

Midwestern & Pacific Railroad Company  
Northern Illinois Division  
17 West Adams Street  
Chicago, IL 60603

Office of the Superintendent  
Northern Illinois Division

November 1, 2018

Via Certified return Receipt Mail

Mr. Richard K Radek, Engineer  
2721 Lake Point Tower  
400 North Sheridan Road  
Chicago, IL 60610

Dear Sir:

This letter is to inform you that after review of the October 29, 2018 investigation transcript, I find substantial evidence and credible testimony proving your responsibility for the charge:

[y]our operating light power, Engines MWP 6847, MWP 6955 and HULC 3121, in excess of the maximum authorized speed, at approximately 1400 hours, September 2, 2018, while eastbound on main track 2, at Milepost 51.2 on the Galena Subdivision, in possible violation of Carrier Operating Rules, Special Instructions and/or Superintendent's Bulletin Notice issued January 1, 2018.

In light of the proven Rules violations, you are hereby assessed discipline of:

**60 days actual suspension**

You are instructed to contact the crew caller's office immediately to return to service.

Very truly,

Neil Harris, Superintendent

cc: Mr. Ken Flashberger, Local Chairman – BLE-T  
Ms. L.L. Ringer, Chief Caller

Northern Illinois Division  
17 West Adams Street  
Chicago, IL 60603

Office of the Superintendent  
Northern Illinois Division

November 1, 2018

Via Certified return Receipt Mail

Mr. Dennis J. Campagna, Conductor  
215 Fish Bait Drive  
River Forest, IL 60026

Dear Sir:

This letter is to inform you that after review of the October 29, 2018 investigation transcript, I find substantial evidence and credible testimony proving your responsibility for violations of:

[y]our operating light power, Engines MWP 6847, MWP 6955 and HULC 3121, in excess of the maximum authorized speed, at approximately 1400 hours, September 2, 2018, while eastbound on main track 2, at Milepost 51.2 on the Galena Subdivision, in possible violation of Carrier Operating Rules, Special Instructions and/or Superintendent's Bulletin Notice issued January 1, 2018, UCOR General Rule A – Safety, UCOR Rule 100.1, UCOR Rule 105 – Duties of Conductors and UCOR Rule 105.2 – Occupancy in Controlling Locomotive Cab.

In light of the proven Rules violations, you are hereby assessed discipline of:

**60 days actual suspension**

In consideration of time you have been held from service, you are instructed to contact the crew caller's office immediately to return to service.

Very truly,

Neil Harris, Superintendent

cc: Mr. Danny Young, Local Chairperson – SMART-UTU

Ken Flashberger, Local Chairman  
BLE-T Division 1011  
898 Oakton Street  
Evanston, IL 60202

November 15, 2018

Mr. Neil Harris, Superintendent  
Northern Illinois  
Division  
Midwestern & Pacific Railroad Company  
17 West Adams St.  
Chicago, IL 60603

Re: Engr. Radek discipline appeal

Mr. Harris:

This is to appeal the discipline assessed Engineer Richard Radek by your letter dated November 1, 2018, following an investigation held October 29, 2018. The BLE-T does not believe the imposition of any discipline was justified.

Mr. Radek was wrongly removed from service pending the investigation. MWP/BLE Agreement Rule 19 (A) states: "An engineer will not be suspended or dismissed without cause and without a fair and impartial investigation." The charge, speeding less than 10 mph above the authorized limit, was not serious enough to justify his removal from service. That can only be done in cases of Rule G, red signal violations, etc. This was prejudgment and violates Rule 19 (A).

Mr. Radek did not receive a fair and impartial investigation due to the prejudicial conduct of the hearing officer. He acted like a prosecutor, tried to badger Engineer Radek to admit guilt, and even recalled Trainmaster Hargrove to testify after our closing statement. Then he abruptly closed the investigation without allowing cross-examination of the improper testimony. He judged the testimony of the investigation, when that is supposed to be done by the reviewing officer. This is another violation of Agreement Rule 19.

For these reasons, Engineer Radek's personal record should be cleared of any notation of this incident, and he must be paid for all time lost. BLE Agreement Rule 19 (F) states: "Following a formal investigation, an engineer who is found to be without fault for an incident or rule violation(s) will be returned to service if suspended and paid for all time or miles lost."

Please advise the undersigned when Mr. Radek's record will be cleared and on which pay period he will receive his back pay.

Sincerely,

K. Flashberger, LC

cc: Mr. Richard Radek, Engr.

