TRANSPORTATION APPEAL TRIBUNAL OF CANADA

Citation: *Cando Rail Services Ltd. v. Canada (Minister of Transport)*, 2019 TATCE 3 (Appeal)

TATC File No.: H-4229-41

Sector: Rail

BETWEEN:

Cando Rail Services Ltd., Appellant

- and -

Canada, (Minister of Transport), Respondent

Heard in: Winnipeg, Manitoba, on June 28, 2018

Before: George Ron Ashley, Member (chairing)

Michael Regimbal, Member

Raymon Kaduck, Member

Rendered: February 5, 2019

APPEAL DECISION AND REASONS

Held: The appeal is allowed in part. The appeal panel dismisses the administrative monetary penalty of $50,666.16 for the violation of rule 112(d) of the *CRORs*. The appeal panel upholds the administrative monetary penalty of $50,666.16 for the violation of rule 125 of the *CRORs*.

The amount of $50,666.16 is payable to the Receiver General for Canada and must be received by the Transportation Appeal Tribunal of Canada within 35 days of the service of this decision.

I. BACKGROUND

[1] On March 21, 2016, the Minister of Transport (Minister) issued a Notice of Violation (Notice) to the appellant, Cando Rail Services Ltd. (Cando), for alleged violations of rules 112(d), as it then was, and 125 of the *Canadian Rail Operating Rules (CRORs)* and section 17.2 of the *Railway Safety Act (RSA)*. The notice read as follows:

> (a) On or about March 1, 2016, at or near Regina, Saskatchewan, Cando Rail Services Ltd. left car GATX 67963 unattended on run around track RA 28 of the CN Quappelle Subdivision, without a sufficient number of hand brakes applied and determined sufficient through an effectiveness test, thereby violating rule 112(*d*) of the *Canadian Rail Operating Rules* and section 17.2 of the *Railway Safety Act*, by operating railway equipment on a railway otherwise than in accordance with the rules made under sections 19 or 20 that apply to Cando Rail Services Ltd.
>
> (b) On or about March 1, 2016, at or near Regina, Saskatchewan, Cando Rail Services Ltd. operated railway equipment on a railway otherwise than in accordance with rule 125 of the *Canadian Rail Operating Rules* that apply to Cando Rail Services Ltd., by having its employee failing to transmit the word "EMERGENCY" three times at the beginning of the transmission, to indicate the report of a condition which may constitute a hazard to employees or others, or a condition which may endanger the passage of movements when car GATX 67963 rolled uncontrolled onto CN Main Track, thereby violating section 17.2 of the *Railway Safety Act.*

The Minister assessed a monetary penalty in the amount of $54,666.12 for each of the two violations, for a total amount of $109,332.24.

[2] Cando requested a review of the Notice by the Transportation Appeal Tribunal of Canada (Tribunal), and a review hearing took place in Winnipeg, Manitoba, on September 27 and 28, 2016. In a decision dated April 4, 2017, the review member upheld the contraventions but reduced the monetary penalty to $50,666.16 for each violation, for a total penalty of $101,332.32.

[3] On May 4, 2017, Cando filed a request for appeal with the Tribunal, citing 16 appeal grounds. The central grounds were as follows:

a. the Notice of Violation is invalid because it references breaches of both the *RSA* and the *CRORs*,
b. the *CRORs* are unclear,
c. a railway company cannot be held vicariously liable for violations of the *RSA* by its employees,
d. the review determination erred in the interpretation and application of the due diligence defence, and
e. the review determination failed to take into account lower administrative monetary penalty (AMP) amounts for infractions in other federally regulated modes of transportation under the Tribunal's jurisdiction.

