessary to be made a part of the final award.

INTERPRETATIONS – COMPLIANCE – ENFORCEMENT

Awards of Public Law Boards are to have the same status as the awards of the National Railroad Adjustment Board including compliance and enforcement. On this basis, the interpretation of awards of the NRAB as provided by Section 3, First (M) of the Railway Labor Act is equally applicable to awards of Public Law Boards. The provisions of the agreement in Paragraph J contains language taken from the Act and sets no time limit for requesting interpretations. Many carriers desire a specified time limit, some as short as thirty days. This matter became the subject of several disputes ruled on by Procedural Neutrals with two finding no time limit required, but the majority finding a period of one year was appropriate. We find a minimum of ninety days (90) to be acceptable, but in no case should thirty days (30) be agreed to, as awards generally provide thirty days (30) for compliance leaving no time to request an interpretation if it is felt the carrier has not properly complied with the award.

Requesting an interpretation can often be utilized to clarify the intended application and required compliance in lieu of seeking enforcement.

INVESTIGATIONS

Know your rights to a fair and impartial investigation – be informed – for today. If a carrier remains adamant about the charges, the only power that can reinstate a discharged railroad employee to his/her job may well be the decision of one "neutral person" appointed by the

National Mediation Board, whose decision must be based solely upon the record made at the investigation hearing.

In the railroad industry (a) the carrier is the moving party in all disciplinary matters and (b) the investigation hearings are under the control of the carrier.

When conducting an investigation, the contract rule covering investigations is the only vehicle between the railroad employee and the carrier before a penalty can be imposed and upheld. An investigation is by no means a one-way street whereby the carrier may channel a preconceived judgment of guilt.

The National Railroad Adjustment Board (NRAB) and other such tribunals have a deeply routed principle of justice, and their decisions (awards) give recognition to the underlying proposition that embodied in any investigation and discipline rule is a most valued right, security of employment. This right may not be denied except in a manner provided in the collective bargaining agreement under which the employee works.

Therefore, predicated on the above, the carrier, as a party to the collective bargaining agreement, has a contractual obligation and responsibility in assuring the fairness and impartiality of the investigation pertaining to the administration of discipline.

It is axiomatic in the employer-employee relationship in the railroad industry that the carrier is the moving party in all disciplinary matters. Likewise, it is axiomatic with the scheme of disciplinary procedures, under schedule agreements requiring the invocation of the investigation rule incident to the administration of carrier imposed discipline, these railroad investigations are under the control of the carrier. The purpose of the investigation is mainly a fact-finding device aimed at conducting an impartial inquiry into all the facts connected with the subject matter under investigation so as to develop the truth regardless of the result to either party. Or to put it another way, the holding of an investigation is not for the sole purpose of proving the correctness of the charges but for the purpose of developing all facts material to the charge, both against and favorable to the employee. It is important to note here that this does not mean to imply that an employee under charges need not plan his defense or conduct it in a diligent manner to the best of his ability, or that he may rely solely on the carrier to develop evidence that will exonerate him of the charge. The real point here is that the carrier, in recognition of the fact that these railroad investigations are under its control must deal with the presentation and development of all facts material to the charge in a fair and just manner; that if the carrier has knowledge of such material facts it has the duty and obligation to produce same; and that necessary latitude be allowed the employees in presenting testimony and evidence material to the fact matter under investigation, without denial or undue hindrance on the part of the hearing officer.

It is noteworthy to comment here that, in the accepted scheme of disciplinary proceedings in connection with the proper application of the (investigation) rule, the investigation hearing is not an adversary proceeding per se. In this respect, it must be borne in mind that the particular forum employed in conducting the hearing does not require strict adherence to courtroom procedures and that the technical rules of evidence do not necessarily apply. However, this is not to be construed as authority for the carrier to disregard the principle of fair play and justice (as they

relate to the carrier's contractual obligation to conduct a fair and impartial investigation) in favor of some type of kangaroo court. If anything, the non-observance of strict courtroom procedures requires that the carrier, in light of its controlling position in the investigation proceedings, exercise special care in affording the accused all rights under the contract and assure the fairness and impartiality of the investigation in keeping with the principal reason for holding same.

Once the employee/member receives notice of a formal investigation, he/she should immediately contact their representatives. Contractual time limits are now in effect and it is most important that both parties adhere to these time limits. Cases have been won and lost when one party or the other fails to adhere to the time limit provisions of the collective bargaining agreement.

What should the local chairperson do once he/she receives notice from a member that he/she has been charged?

Prepare! Prepare! Prepare!

There is no substitute for preparation. You and your local must be willing to spend the time and money required for you to be properly prepared to represent our membership. Attempting to do all of the necessary preparation by meeting at a restaurant a few hours before the scheduled start of the formal investigation simply does not do justice to the member under charge.