Midwestern & Pacific Railroad Company  
Northern Illinois Division  
17 West Adams Street  
Chicago, IL 60603

Office of the Superintendent  
Northern Illinois Division

November 21, 2018

Ken Flashberger, Local Chairman  
BLE-T Division 1011  
898 Oakton Street  
Evanston, IL 60202

Dear Sir:

This letter is to acknowledge your November 15, 2018 letter appealing the discipline assessed Engineer Richard Radek following an investigation held on October 29, 2018, involving the charge:

[y]our operating light power, Engines MWP 6847, MWP 6955 and HULC 3121, in excess of the maximum authorized speed, at approximately 1400 hours, September 2, 2018, while eastbound on main track 2, at Milepost 51.2 on the Galena Subdivision, in possible violation of Carrier Operating Rules, Special Instructions and/or Superintendent's Bulletin Notice issued January 1, 2018.

I have read your appeal, but I am not persuaded by your arguments. Engineer Radek had a fair and impartial investigation. He was present throughout, had able representation, and was permitted to ask any and all questions, personally or through his representative, of the witnesses. You were also able to voice whatever objections you thought were appropriate. The record established the speed of the locomotives to be at least 49 mph, in violation of the rules.

Accordingly, your appeal is denied in its entirety.

Yours truly,

Neil Harris, Superintendent

cc: D. D. Bridgewater, Manager - LR

Ken Flashberger, Local Chairman  
BLE-T Division 1011  
898 Oakton Street  
Evanston, IL 60202

November 28, 2018

Mr. Neil Harris, Superintendent  
Northern Illinois  
Division  
Midwestern & Pacific Railroad Company  
17 West Adams St.  
Chicago, IL 60603

Re: Engr. Radek discipline appeal

Mr. Harris:

This is to respond to your letter dated November 21, 2018, denying the Organization's appeal of the discipline assessed Engineer Radek. The Organization does not accept your decision.

We stand by what we said in our initial appeal, and we will advance this claim to the General Chairman's office for further handling.

Sincerely,

K. Flashberger, LC

cc: Mr. Richard Radek, Engr.  
General Chairman B. J. Betterman

B.J. Betterman, General Chairman  
Brotherhood of Locomotive Engineers & Trainmen  
404 S. Wacker Drive Suite 601  
Chicago, IL 60604

December 12, 2018

Ms. D. D. Bridgewater, Manager – LR  
Midwestern & Pacific Railroad Company  
4120 Falls Ave.  
Minneapolis, MN 55418

Re: File E-18-49-S

Dear Ms. Bridgewater:

This is to further appeal the disciplinary suspension assessed Engineer Richard Radek by Superintendent Harris' letter dated November 1, 2018. The Local Chairman's November 15, 2018 appeal sets forth the procedural arguments that are pertinent, and I incorporate them by reference here. The patent violations of Agreement Article 19 alone are sufficient to overturn the discipline that was assessed in this case.

In addition, Engineer Radek was found responsible for rule violations that were never proven in the transcript. For instance, there was no evidence in the record that Engineer Radek did not have current copies of the Operating Rules, System Timetable, Special Instructions and Bulletins in his possession at the time of the incident that gave rise to the charges. It was an error on the Company's part to hold him accountable for something there was absolutely no evidence to support.

Even if the Company had established the right to impose discipline, it must be reduced due to the recent roll-back of the suspension assessed his conductor. We have learned from the UTU that the Company offered to reduce the conductor's discipline to a ten-day suspension. I have attached the Carrier's December 2, 2018 letter confirming this. Since the conductor and engineer are equally responsible to comply with the rules and in the operation of trains and engines, the engineer's discipline should not be greater than the conductor's resulting from the same incident. This means Engineer Radek should be offered the same reduction.

BLE/MWP Agreement Article 19 provides that engineers must receive a fair and impartial investigation, and that engineers who are not proven culpable for an offense or wrong doing must be returned to service and paid for time lost. Accordingly, we ask that Engineer Radek's record be cleared and that he be paid for all time he lost as a result of the suspension he wrongly served.

Truly,

B.J. Betterman, General Chairman

cc: Mr. Ken Flashberger, LC

Ms. D. D. Bridgewater, Manager – LR  
Midwestern & Pacific Railroad Company  
4120 Falls Ave.  
Minneapolis, MN 55418

B.J Betterman, General Chairman  
Brotherhood of Locomotive Engineers & Trainmen  
404 S. Wacker Drive Suite 601  
Chicago, IL 60604

December 29, 2018

Re: File E-18-49-S

Dear Sir:

This is to acknowledge receipt and to respond to your letter of December 12, 2018, regarding the above-captioned matter. For the reasons that follow, I must decline your appeal in its entirety.

