LOCAL CHAIRMAN & VICE LOCAL CHAIRMAN’S

FORMAL INVESTIGATION BASIC GUIDELINE

The BLE&T Education & Training Department has developed a state-of-the-art training / workshop program that all Local Chairmen should strive to attend; however, because of high demand, many new Local Chairmen are unable to obtain this training as early as they would like. What follows is not a substitute for the workshop but is a quick reference to Local Chairmen who have not attended training or who need to have a simple question answered.

PREPARATION FOR INVESTIGATION

Your job as Local Chairman is to develop a transcript with pertinent points to convince the Arbitrator at a later date, not the railroad that has already determined guilt. You should speak and ask questions as if the Arbitrator was in the room.

Review the discipline article in your Agreement. Closely check the letter of charge for compliance with the time limits specified in the agreement.

Prepare the Principal (charged employee) for anticipated questions from Hearing Officer.

Closely examine the letter of charge and write back to the Superintendent requesting relevant information and witnesses. Oftentimes the railroad will refuse discovery documents but you will have it on the record for timely objection.

Anticipate that the Charging Officer or other company witnesses will present maps, diagrams, videos, sketches, photographs, and tapes illustrating crossings, curves, signals, surface and equipment conditions (if favorable). Videos can be edited, ask about editing and object if there has been any editing.

Prepare exhibits you plan to use.

Your questions should be organized in advance (as much as possible) in such order that each question and answer will present a link in the logical development of particular facts you want to establish. The Hearing Officer will attempt to come back on your good points. You must do the same. Remember, uncontradicted testimony will be accepted as factual to the reviewer of your transcript.

If the Hearing Officer restricts you in any way in your questioning or presenting exhibits, state “for the record” that he is doing so and object.

Also remember, the burden of proof is theirs, not yours.
The letter of charge will describe the incident just enough to afford the employee’s representative “the opportunity to prepare a defense”. They will cite specific operating rules charging the principal at the very end of the investigation hoping you will allow closing of the investigation without direct defense of each rule. Recall the charged employee and clear him (if possible) on each rule.

Our major problem is often statements already made at the scene of the incident. The Charging Officers rely heavily on this. Be prepared to object stating “we are here today to determine facts, at the scene of the incident many non-factual statements or speculation could have been made”. Try to get some quotes that the Charging Officer may have made at the scene that were not facts or perhaps questions he asked at the scene of the incident that showed his misunderstanding of the incident.

**OPENING PHASE OF THE INVESTIGATION**

Have the principal prepared for opening questions. For example, he may want to answer NO to “do you understand the purpose or the charge in this investigation”, especially in injury investigations where he is charged with “false/conflicting statements” that he knows he did not make. In such a case, let the very beginning of the record show that the principal had no idea why he would face such a charge.

The opening questions asked of you, the representative, such as “are you ready to proceed” is the best time for you to state NO if you have objections such as employee removed from service pending the investigation, exhibit sections of the Discipline Article to support your objections, or the fact that you asked for information prior to the investigation and they refused. Object to refusal of the company to have witnesses present, or refusal to comply with your previous written requests for discovery documents. Do this before you say YES to “ready to proceed with the investigation”. Note that the letter of charge states, “other witnesses may be called” by the carrier. You may want to declare the same without naming witnesses at this time. Get them off guard as to who you may call.

Make certain all witnesses are segregated and out of the hearing room prior to the charging officer making his statement or any witness testifying.

Object to any attempt by the Hearing Officer to call the principal first (before having the opportunity to hear the charges). You should state in your objection that you cannot possibly have a “fair and impartial investigation” if they insist on such a format. Often times they will attempt to call the principal first in investigations involving injuries. Do all possible to prevent it and have objections in the record to convince the Arbitrator that a fair and impartial investigation is impossible without the principal hearing and understanding the charges prior to him testifying, especially if the principal has previously stated he does not understand the charges.

Make certain all your pre-investigation letters have been read into the record.
DURING THE PROGRESS OF THE INVESTIGATION

Stay focused on the letter of charge. Object if they stray to other than the specific letter of charge.

Use exhibits at every opportunity. Supporting documents are very important to the record.

Take notes from statements of each witness to form questions after he is through testifying. Especially take notes to form cross-examination questions to answers your member or witnesses have given the Hearing Officer. You can be sure the Hearing Officer is doing the same to you.

Take frequent recesses, especially after documents/exhibits, event recorder tapes etc. have been introduced, in order to discuss them with the principal and form questions.

