Chapter 9

DUE PROCESS IN THE RAILROAD INDUSTRY

I. Due Process in Railway Hearings and Appeals

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Due process, either within a general or a specific context of jurisprudence, is difficult to define. One usually thinks of due process of law as expressed in the Fifth and Fourteenth Amendments to the U.S. Constitution. Constitutional due process primarily concerns the government's regulation of individuals and corporations, including whether the government may deprive a person of any of the three protected interests: life, liberty, and property. *Black's Law Dictionary* defines due process as a course of legal proceedings conducted in accord with rules and principles that have been established in the United States' system of jurisprudence.[1] Perhaps a simple definition of due process is better. Due process means fundamental fairness. We will only have confidence in and defend a procedure that guarantees fairness to the parties who have a stake in the outcome of the dispute. Thus, I will analyze railway hearings according to universal notions of fundamental fairness, starting with disciplinary hearings.

Section 3 First (i) of the Railway Labor Act contemplates that the carrier convene a pre-disciplinary hearing (sometimes called an investigation) on the property presided over by a hearing officer employed by the carrier.[2] Railroad collective bargaining agreements provide that the carrier may not assess discipline against an employee without first conducting a fair and impartial hearing.[3] These provisions always include an advance notice requirement.

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[1]Black's Law Dictionary, 6th ed. (West Publishing 1990), at 500.

[2]45 U.S.C. §153, First (i); Edwards v. St. Louis-San Francisco R.R. Co., 361 F.2d 946 (7th Cir. 1966).

[3]Lazar, Due Process and Disciplinary Hearings: Decisions of the National Railroad Adjustment Board (Institute of Industrial Relations, University of California 1980) [hereinafter Due Process and Disciplinary Hearings].

The carrier must provide the employee and his or her representative with a statement of the nature of the charges, sometimes using the terminology "the precise charge" or "the specific charge." The agreement usually permits the carrier to withhold a charged employee from service pending the hearing if the allegations are serious.[4] The following rule has appeared for years in the Firemen and Oilers–Burlington Northern Santa Fe schedule agreement:

(a) *An employee* in service more than 60 days *will not be disciplined or dismissed until after a fair and impartial investigation has been held.* Such investigation shall be set promptly to be held not later than 20 days from the date of the occurrence, except that personal conduct cases will be subject to the 20 day limit from the date information is obtained by an officer of the Carrier and except as provided in (b) hereof. (Personal conduct cases have reference to violation of rules involving an individual's conduct such as dishonesty, immorality or vicious actions).

(b) In the case of an employee who may be held out of service in cases involving serious infraction of rules pending investigation, the investigation shall be held within ten days after date withheld from service. He will be notified at time held out of service of the reasons therefor.

(c) *At least five days' advance written notice of the investigation shall be given the employee and the appropriate local organization representative,* in order that the employee may arrange for representation by a duly authorized representative and for presence of necessary witnesses he may desire. *The notice must specify the charge for which investigation is being held.* Unless conditions or circumstances warrant other arrangements, efforts will be made to hold the investigation at the city where the employee is headquartered.

(d) A decision shall be rendered within 20 days following the investigation, and written notice of discipline will be given the employee, with copy to local organization's representative.[5]

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[4]NRAB First Div. Award No. 25200 (Ref. Peterson, 2001).

[5]Service Employees International Union, National Conference of Firemen and Oilers and Burlington Northern and Santa Fe Railway Company, 1983 and 1990 Agreement, Rule 28 (emphasis added).

The hearing contemplated by the statute and mandated by an agreement is far more formal than the opportunity to be heard that is afforded to public employees before a public employer assesses discipline. At the railroad hearing, witnesses testify. Documentary evidence is submitted into a record. The carrier official, who presides over the hearing, and the charged employee's union representative question the witnesses.[6]

A formal, pre-disciplinary hearing is unusual in industries covered by the National Labor Relations Act. Just cause may require a company to conduct a fair and thorough investigation before imposing discipline on an employee, but collective bargaining agreements do not require the employer to hold a plenary hearing prior to the imposition of discipline. Indeed, the full evidentiary hearing occurs if and when a disciplinary appeal is progressed to arbitration. The railroad pre-disciplinary hearing procedure has advantages and disadvantages.