II. STATEMENT OF FACTS

[4] The facts were not disputed. Both parties agreed to the following facts:

a. For the purposes of this appeal, Cando is operating as a "Local Railway Company" as defined under the *RSA* and as such falls under federal jurisdiction. Cando acknowledges that it was subject to the *CRORs* during the relevant time period.

b. On March 1, 2016, Cando was operating on the Canadian National Railway (CN) Quappelle Subdivision in Regina, Saskatchewan. A Cando three-person operating crew consisting of two conductors and an engineer was switching loaded tank cars at the Co-op Refinery Complex in Regina.

c. The operation involved train movements into and out of the refinery compound on refinery tracks identified as RA26 and RA27, with the switcher (train) moving along those tracks to connect with the CN track. Switching also took place on CN track RA28, a non-main track.

d. Mile 88.0 to mile 93.8 of the Quappelle Subdivision is classified as a non-main track. It is identified as "Subdivision Track" in the relevant CN Timetable, and Cando has an operating agreement on this track between mile 88.0 and mile 91.9.

e. During the switching operation on March 1, 2016, one railway tank car (GATX 67963) loaded with asphalt was "spotted" (dropped off) on track RA28, and it was secured by the application of the emergency air brake only (compressed air in the car brake lines).

f. One of the Cando conductors left that tank car unattended on track RA28 in order to join the other conductor, who was at track RA27 in the refinery compound. When he left the railcar on track RA28, he failed to set the hand brake and he did not test its effectiveness, as required by rule 112(d) of the *CRORs* and Cando internal operating instructions.

g. At approximately 23:47 Central Standard Time, the railcar began to roll uncontrolled along track RA28 and then onto the connecting CN subdivision track. The railcar then proceeded uncontrolled for 2.7 miles (4.3 kilometres), passing over seven public crossings at grade in the city of Regina. It also passed over one Canadian Pacific Railway (CP) interlocking and two private industrial crossings. The railcar was located approximately 26 minutes later by the second Cando conductor, who secured the car and applied the hand brake.

h. When the Cando engineer noticed the rolling railcar, he attempted to capture it by following behind it at increasing speeds. Failing to do so, the engineer switched the radio to the local CN frequency and attempted to contact the CN yardmaster on that specific radio frequency. Receiving no response, he then called other yardmasters in the vicinity on the phone, first CN Regina and then CN Melville. CN Melville picked up and was informed of the situation. At 00:01 on March 2, or approximately 14 minutes after the railcar began to roll, the engineer re-called and this time reached the CN Regina yardmaster, who was advised of the situation. The yardmaster stated at that point that there were no conflicting CN train movements.

i. At 00:03, the engineer telephoned the Regina police, although not at 911.

j. At approximately 00:15, the Cando engineer telephoned the CN Regina yardmaster and stated that the railcar had been found stationary. Regina police were then re-contacted and given the same message.

k. The calls made by Cando employees as the incident evolved did not announce "emergency" at the start of the communications.

l. There was no reported collision, derail, damage, injury or loss of asphalt in the railcar.

m. Transport Canada was advised of the incident by 9:15 a.m. on March 2.

n. Subsequently, the Minister of Transport issued a Notice of Violation against Cando for alleged breaches of rules 112(d) and 125 of the *CRORs*.

III. ANALYSIS

A. Standard of review

[5] The appellant argued that when an appeal panel has the same specialized expertise as the review member, the standard of review is correctness for questions of law and reasonableness for questions of credibility, fact, and mixed fact and law. In support, the appellant referred to a recent Federal Court decision dealing with Tribunal appeal decisions, *Canada (Attorney General) v. Friesen*, 2017 FC 567. Based on this decision, counsel for the appellant argued that the correctness review standard applies here to the interpretation and application of the *RSA* and the *CRORs.* The correctness standard of review also applies to whether the due diligence defence is applicable to the alleged violations. Counsel for the appellant invited the panel to assess the review member's findings of fact on a reasonableness standard.