Take a recess immediately prior to calling of the principal to testify. You must warn your member that his time is now coming up. The Hearing Officer’s goal is admission of a rule violation. Advise your member that he can explain his answers; he doesn’t have to make a direct yes/no answer. Warn the principal of the first question of “do you want to make a statement” or “do you take exception to any testimony you have heard”. You should object to the “do you take exception” ploy of the Hearing Officer and state in your objection “the purpose of this investigation is to develop facts and place responsibility, not for the purpose of the accused taking exception”. The Hearing Officer will probably sustain your objection but if you allow the principal to take exception to certain testimony, you allow him to be set up for contradictory questions from the Hearing Officer. On rare occasions you may allow the principal to make a very brief opening statement but the best results will come from just having the principal answer questions.

Make certain you ask the principal pre-arranged questions designed to clear him. Go back to your notes of questions the Hearing Officer may have asked the principal that seem to have a contradictory effect on the record, clear up each of these.

CLOSING PHASE OF THE INVESTIGATION

In most cases the Charging Officer will now be recalled to read the rules into the record.

Write each rule down. You may notice a deliberate speed of reading the rules from some of the Charging Officers. You should call a recess and go over each rule with the principal. Question the Charging Officer on each rule and relativity to this incident. You may be surprised how many you dispel.

Recall the principal with questions to clear him of the rules charged if possible.

Consider the recall of any witnesses or need for any documents etc. Recess the investigation for another day if necessary.

Advise the principal to answer “let the record speak for itself” to the final question from the Hearing Officer regarding “has this been a fair and impartial investigation”.

SPECIFIC CHARGES

CFR 49, PART 240 – ENGINEER CERTIFICATION

Study Section 240.117 (pages 30-38 in your FRA handbook). Focus on 240.117 (e) and the specific wording “A railroad shall only consider violations of its operating rules that involve:” and the specific cardinal rule applicable. Now, go to section 240.307 (i) (1) (page 95, FRA handbook). This section is very important. You must now connect these two sections and ask yourself, based on the initial evidence, is there sufficient evidence to establish that an *intervening cause* prevented or *materially impaired* the Engineer’s ability to *comply with the operating rule* he has been charged with. Place special emphasis (in your line of questioning) on “the railroad shall not revoke the person’s certification” if these conditions exist! Place a copy of page 95, section 240.307 (i) (1) into the record as an *exhibit*. Was he *impaired* from seeing the signal, banner? Was there a problem or *intervening cause* with the display of the signal? Did he comply with the *engineer* requirements of the brake test rules? If you think so, go to investigation and establish proof. In FRA Certification investigations, ask the charging officer what specific rule did he “consider” when he suspended the principal’s Certification. While there may be many rules charged to the crew at the end, get that specific rule involved in suspending the certification into the record early and work on it. Keep in mind that we (GCA) may ultimately have to petition the FRA Locomotive Engineer Review Board (LERB) and every detail must be in the transcript. Double-check the transcript and your own recording of it for missing statements or even missing pages. Fatal “procedural errors” are getting harder to come by from the LERB but if something is wrong with the carrier’s transcript, you may have a significant procedural error fatal to the carrier’s case. The engineer is the only one with a federal certification. Don’t allow charges to progress against him as “crew member responsible”. Stay specific on the charges brought specifically against him and his compliance with specific rules as outlined in Section 240.117 of the engineer certification requirements.

FRA Certification Specialist Joseph Riley’s Washington, DC Tel. is (202) 493-6318.

**SIGNS (240.117 (e) (1)**

In most cases, the RR will not admit signal problems but we have proved different. False signal do occur (FRA clearly recognizes it). Sunlight does create an *intervening cause* in some cases and can be proved. Signals get turned and *materially impair* the Engineer’s ability to “comply with the rule”. FRA permits the Banner to be regarded as a signal that requires a complete stop in a test for compliance with the rule of restricted speed. After many cases regarding the banner, it has come down to one simple fact of defense that must be present ... *could the Engineer see it or was he told of the banner’s presence (or fusee) in time to stop within half the range of vision and be in compliance with restricted speed?*

In cases of signal indication dispute, establish on the record (if such truthful evidence exists) *that the manner in which the engineer operated the train is corroborative of the signal indication he testifies he saw*. For example, radio tapes show he or the conductor was alert in calling signals, tapes show he had previously complied with a signal indication (other than clear) at a couple of previous signals and his
train speed was correct with all previous signal indications and his speed at the disputed signal was in conjunction with the signal indication he testifies he saw. This is very important for the record and has been recognized as important by the FRA Locomotive Engineer Review Board (LERB).