A major advantage is that it discourages a carrier from issuing impromptu discipline. The carrier is forced to marshal evidence and prove its case against an employee before assessing the discipline. Another advantage is that witnesses give testimony within a few days after an event while their memories are fresh. Testimony submitted at an arbitration hearing can be unreliable due to the passage of time. Another advantage is that the pre-hearing disciplinary procedure may incite settlements. If the carrier is unsure that it can prove its case, then it may be willing to strike a deal. In exchange for the employee waiving the hearing, the carrier imposes a lesser level of discipline than the carrier would have imposed if it conducted a hearing.[7]

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[6]An employee is entitled to a representative of his or her own choosing at the hearing. Due Process and Disciplinary Hearings, at 202. However, *Weingarten* rights do not apply to disciplinary matters under the Railway Labor Act. Johnson v. Express One, Int'l, Inc., 944 F.2d 247 (5th Cir. 1991).

[7]Some agreements address the hearing waiver. Rule 28(f) of the Firemen and Oilers—Burlington Northern Santa Fe Agreement reads:

> An employee and his duly authorized representative may request to waive a hearing in which such employee is under investigation. If the designated Carrier officer agrees to grant the request, the employee will be advised of the discipline to be assessed prior to being required to sign the request for waiver of formal investigation form.... (1) The investigation will not be waived unless the form is signed by the employee under investigation, his duly authorized representative, and the designated Carrier officer. (2) This procedure is entirely voluntary on the part of the employee under charge and his duly authorized representative. (3) If waiver is not granted, the request shall not be referred to nor cited by either party during subsequent handling. (4) If signed, a copy of the executed form will be furnished the employee under charge and his duly authorized representative. (5) The discipline agreed to and assessed in connection with this provision is not subject to appeal by the employee or his duly authorized representative.

The disadvantages are that the hearing may be conducted by a carrier officer who is not trained in skills needed to build a full and complete record, to elicit relevant testimony, and to admit probative evidence. The employee may be represented by a local chairperson who lacks some of the same skills. Another disadvantage is the absence of subpoena power, which can create gaps in the record. Without a subpoena, the carrier cannot compel the attendance of, for example, a complaining customer, yet the absence of the customer does not constitute a denial of due process.[8] Another disadvantage is that an arbitrator has no control over the boundaries of the record. Similarly, the arbitrator cannot order the parties to fill in gaps in the record. On appeal, the arbitrator must accept the record developed on the property. This results in, among other anomalies, the inability of the arbitrator to judge the credibility of witnesses.

If, after the hearing, the railroad imposes discipline, then the employee and the organization can appeal the discipline to a Section 3 tribunal. These tribunals are the National Railroad Adjustment Board (NRAB) and Public Law Boards.[9] The Adjustment Board or a Public Law Board, sitting with a neutral referee, decides whether the carrier proved the charges with substantial evidence based on the record developed on the property during the pre-disciplinary hearing. There are two major due process considerations. Was the pre-disciplinary hearing fundamentally fair? Was the appeal hearing at the Adjustment Board or Public Law Board fundamentally fair? The hearing on the property is controlled by contractual due process, while the appeal to the Adjustment Board or Public Law Board is governed by statutory due process.[10]

The Railway Labor Act and the labor agreements envision that the pre-disciplinary hearing will be conducted by a railroad officer and that the employee is entitled to an impartial hearing officer at only the Adjustment Board or a Public Law Board.[11] The Railway Labor Act does not prescribe a procedure for conducting a hearing on the railroad property.[12] Thus, the quantum and quality of due process at the pre-disciplinary hearing is governed by the collective bargaining agreement provisions, that is, contractual

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[8]Edwards v. St. Louis-San Francisco R.R. Co., 361 F.2d 946 (7th Cir. 1966).

[9]The NRAB is divided into four divisions according to craft and classes. 45 U.S.C. §153, First (h).

[10]Butler v. Thompson, 192 F.2d 831 (8th Cir. 1951).

[11]D'Elia v. New York, New Haven & Hartford R.R., 338 F.2d 701 (2d Cir. 1964).

[12]*Edwards*, 361 F.2d 946; Brooks v. Chicago, Rock Island & Pac. R.R. Co., 177 F.2d 385 (8th Cir. 1949).

due process. One might conclude that the pre-disciplinary hearing record will always be tilted heavily in the carrier's favor. Concomitantly, one might assume that the on-the-property hearing presumptively lacks due process because a partial hearing officer presides over the hearing. However, these assumptions are false.