[6] Counsel for the Minister argued that the standard of correctness should apply to the first four appeal grounds in this case: whether or not (i) the Notice of Violation is invalid because it references breaches of both the *RSA* and the *CRORs*, (ii) the *CRORs* are clear, (iii) a railway company can be held vicariously liable for violations of the *RSA* by its employees, and (iv) the review determination erred in the interpretation and application of the due diligence defence.

[7] Counsel for the Minister argued that the reasonableness standard should apply to the fifth ground of appeal: whether the review determination failed to take into account lower administrative penalty amounts for infractions in other federally regulated modes of transportation under the Tribunal's jurisdiction.

Appeal panel finding

[8] The panel finds that the first four appeal grounds will be assessed on the standard of correctness, and accordingly, the panel will conduct its own analysis of the matters at issue. The panel's assessment of the fifth appeal ground, the amount of any monetary penalty, will be undertaken pursuant to a reasonableness standard.

B. Is the Notice of Violation invalid because it references breaches of both the *RSA* and the *CRORs*?

[9] Counsel for the appellant noted that the Notice of Violation issued by the Minister in this case cited both rule 112(d) of the *CRORs* and section 17.2 of the *RSA* as violation no. 1 and both rule 125 of the *CRORs* and section 17.2 of the *RSA* as violation no. 2. Counsel for the appellant

asserted that this is an improper practice and is at odds with the treatment of administrative violations under the *Aeronautics Act*, where there is no double-tracking of liability for designated provisions and offences. The claim is that under aeronautics legislation there is an explicit segregation of the two; there is no discretion in terms of which way the Minister can proceed in a given circumstance.

[10] Counsel for the appellant submitted that the Minister's broad reference to section 17.2 of the *RSA* in the Notice and then also to a specific violation under the *CRORs* is unnecessary and inappropriate. This, the appellant argued, represents an intentional effort by the Minister to skim over questions of vicarious liability, which counsel for the appellant asserted is confusing at best and compromises Cando's right to a fair hearing.

[11] Counsel for the Minister countered that in referring to section 17.2, the Minister sought to engage the appellant's responsibility for contraventions (as opposed to offences) committed by its employees. Counsel for the Minister submitted that reference in a Notice of Violation to both the *RSA* and the *CRORs* makes the Notice "more complete and detailed".

[12] The review determination found that there were "… no anomalies in the way the Minister proceeded to lay the charges".

Appeal panel finding

[13] There is no duplicity, double jeopardy or confusion created by reference in the Notice to both the *CRORs* and section 17.2 of the *RSA*. Reference to both in a notice is not incorrect. It is clear that the Minister elected to pursue the events here as violations or infractions rather than as offences. One of the direct consequences of that choice is a lower potential maximum penalty. Whether or not there is vicarious liability for violations—as opposed to offences—is another question, and this is dealt with below.

C. Are the *CRORs* unclear?

[14] The appellant submitted that the communication requirements under rule 125 of the *CRORs* require an employee to transmit the word "emergency" three times at the beginning of a transmission in order to report an accident or dangerous circumstance. Rule 125 prescribes:

> **125. EMERGENCY COMMUNICATION PROCEDURES**
>
> (a) An employee will transmit the word "EMERGENCY" three times at the beginning of the transmission to indicate the report of;
>
> […]
>
> (ii) a condition which may constitute a hazard to employees or others;
>
> (iii) a condition which may endanger the passage of movements;

[15] Counsel for the appellant argued that this must be read in conjunction with other communication directions under the *CRORs*. These include general rule A(iv), which provides, in part:

> **A** Every employee in any service connected with movements, handling of main track switches and protection of track work and track units shall;

> […]
>
> (iv) communicate by the quickest available means to the proper authority any condition which may affect the safe operation of a movement and be alert to the company's interest and join forces to protect it;

[16] Counsel for the appellant referred to this as the "primary requirement" that governed the engineers' actions on the night in question. It is to be read along with rule 121 of the *CRORs*, which provides, in part:

> **121. POSITIVE IDENTIFICATION**
>
> (a) The person initiating a radio communication and the responding party must establish positive identification. The initial call must commence with the railway company initials of the person being called. […]

[17] The appellant argued that rule 121 is not expressed to be "notwithstanding or despite rule 125" and, in turn, rule 125 "… doesn't state that the positive identification required by rule 121 … should not be used in the case of an emergency". Contradiction and ambiguity is the result, leaving Cando employees uncertain as to which rule they should apply.