If you are questioning a signal maintainer in a signal dispute investigation, you should consider detailed questions exploring such questions as: foreign power interference, static interference, two wires getting together, vibration, and problems from paralleling cables. What corrective work was done after the incident? Was Phankill installed on the signal to prevent sunlight from giving phantom or false signals? Was it installed after the incident? (Information on Phankill Assemblies can be accessed at www.alstomsignalingsolutions.com) Any possibilities should be explored. Get the witness (maintainer) to confirm on the record that signal problems do occur, a lot of maintenance is required and above all, false signals do occur. (Do the same series of these questions on the Charging Officer as well in order to compare). After he confirms that false signals do occur, ask for examples as to what might cause them. Then, apply those possibilities to your case. If any changes to the signal or signal location were made after the incident ask questions to establish that the signal was not acceptable for operations and not safe. Also question in detail about the signal bungalow and immediately after the incident, did a signal maintainer enter the bungalow alone without a supervisor or vice versa. Insist on both the tapes (log) from the bungalow and the Dispatcher event tapes for comparison.

TRAIN SPEED 240.117 (e) (2)

Examine what evidence exists to prove the Engineer was 10 MPH over the posted speed. If it is close, the event recorder tapes (discussed below) must be subject to your challenge. Your member’s certification may depend on disputed evidence of 1-3 MPH and you could cast doubt on the record by challenging the tapes in a professional manner, remembering that the burden of proof is the carrier’s.

BRAKE TESTS 240.117 (e) (3)

We sometime find that the Engineer has fully complied with the requirements of the actual brake test but a officer on a rule check wants to tie him to failure on the part of the on the ground inspector by making him a “crew member” or vice-versa. That person may have opted for a waiver and if the Engineer goes along with also assuming and admitting guilt, he gets 30 days decertification and a 24 month period in which a second incident would cause his certificate to be revoked for 6 months. So, we must defend in such case and petition the LERB if the Engineer complied with his engine cab brake test responsibilities under the rules. (All this is assuming the Engineer knew the ground person was actually off the locomotive.) We also have to be prepared to defend our conductor member who quite possibly has been falsely accused regarding his performance on the ground. Was the Charging Officer watching from such a distance that could cast doubt on the accuracy of his testimony?
OCCUPYING A TRACK WITHOUT AUTHORITY 240.117 (e) (4)

We have had cases where our position regarding this rule was correct and the carrier officer attempting to bring the charges was incorrect. Consult the General Chairman’s office on carrier’s application of the rule in the incident under investigation. The charge must be for a main track violation. Detailed examination of the Dispatcher instructions must be examined. If the carrier refuses to call him/her to the investigation it may not be possible to “determine facts” as directed in the letter of charge.

TAMPERING WITH LOCOMOTIVE MOUNTED SAFETY DEVICES 240.117 (e) (5)

We hope no one tampers with the equipment or knowingly operates a train that a device has been tampered with. Proof of knowingly may be paramount to such a case.

INVESTIGATIONS INVOLVING EVENT RECORDER TAPES:

In some cases the critical evidence produced by the tapes depends on one or two miles per hour or one or two car lengths, in such cases the tapes must be closely scrutinized and/or challenged.

You should insist on seeing both the text tapes along with the graph tapes that the RFE will present.

Ask what does wheel size/measurement have to do with the printout being accurate. (It changes speeds and distances).

Ask who performed the downloading, who performed the wheel measurement, when where etc. Is that person present? Don’t accept second hand testimony from a RFE not actually involved.

Ask RFE his training (schools) or qualifications (re: event recorder) in detail. Does he have any real training to qualify him or just a couple of quick lessons from the Division RFE?

Have RFE explain each function comparatively with both type tapes and tapes from other units.

Have RFE answer whether each function is a continuous readout or does it random sample. (Amps, speedline and reverser is on continuous running, everything else is random selection i.e. throttle and brake).

Is this an 8 hour or 48 hour tape or from memory download card. Have RFE produce the original if an 8 track cartridge (8 hour or 48 hour).

Object if the tape is being used past FRA limits – 60 days from date of first use. Check dates on sticker for first use. If from memory download, ask how old the card is and if it has ever had the battery changed or card erased. Check for sticker on download card.
If a stop of a couple of minutes or more is involved, ask if this is a continuous read while the engine was stopped. (yes on 48 – no on 8)

SLEEPING ON DUTY:

The best thing for the Local Chairman to do is, obtain a truthful assessment of the case and decide if there is a legitimate dispute of whether or not your member was sleeping. Was there a witness to the Officer’s story or conflicting witness that he was not asleep? Did the carrier officer charge the member with sleeping immediately at the scene or fail to mention sleeping until later (showing that the case is weak)? Where did the Charging Officer view the principal from? Unless you have a very good case for your member, you may want to consider settling with the Superintendent for the inattentive to duty rule rather than the sleeping on duty rule for less consequence (and job insurance eligibility).

Investigation postponements have served us well in this area and after a couple of postponements the Superintendent may look at it a little less severely. However, we have seen some rather flimsy charges that are not legitimate sleeping charges and are easily defended.