The intent of the hearing is to develop the truth "regardless of the result to either party. . . ."[13] The check on a hearing officer amassing a record disproportionately in favor of the carrier's disciplinary sanction is the appeal. The Adjustment Board or a Public Law Board can reverse the discipline on the basis that the collective bargaining agreement was violated because the carrier deprived the employee of a fair and impartial hearing without addressing the merits of the discipline. The carrier can accumulate overwhelming proof that the employee committed the charged offense, but if the carrier denies the employee contractual due process, the discipline is expunged.[14] The carrier runs the risk of being compelled to reinstate a guilty employee, with back pay, if the carrier unfairly constructs a one-sided record in favor of the carrier. Let's consider some major issues that arise with regard to conducting pre-disciplinary hearings and determine how the issues are resolved. Let's also consider if the hearings are fundamentally fair.[15]

Although I do not have any statistics, I estimate that labor organizations allege that the charged employee received unfair hearings and/or challenged the propriety of the hearing notice in about 75 percent of the disciplinary appeals handled at the Adjustment Board and Public Law Boards.

To reiterate, railroad collective bargaining agreements provide that the carrier must provide the charged employee with a notice containing a statement of the "precise charge(s)". A faulty notice is a denial of contractual due process justifying an arbitral tribunal's decision to overturn the discipline without considering the merits of the case. The words "precise charge" need not be a bill of particulars.[16] The notice must be sufficient to guarantee the employee an opportunity to prepare a defense.[17] The carrier does not have to submit an offer of proof in the notice or cite a specific rule

[13]Due Process and Disciplinary Hearings, at 229.
[14]Due Process and Disciplinary Hearings, at 19.
[15]The purpose of this paper is to identify several common issues to illustrate how contractual due process operates. It is not the purpose of this paper to explore the issues in depth or to exhaustively enumerate all issues that are part of due process.
[16]Due Process and Disciplinary Hearings, at 148.
[17]Due Process and Disciplinary Hearings, at 134–36.

that the employee allegedly violated.[18] Rather, the precise charge requirement means that the carrier must give the employee clear notice of the nature of the charged offenses and a description of the incident under investigation so that the employee can mount a meaningful defense.[19] One way to determine if the notice was sufficiently specific is to evaluate the defense brought forward by the employee and the employee's representative. If the defense was obviously well-prepared and joined the factual issues raised by the carrier, then the notice was sufficient, even if the defense was ultimately unsuccessful.[20] On the other hand, "charging an employee with nothing more specific than being dishonest" does not meet the agreement's "precise charge" requirement. "Dishonest conduct encompasses such a broad spectrum of actions that it would be impossible to prepare a defense…" and to secure any necessary witnesses.[21] Even if the hearing notice contains a defect, the defect is harmless if the employee did not suffer any prejudice.[22] So, for example, mistakenly stating the incorrect date of the incident under investigation does not render the notice fatally defective.[23]

Prejudgment by a carrier official can undermine a fair and impartial hearing even though the carrier would not have brought the charges unless it believed that the charged employee was culpable. A hearing officer who persistently and hostilely cross-examines the charged employee in repeated attempts to "trip him up" is a biased hearing officer.[24] Failing to allow the accused employee to stay in the hearing and confront witnesses is a violation of contractual due process.[25] To avoid bias and partiality, the carrier must produce essential evidence, especially if the evidence could be exculpatory, when requested by the organization prior to the hearing.[26] The carrier may have to produce witness statements.[27] Where the carrier is relying on expert evidence, the carrier must furnish the organization with underlying documents to permit the organization's expert to render an opinion.[28]

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[18]Pub. Law Bd. 206, Award No. 4 (Ref. Seidenberg, 1970).
[19]NARB Second Div. Award No. 9269 (Ref. McAllister, 1982).
[20]Pub. Law Bd. 4599, Award No. 144 (Ref. McAlpine, 2000).
[21]Pub. Law Bd. 4746, Award No. 168 (Ref. Simon, 2001).
[22]Pub. Law Bd. 1817, Award No. 1 (Ref. Dugan, 1977).
[23]Pub. Law Bd. 2010, Award No. 22 (Ref. Brown, 1980).
[24]Pub. Law Bd. 1802, Award No. 6 (Ref. Lieberman, 1977).
[25]Pub. Law Bd. 6192, Award No. 35 (Ref. Peterson, 2001).
[26]NRAB First Div. Award No. 25264 (Ref. Meyers, 2001).
[27]Pub. Law Bd. 6040, Award No. 85 (Ref. Eischen, 2000).
[28]Pub. Law Bd. 6059, Award No. 63 (Ref. Lynch, 2001).