[18] Counsel for the appellant submitted that in any event there is no evidence showing that the Cando employees did not comply with rule 125 in any of the calls subsequent to the first failed call to the CN yardmaster.

[19] Counsel for the Minister argued that rule 125 is not confusing. Rather, counsel for the Minister asserted that the rule makes clear that "an emergency communication has absolute priority over other transmissions", and there is no debate that the runaway tank car was an emergency situation requiring emergency communication procedures.

Appeal panel finding

[20] The panel finds that the review determination is correct because there is no ambiguity in the application of rule 125. Rule 125(c) makes it clear that the emergency procedures take precedence over any related communication protocols or rules. No "deeming" of anything is required to make this finding. The language of the rule is clear, especially when viewed in the context of a legislative and regulatory scheme that speaks so strongly in favour of railway safety measures aimed at protecting the public and railway employees.

[21] The appellant argued that there is no evidence to show that Cando employees did not declare an emergency in the prescribed manner. This is a question of fact. The available evidence on this point shows that the engineer made his first call, to which there was no response, to the CN yardmaster at the local yard at approximately 23:53. There was no declaration of an emergency at this point or during any of the subsequent communications.

[22] This is where the railway company is in a position to provide direct evidence of what took place, especially if the facts demonstrated compliance with the law. Cando did not do this. In the agreed set of facts, it conceded that the declaration was not made as required. This failure and the direct testimony that there was no declaration at the time of the first call support the review member's finding that no declaration was made by the relevant Cando employees.

D. Liability

[23] The appellant disagreed with the review member's finding that the *RSA* includes vicarious liability for violations committed under the *RSA*. Fundamentally, the appellant argued that the wording of the relevant provisions of the *RSA* and its regulations, the distinctions drawn between the treatment of offences and violations, and the principles of statutory interpretation all point to vicarious liability—but only when the company is complicit or complacent in the commission of the violation. The onus, according to the appellant, is on the Minister to establish complicity or complacency. Otherwise, there is no corporate liability for the acts of employees performed in the course of their employment duties.

[24] Counsel for the Minister sought to uphold the review member's determination, arguing that the *RSA* either explicitly or implicitly conveys corporate liability for employee acts and, as such, the principles of strict liability apply. In other words, corporations are liable for employee acts, subject to the corporations' ability to present a successful due diligence defence in accordance with the principles set out in *R. v. Sault Ste. Marie*, [1978] 2 S.C.R. 1299 (*R. v. Sault Ste. Marie*).

[25] There are two facets to the appellant's argument, and they are each dealt with below.

(1) Were rule 112(d) of the CRORs and the other CRORs drafted and approved by the rail industry?

[26] The review member found that the *RSA* creates company or employer liability because "… the Minister may require a company by order to formulate rules; the railway companies are therefore responsible for respecting those rules they have themselves formulated and cannot simply exculpate themselves by shifting the responsibility for breaches of those rules onto their employees".

Appeal panel finding

[27] It is correct to say that the *RSA* expressly acknowledges that a railway company is to create the safety rules necessary to govern the safe operation of the railway. Subsection 19(1) of the *RSA* states, in part, that "… the Minister may, by order, require a company (a) to formulate rules respecting any matter referred to in subsection 18(1) or (2.1) …". Under subsection 19(2), the company is to consult with affected associations or organizations. Under subsection 19(4), the company can be required to file the rules with the Minister, who may approve them as filed, amend them or refuse to approve them. In certain circumstances, the Minister may establish rules pursuant to subsections 19(7) through (9).