At a minimum, substantial time must be spent interviewing and gathering statements from those under charge and those who will testify as witnesses. At the same time, those same parties must be familiar with investigation procedures and protocol, as well as the questions that may be posed to them.

Concurrently, the representative must develop a written outline of the facts and issues that must be covered. At the same time the applicable collective bargaining agreement provisions must be reviewed. Moreover, resources such as past precedent on issues of both procedure and merit must be re-examined and studied.

Additionally, in many cases it will be necessary to visit the scene where the occurrence took place, to take photographs and prepare sketches, maps, charts, and the like for introduction as exhibits into the investigation transcript. In this respect, keep in mind that a picture is worth a thousand words.

An Investigation Is Not a Court of Law

Many of us have a tendency to confuse the internal "railroad administrative" hearing (i.e., the formal investigation) with a criminal trial in a court of law. It has been suggested that this gross misconception comes from watching too much television and relying on the unrealistic perceptions we have developed from viewing programs such as *Law and Order*. This is a terrible injustice to our members.

The bottom line is that there are few valid similarities between a proceeding conducted in a court of law and an administrative investigatory proceeding that is conducted pursuant to the Railway Labor Act and the collective bargaining agreement.

Keep in mind that the only rights we have in an investigation are those contained within, or triggered by, the contract. To put it another way, contractual rights are not rights enjoyed by everyone who walks on American soil. Why? Federal and state constitutions govern actions between a government (e.g., state or federal) and its citizens. To a significant extent, constitutions **do not govern** actions between private parties, such as actions between a corporation and an employee.

From time to time, local chairpersons and their members may assert that the First, Fourth, Fifth, or Fourteenth Amendments to the United States Constitution apply to investigation procedures. The simple answer to that assertion is "**they do not apply**."

The clerk at the grocery store, or the employee who pumps gas at the service station, is not entitled to an investigation before his employer disciplines him or her unless he or she has a contract that mandates the same. We have such a contract, but the process mandated therein has little or nothing to do with our constitutional and legal rights.

Primary Purpose – Build a Record Contained in the Transcript

Thus, the primary purpose of an investigation is to build a record for subsequent review by a neutral arbitrator. Remember, if your point is not contained within the official hearing record (the investigation transcript), the neutral arbitrator **will not consider** it when the case is arbitrated. Simply stated, the primary purpose of the investigation is to build a record (i.e., the testimony contained within the hearing transcript) by which we may overturn the discipline that has been assessed.

Fair and Impartial

As a foundation for most written discipline rules, the accused is entitled to a "fair and impartial" hearing prior to the assessment of any discipline. This is a "contractual" right.

As a party to the contractual provision, the railroad has a collateral obligation to guarantee that the accused receives certain "fundamental" rights that are triggered by virtue of the "fair and impartial" contractual provision. The "fundamental" rights may or may not be specifically articulated within the body of the contract.

Fundamental rights include, but are not limited to, the following principles:

- Written notice containing specific charges.
- Right to representation.
- Right to confront and question accuser and/or witness.
- Right to defend one's self, including producing evidence on one's own behalf and calling witnesses with pertinent testimony.

- Right to a hearing that is free of bias and prejudgment.

Burden of Proof

Another critical difference between a criminal trial and a formal investigation is the standard of evidence necessary for the moving party to meet its burden of proof. As the moving party, the railroad has the burden of proof. That is, management must produce probative evidence (firsthand, credible facts) in support of the charges.

What does the term probative mean? A probative fact is one that proves the charge being sought. As an example, a credible fellow crew member who testifies that he or she saw the accused consume a pint of whiskey within the tour of duty establishes a "probative" fact in connection with a Rule G charge.

What is the "standard of proof" necessary to convict the defendant in a criminal trial?

"Beyond a reasonable doubt." This means that the judge is entirely convinced, without any reasonable doubt, that no other outcome is possible. This is the highest standard of proof. However the railroad **does not** have to meet this standard in an investigation. Moreover, that standard only has to be met in a criminal trial in a court of law.

What is the next highest standard? "Clear and convincing evidence." This means the judge believes it is "highly probable" that the defendant committed the offense, and also believes that another outcome is only slightly possible. The railroad **does not** have to meet this burden in an investigation. It is met in certain civil cases.

The lowest standard of proof is "substantial evidence." A layman's definition of this standard is that a "reasonable person" could conclude that the rule was violated. This is the standard the railroad **must meet** in a formal investigation.

Also on this CD you will find a booklet entitled *"You are Hereby Notified"* by Duane Beeler. This booklet was copied with permission from Mr. Beeler, who was a member of the United Transportation Union and was on the faculty of Roosevelt University's Industrial Labor Relations Department. Please take a moment to review this material, as you may find it helpful when conducting an investigation.