A careful reading of the transcript does not show that Engineer Radek did not receive a fair and impartial investigation. The hearing officer allowed the engineer's representative full freedom to question the witnesses, made his objections a matter of record, and permitted him to make a closing statement intended, in our view, to challenge or embarrass a Carrier witness. It is the Company's position that a hearing officer must conduct an orderly hearing, one which develops the material facts, but does not go off on tangents or devolve into chaos. In this instance the hearing officer did a very good job keeping the investigation on track, while observing the charged employees' rights.

The transcript establishes beyond doubt that the speed of the locomotive at Milepost 51.2 was 49 mph, more than 20% above the allowable limit. A 60-day suspension for such an egregious offense is lenient treatment.

With respect to the conductor's suspension, settlement offers are frequently made to disciplined employees, and for a number of reasons. Such offers are non-referable, and made without prejudice to the Carrier's position or actions in another case. In this instance, the conductor was in the nose of the engine and unable to observe the engineer while he operated above the speed limit. In short, the conductor's responsibility was not as great as the engineer's and the settlement offer he received reflects that fact. Moreover, at the time of this writing, the settlement offer has not been accepted, making the issue irrelevant, as the original suspension the conductor received still stands.

Accordingly, I must respectfully decline your appeal. If you desire to continue your handling of this matter, send me an email requesting to place it for conference, and I will list it for our March meeting.

Sincerely,

D.D. Bridgewater, Manager - LR

**Before Public Law Board No. XXXX**

**Carrier's Ex Parte Submission**

Parties to the Dispute

The Brotherhood of Locomotive Engineers and Trainmen

And

Midwestern & Pacific Railroad Company (Northern Illinois Division)

Statement of the Claim

Claim of Engineer R. K. Radek for removal of a notation of discipline imposed (60-day suspension) from his personal record, with pay for all time lost, following an investigation held October 29, 2018, in connection with an incident on September 2, 2018, at approximately 1400 hours, while he was operating lite units in the vicinity of Milepost 51.2 on main track no. 2, eastbound, on the Galena subdivision.

Facts of the Dispute



On September 2, 2018, Trainmaster D. Hargrove, along with an officer trainee, traveled to Garden Prairie, Illinois, and prepared to conduct an efficiency (speed check) test on lite engines moving eastward on main track 2 at Milepost 51.2, on the Carrier's Galena Subdivision at approximately 1400 hours. The trainmaster and the trainee positioned themselves in front of a crossing protection bungalow located at Depot Street, the first of three grade crossings in the direction of the engines' movement in Garden Prairie.

As the engines approached the crossing, the movement was captured on radar, with a speed indication of 49.38 mph. Due to a concurrent accident at the very next crossing, County Road 29, involving the same lite engines and a pick-up truck, and the officer's required attention to it, the speed indication recorded by the radar gun was not immediately noted. After all duties in connection with the accident had been discharged, the crew of the lite engine movement was released to continue their trip to Terminal City. A few minutes later, the radar gun, registering the speed noted above, was read. The Trainmaster checked the Galena Subdivision timetable and determined a maximum allowable speed of 40 mph for the movement at issue, nine and a fraction mph slower than the lite engines had been moving.

At that point, Trainmaster Hargrove contacted Division officers to report the speed violation, and after reaching their objective terminal, the crew, Engineer R. Radek, hereinafter "claimant," and Conductor D. Campagna were removed from service after completing required forms relating to the grade crossing accident in Garden Prairie. Thereafter, by letter dated September 2, 2018 (Carrier Exhibit A), claimant and Conductor Campagna were directed to attend a formal investigation for the purpose of:

Following postponements, the investigation was held on October 29, 2018, and following a thorough review of the evidence and testimony of record, claimant was notified by letter dated November , 2018 (Carrier Exhibit B), that he had been found culpable of the charge and was assessed the disciplinary suspension subject of this proceeding.

The Organization appealed the discipline on procedural grounds, and the appeal was declined initially and at each subsequent level of handling. This matter has been handled in accordance with the applicable agreement provisions, conferenced by the parties, and is now pending before this Board for final adjudication.

#### Position of the Carrier

It is the Carrier's position that there were no procedural errors made during claimant's formal investigation. Substantial evidence was adduced, including the claimant's admission, proving the operation of the lite engines at a speed well above the authorized maximum, an egregious violation of the Carrier's Rules. Finally, the settlement reached with Conductor Campagna's representatives to remove his discipline has no relevance to this case, was non-referable, and was improperly cited by the Organization during the conference held in connection with this matter. We ask the Board to uphold the disciplinary action the Carrier has taken here.