Another common problem is when a carrier officer fills multiple roles. The same officer brings the charge against the employee, presides over the hearing, and later decides on the disciplinary sanction. This officer is prosecutor, judge, and jury. Even though the same individual on the railroad can be prosecutor and judge, the individual cannot become so biased and so lacking in objectivity as to be unable to preside over a fair and impartial investigation.[29] Referee Carol R. Daugherty wrote, back in 1967, that a carrier official who conducts an investigation against an employee "should not normally have been involved in the occurrences leading up to the leveling of the charge and . . . should comport himself at the investigation . . . in a truly objective and aloof manner, just as would an outside judge."[30] However, the multiple roles do not per se constitute a due process violation.[31] A carrier that permits its officers to engage in multiple roles does so at its own peril because of the obvious increase in the risk of violating due process.[32] But, absent some prejudice, the single individual filling multiple roles does not denigrate due process.[33] For example, prejudice arises when the major witness against the charged employee was the same carrier officer who issued the discipline.[34] Similarly, where the hearing officer, who was also the officer assessing discipline, clearly formed the opinion that the employee was guilty of the charged offense even before convening the hearing, the multiple roles prejudiced the employee.[35] Therefore, the carrier and its officers must be particularly careful when the carrier allows one officer to serve more than one role in the process of disciplining any employee.[36]

Even if the hearing had some unfair procedures or if the hearing notice was defective, the organization is sometimes required to raise objections during the hearing or any later challenge to the hearing will be deemed waived.[37] Objections to the timeliness of the hearing, the propriety of the notice of charges, and the manner in which the investigation is conducted must be raised during the course of the hearing or the objections are waived.[38]

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[29]Due Process and Disciplinary Hearings, at 293.
[30]NRAB First Div. Award No. 21046 (Ref. Daugherty, 1967).
[31]NRAB First Div. Award No. 25400 (Ref. Kenis, 2003).
[32]NRAB Third Div. Award No. 36110 (Ref. O'Brien, 2002).
[33]NRAB Second Div. Award No. 8696 (Ref. LaRocco, 1981).
[34]NRAB Second Div. Award No. 10327 (Ref. Doering, 1985).
[35]Pub. Law Bd. 3139, Award No. 118 (Ref. LaRocco, 1990).
[36]NRAB Second Div. Award No. 12745 (Ref. Wesman, 1994).
[37]NRAB Third Div. Award No. 16678 (Ref. Perelson, 1968).
[38]NRAB Third Div. Award No. 22456 (Ref. Carter, 1979).

However, strict enforcement of this principle may result in unfairness under certain circumstances.

The burden of proof on the carrier is substantial evidence. It cannot rely on evidence not included in the hearing record.[39] Similarly, the organization may not rely on evidence it develops subsequent to the hearing that might exonerate the employee.[40] As stated previously, because the Adjustment Board and Public Law Boards are appellate arbitrations, witness credibility is evaluated on the property. The fact that credibility determinations may be resolved by the carrier hearing officer does not constitute a denial of contractual due process.[41] However, overruling a hearing officer's credibility determination is appropriate if the determination was unreasonable, arbitrary, or capricious.[42] Although the arbitrator is unable to judge the credibility of witnesses, as the witnesses do not personally appear before the arbitrator, the arbitrator can still, from the face of the transcript, consider testimonial contradictions or inconsistencies that can be incorporated into the arbitrator's analysis of whether the burden of proof has been satisfied.[43]

Other procedural issues relating to due process include time limits, accuracy of the transcript, request for postponement, and rulings on evidentiary objections. All these issues are considered by the Adjustment Board or Public Law Board.

Due to the scrutiny of an appellate review, the pre-disciplinary hearings process is fundamentally fair. With the arbitrator looking over the shoulder of the carrier hearing officer, the carrier has a strong incentive to conduct a fair hearing. The system has worked remarkably well for more than 80 years.