INJURY RELATED:

A lot of our “injury” investigations are weak cases on the part of the RR with very little objective facts and a lot of subjective theories. We have seen some unfortunate instances hard to defend, but by and large, charges such as “conduct unbecoming by giving false/conflicting statements”, “conspiracy to defraud to company”, and “not reporting in a timely manner” etc., the member’s side of the story has the most credibility. Was there a pattern or deliberate strategy when the principal was questioned to create “conflicting” answers by being asked the same type question in different manners?

Search for the truth and defend nothing but the truth! Protect your own credibility!

Never allow the Hearing Officer to call your member to testify prior to calling the charging officer and all witnesses against the member if at all possible. Object to this as “impossibility for a fair and impartial investigation” to the point of and including recessing the investigation until you can get professional advice on defending a principal that will be forced to testify prior to hearing accusations against him. We stress this because we have seen this deliberate strategy in these cases. Never waive an investigation and agree to discipline in a personal injury without seeking advice from designated legal counsel. Also, seek help and advice from BLET designated counsel prior to an injury related investigation.

Ask questions in detail regarding multiple interviews your members may have been subjected to that resulted in “conflicting statements”. Don’t get hung up on their case against your member, work on what the railroad done wrong and defective equipment etc. Study the next subject below, “Reenactments”.
Consider requesting an investigation assistant from the General Chairman’s office, General Committee Officer, Regional VGC or another Local Chairman.

REENACTMENTS AND SUBJECTIVE TESTIMONY:

If you allow it, the Charging Officer and the Hearing Officer will wear you out with subjective testimony and reenactments that are not facts and if you allow it, it will be seen as uncontested facts. Objective testimony has to do with actual fact. Subjective testimony is full of thoughts, ideas, feelings and theories of how the incident (or injury) occurred. After the Charging Officer or carrier witness has exhausted reenactments, pin him down on the difference in objective and subjective and ask if his previous testimony is actual fact (a reenactment is not) and remind him that the letter of charge is to “determine facts and place responsibility”. Challenge reenactments! Object to hearsay, opinions, second hand information, and “our conclusion that it did not happen this way” as subjective testimony and has no place in an investigation to “determine facts” and place responsibility upon the person you are representing. Establish on the record that such testimony is/was subjective and not fact.

JOB INSURANCE CONSIDERATIONS:

You can be a big help to your member in this area by becoming familiar with what his job insurance will not pay for and how to obtain alternative charges or wording in order for him to be paid in cases where he would not have been paid if changes were not made. The problem areas are “willful violation”, “altercations verbal or physical”, “not following instructions” and of course “conduct unbecoming”. When the wording in the original charge letter or discipline letter can be changed (waiver etc.), it can be of benefit to your member when/if he makes a claim for job insurance benefits.

Some recent examples where some Local Chairmen have made a difference are:

Charge of “failure to follow instructions” and wore a wedding ring to work changed to only the rule number prohibiting the ring after a good discussion with a reasonable Supt.

Charge of sleeping changed to inattentive to duty. (When flagrant sleeping was not involved).

Letters of charge stating “willfully” and striking that word from the letter.

Charge of “conduct unbecoming” taken out of the charge or discipline letter.

Keep your member’s job insurance in mind in all investigations.
FORMAT FOR APPEALS:

The time limits on appeals are a huge responsibility of the Local Chairman. If you let the time limit expire, the discipline assessed stands! Thirty days (in most agreements) from the date of the letter of discipline you must submit your local appeal. Then, thirty days (check your applicable agreement time limit) from the date of a letter declining your local appeal, you must have the decline letter and the transcript in the hands of the General Chairman for his part of the appeal process. Every Local Chairman is different in writing a local appeal to discipline but most are brief and wait for the General Chairman’s appeal to detail everything in the transcript. Below is a sample format you could consider in writing your local appeal to discipline:

YOUR LETTERHEAD

January 15, 2010

P. E. Mathis, Division Superintendent
Alabama Division, Norfolk Southern Corporation
Norfolk Southern Drive
Boogaloo, AL 00286

Re: Investigation held January 1, 2002 at Boogaloo, Alabama in which J. C. Jones was Principal and subsequently received a letter dated January 9, 2002 from Assistant Superintendent A. W. Right notifying Mr. Jones of his dismissal (or 30 days etc.) from service of the company.

Dear Mr. Mathis:

Having represented Mr. Jones in the above referenced investigation and after reviewing the transcript, (or without benefit of transcript) I fail to find any substantive merit in the record to warrant the discipline assessed.

(Briefly state a couple of reasons in maybe one paragraph.)
Therefore, I respectfully appeal Mr. Right’s letter of January 9, 2002 and request that you restore Mr. Jones to service with pay for all time lost and seniority unimpaired.

Yours Truly,

Local Chairman