- I. The Organization's procedural arguments are meritless.

The claimant's representative made numerous objections during the October 29, 2018 investigation. First was its frivolous complaint that the Carrier did not comply with its discovery request for downloads and documents. Downloads from the locomotives did not exist, and, therefore, could not have been produced even if the carrier had some duty, that it does not, to provide them. The claimant himself filled out an incident report concerning the grade crossing accident at County Road 29, and should have known what information he gave, making its production totally unnecessary. Additionally, that form, the only one that existed that had any bearing on the events and charge at Garden Prairie were never introduced in evidence. The download from the bungalows were shared with claimant and his representative during the investigation. There was no objection made to them or to the testimony about them by the Carrier's witness. Claimant was in no way prejudiced by not having them sooner.

With respect to Claimant's removal from service on September 2, 2018, it is our steadfast belief that speeding, fully 20% above the allowable maximum, is a very serious matter, and justified immediate removal from service. The consequence of that speed was not only registered on the radar, but, although caused by a driver's decision to illegally ignore lowered crossing gates, in the collision at County Road 29.

There is no merit to the Organization's argument that the hearing officer denied Claimant a fair investigation. Claimant heard all the testimony, examined all the evidence, and was able to ask questions of the witnesses and even make a statement. The Organization's complaint concerning the hearing officer's conduct badly overlooks the important responsibilities he has to make certain an investigation is orderly and develops the evidence pertinent to the charge. The hearing officer's handling of this investigation was both economical and exemplary!

## II. The record proves Claimant's culpability.

There is substantial evidence of Claimant's responsibility for the charge; the radar indication, the downloads from the crossing protection bungalows and the expert

testimony of the Signal Supervisor, all of which objectively establishes the speed of the locomotive's operation in violation of the cited Rules. If this was not enough, there is Claimant's own admission his speed at Milepost 51 was 49 mph. If there ever was an "open and shut case," this is it.

Where the Carrier proves its charge by substantial evidence, an arbitrator should not disturb the result. A body of authority going to this principle is Carrier Exhibit C.

Finally, the fact that claimant's conductor's discipline was altered has no bearing to Claimant's case. The conductor was not in the operating cab at the critical time, and due to non-involvement, the Carrier, in its sole discretion, offered a settlement which was accepted. The Carrier believes it highly inappropriate that the Organization would even mention a settlement with another employee (which was made on a non-referable basis) in its handling, and we urge this Board to disregard it.

For the reasons set forth above, the instant claim should be denied.

For the Midwestern & Pacific RR Company,

## Organization's Statement of Facts

On September 2, 2018, Engineer R.K. Radek, hereinafter Claimant, had been called, along with Conductor Dennis Campagna, for a hopper extra 6847 west, on duty at 0800 at Terminal City Yard. Two additional units made up the locomotive consist, MWP 6955 and HULC 3121 (a leased engine). The train was operated without incident to the Midland Daniels elevator in Carlton, IL, located at approximately MP 60 on the Galena Subdivision of the Carrier's Northern Illinois District. After setting out their train, Claimant and his conductor were instructed to return to Terminal City Yard with only their locomotive consist, known on the railroad as "lite power." Claimant followed this directive, departing Carlton at approximately 1345 hours.

Unknown to Claimant at the time, a Carrier officer and her trainee were preparing to do a radar speed check (efficiency test) on the lite engines as they approached Garden Prairie, IL, a small community situated at MP 51 on the Subdivision. As the locomotives neared MP 51, Claimant began whistling for the three grade crossings in the town. He also spotted two individuals standing at the first crossing bungalow, and as required by the rules, he never let off the horn as a warning to them. One of the individuals then pointed a radar gun at the units, and at the same time, unfortunately, a pick-up truck started around the lowered crossing gates at the second crossing, County Road 29. There was nothing Claimant could do to avoid hitting the truck. The units tore the truck in two, the truck bed being propelled ahead and right of the locomotive, taking out two sets of crossing gates before coming to rest a considerable distance down the tracks. Even before the truck bed came to rest, Claimant was on the radio with the dispatcher, declaring the emergency so that the authorities and emergency responders could be called. At the same time, claimant began braking gradually to a stop, received permission for a reverse movement back to town, and pulled up to a stop in the

vicinity of the County Road. He and Conductor Campagna were met at the scene by Trainmaster Hargrove and a management trainee (name unknown), and County Sheriffs' deputies who were nearly immediately on the scene. After the authorities and the Carrier officers had collected what information they required, Claimant and Conductor Compagna were released to resume their trip. It was when they reached Terminal City that matters went south.