Due process in contract interpretation cases is also present albeit grievances are initiated, appealed, and arbitrated without any evidentiary hearing. Unlike discipline cases, a contract or rule violation claim is not adjudicated on the property, although the parties must hold a conference to discuss the claim.[44] During the on-the-property handling, either party can submit whatever evidence the party wants. The record is wide open. At the arbitral tribunal, the parties present extensive argument based on the evi-

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[39]NRAB Third Div. Award No. 25907 (Ref. Carter, 1986).
[40]Pub. Law Bd. 6287, Award No. 5 (Ref. Peterson, 2000).
[41]Pub. Law Bd. 5835, Award No. 101 (Ref. Gold, 2001).
[42]Pub. Law Bd. 6189, Award No. 25 (Ref. Wallin, 2000).
[43]Pub. Law Bd. 5956, Award No. 11 (Ref. Twomey, 2001).
[44]The Railway Labor Act mandates that claims be handled in "the usual manner," which includes a conference. 45 U.S.C. §152, Second; §152, Sixth; §153, First (i).

dence the parties collected on the property. Because the parties completely control the admission of evidence, there is a plethora of due process. The only flaw is that the parties fix a closure date. If one party submits new material at the deadline, then the other party will not have an opportunity to respond except in oral argument before the arbitral board. Arbitrators should, at least, consider whether a party is substantially prejudiced by the inability to adequately respond. The parties generally expect the Adjustment Board and Public Law Board to disregard evidence submitted after the deadline.

Turning to the hearing at the Adjustment Board or a Public Law Board, due process emanates from the Railway Labor Act. It is beyond the scope of this paper to delve into the controversy over whether federal courts can review and vacate an Adjustment Board or Public Law Board decision on due process grounds.[45] Instead, I will concentrate on the practices that instill due process into appellate arbitration.

The statute requires that interested employees be given notice of the pending hearing before the Adjustment Board and Public Law Board.[46] The statute also mandates that the parties to the dispute can be heard in person, by counsel, or through their representatives.[47] Although it is appellate arbitration, I permit the charged employee to make a statement to the Board even though the statement does not become part of the record.[48] The tripartite Public Law Boards or the Adjustment Board, with its partisan members, ensure that the referee is well-educated on railway labor relations, the issues in dispute, and the governing rules and working conditions. As with all arbitrations, the referee issues a written opinion that is subject to peer review to encourage deliberate and fair decision making. Finally, I endeavor to permit the parties to

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[45]The most recent case addressing the authority of federal courts to judicially review a railroad arbitration decision predicated on an alleged due process violation is *Brotherhood of Locomotive Eng's & Trainmen v. Union Pac. R,R, Co.*, 522 F.3d 746 (7th Cir. 2008) *cert. granted*, ___ U.S. ___ (Feb. 2, 2009). The Seventh Circuit, along with the Second, Fifth, Eighth, and Ninth Circuits, permit federal courts to review arbitration decisions on due process grounds. The Third, Sixth, and Eleventh Circuits have held that due process is not grounds for judicial review. For a thorough discussion of the split among the Circuit Courts of Appeal, see Beltzer & Wichern, *Judicial Review under the Railway Labor Act: Are Due Process Claims Possible?* 33 Transp. L.J. 197 (2006).

[46]45 U.S.C. §153 First (j). The statute also contemplates that third parties be notified of the hearing, even if they were not parties to the claim during the on-the-property handling.

[47]*Id.*

[48]Before the employee speaks, I explain to him or her my role as the neutral member of the Board and I emphasize that I do not hold any allegiance to either the union or the carrier.

present their case in the manner that they believe is most persuasive without imposing procedural limitations that might impair their advocacy strategies. Therefore, there are sufficient statutory safeguards to ensure due process before the Adjustment Board and Public Law Boards.

In conclusion, due process is critical to claims handling on the railroad property, especially with regard to pre-disciplinary hearings. I advise railroad hearing officers to preside over and conduct the hearing as if they were the charged employee. Stated differently, the question posed to these hearing officers is: How would they want the hearing to be conducted if they were facing discipline from the carrier regardless of whether they were innocent or guilty of the charge? Similarly, I advise union representatives to vigorously and zealously advocate for the charged employee as if the representative was on trial at the hearing. The rhetorical question becomes: How would the union representative want his or her representative to perform if his or her job was in jeopardy? If the participants repeatedly ask themselves these questions and then act accordingly, they should achieve the desired result of conducting a fundamentally fair hearing.

II. Due Process in the Railroad Industry

John Moreau*

Let me say at the outset how much your system mirrors that of the Canadian Railway Office of Arbitration, commonly known by its acronym CROA.

I note from John LaRocca's paper that the equivalent railway adjudicative forum in the United States is the National Railway Adjustment Board (NRAB). I understand that this arbitration of railway disputes dates back some 80 years. The CROA is the kid brother of the U.S. legislation. Some 3,700 cases and counting have been issued by the CROA, with the bulk of the jurisprudence being authored by two Presidents of this distinguished Academy, Ted Weatherill and Michel Picher, the current Chief Arbitrator.

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