Claimant and Conductor Campagna were met by a Terminal officer, required to fill out an accident incident report (Form 1080), and removed from service pending an investigation for alleged speeding.

The investigation was conducted after postponements on October 29, 2018, and Claimant was out of service 55 days when it commenced. The investigation transcript is **Exhibit 1** to this Submission and contains the notice of charges, and the Organization's request for documents as exhibits. There were several objections made by the union representatives during the investigation, and they will be discussed herein below.

Following the investigation, Claimant received a notice of discipline dated November , 2018, assessing him a suspension coincidentally nearly equal to the time he was out of service prior to the investigation. That discipline was appealed, but every effort to settle the matter in handling has failed. It is now placed before this Board for adjudication pursuant to Section 3 Second of the Railway Labor Act, as amended.

#### Position of the Organization

It is the position of the Organization that the discipline assessed Claimant cannot stand. Claimant was denied a fair and impartial investigation, and even if the Board does not find the procedural defects that occurred fatal, the Carrier did not meet its burden of proof that Claimant was speeding at the critical time.

## I. Procedure

That Claimant was removed from service prior to an investigation is clear evidence of prejudgment. BLE-T Agreement Rule (**Exhibit 2**) stipulates that “except in serious cases, an engineer will not be suspended or discharged without first being accorded a fair and impartial investigation.” Claimant’s representative made timely objection at the investigation, pointing out that the speeding *alleged* did not rise to a level of importance to justify the immediate suspension. He also argued that Claimant’s locomotive engineer certification was not suspended, indicating the alleged speeding was not so serious that the FRA regulations would have required suspension. (See 49 CFR §240.112, **Exhibit 3**). The hearing officer overruled, rationalizing that a 9 mph overspeed was serious, and later, during handling, the Carrier called it “egregious.” It clearly was not, and this claim should be sustained on that basis.

The hearing officer’s conduct of the investigation was patently prejudicial. For instance, he allowed a Carrier witness to speculate that the Claimant may have caused the grade crossing accident at County Road 29, even though that event was not at all his fault and completely irrelevant to the charge (Trans. P 10). He then offers his own testimony concerning the ease of using a radar gun without any expert testimony from anyone what training or practice is required to use it (Trans. P 11). Next he twice asks the charged employees to take responsibility for the



charge on only the evidence of the complaining (Carrier) witnesses, before the employees have begun to build a defense. The hearing officer has obviously decided the question of the employees' guilt without building a complete record.

The role of a hearing officer is supposed to be that of a factfinder, establishing what would prove a charged employee's responsibility for an offense or would exonerate him or her. In this case the hearing officer was solely the Carrier's advocate, going so far as to recall a witness to rebut Claimant's closing statement. We believe the record of this investigation is flawed and cannot justify the discipline assessed.

## II. Merits

Even should the Board decide there were no procedural errors serious enough to be fatal to the Carrier's case, the Carrier did not meet the burden of proof of a rule violation. We draw the Board's attention to Transcript Exhibits E and F, which say essentially the same things. Page 14 of the System Special Instructions and Page 16 of the Galena Subdivision Timetable restrict lite engines to 40 mph if those engines *are not equipped with dynamic brakes*. The units Claimant operated on September 2, 2018, were all equipped with dynamic brakes. See **Exhibit 4**, photos of the controls of each unit Claimant operated on September 2, 2018, with dynamic brake handles plainly visible. Therefore the 40 mph restriction did not apply. Claimant was perfectly in compliance with the speed limit, 50 mph, at the time of the radar test conducted at Garden Prairie. It is axiomatic an employee may not be disciplined without just cause, and in this case, there was no cause.

### III. Disparate Treatment

Lastly, the Organization points out that Conductor Campagna was exonerated by the Carrier after a final conference between the Carrier and his Union. Since conductors and engineers are equally responsible for the safe operation of trains and compliance with the rules, the discipline assessed each in the same incident should be equal as well. In this case, the conductor, at the end, was not assessed any discipline at all. We felt it should be the same for the Claimant engineer.

In conclusion, Claimant was prejudged, did not receive a fair and impartial investigation, and was not proven culpable for a violation of the Rules or Special Instructions. This claim should be sustained in accordance with Agreement Rule , **Exhibit 5** to this submission.

For the Brotherhood of Locomotive Engineers and Trainmen,

General Chairman