[28] Presently, the Railway Association of Canada coordinates the creation of safety rules among industry participants. There is a delegation of authority permitting this under section 20.1 of the *RSA*.

[29] It cannot be said that Cando formulated the relevant rules.

(2) Does vicarious liability apply to the CRORs?

[30] The review member found that, when a corporation is alleged to have committed an offence, section 42 of the *RSA* is necessary in order to reflect the potential criminal and penal corporate liability. In other words, the review member determined that an explicit provision offering a due diligence defence is necessary for offences under the *RSA* but not for violations, because violations do not carry any criminal sanctions.

[31] The appellant acknowledged that section 42 deals with offences that are criminal in nature and that it expressly assigns corporate liability for the acts of employees. Their point of divergence from the review member's determination arises when the legislative treatment for violations is compared to that for offences. The appellant noted that vicarious liability is explicitly addressed for offences but not for violations. This distinction, according to the appellant, must be on purpose; otherwise, the same or comparable language would have been used in the creation of violations. The appellant referred to the interpretative principle *expressio unius est eclusio alterius* (by naming one thing, you exclude another).

[32] In further support of this argument, the appellant compared the language of the *RSA* to that of other statutes in transportation (aeronautics) and in other areas (food safety) that create both offences and violations or administrative monetary penalties. In these other contexts, the appellant noted that vicarious liability is explicitly applied to both offences and violations.

[33] Nevertheless, the appellant submitted that vicarious liability can still apply under the *RSA* for violations; however, the difference is in how it is applied. For offences, the onus is on the railway company to show on a balance of probabilities that it was duly diligent. For violations, the appellant claimed, the onus is on the Minister to show that the railway company was either complicit or complacent, by having excused or condoned the safety violations at issue.

[34] The Minister disagreed, arguing that the language in section 42 of the *RSA* creating vicarious liability for offences does not, on its own, mean that Parliament meant to exclude vicarious liability for violations. The Minister relied on the explicit language in section 17.2, which declares: "No railway company shall operate or maintain a railway … or railway equipment … otherwise than in accordance with a railway operating certificate and … with the regulations and rules made under sections 19 and 20 …". To find a railway company not vicariously liable for employee acts simply because of language in section 42 would make section 17.2 meaningless.

[35] The Minister argued that the *RSA* and the referenced provisions must "… be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament" (citing Driedger as quoted in *Bell ExpressVu Limited Partnership v. Rex*, [2002] 2 SCR 559, at paragraph 26). Section 12 of the *Interpretation Act* (R.S.C., 1985, c. I-21) also states that enactments are to be "… deemed remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of [their] objects".

Appeal panel finding

[36] The correct interpretation is that which attaches vicarious liability to railway companies for violations under the *RSA*. There are two reasons for this.

[37] The *RSA* provides three ways the Minister can pursue a breach of the *CRORs*. The Minister may prosecute before the courts by way of indictment (section 42) or summary conviction (section 41) or proceed with a notice of violation (section 17.2), which can be challenged before the Tribunal. The former two are criminal or quasi-criminal, while the latter is administrative or regulatory. They are treated differently in the statute, with different proceedings and potential outcomes. Subsection 40.13(4) of the *RSA* specifically confirms this distinction when it directs that a violation is not an offence. There is no ambiguity if the provisions for one approach are not reflected in those for the other.

[38] Section 17.2 attaches administrative liability to the railway company when it prescribes that "… no railway company shall operate or maintain a railway, including any railway work or railway equipment … otherwise than in accordance with … the regulations and the rules made under sections 19 and 20 that apply to the company". It is not disputed in this appeal that the *CRORs* and specifically rules 112(d) and 125 are such rules, and it is not disputed that the appellant is a railway company. While the term "operate" is not defined in the *RSA*, it is defined in section 87 of the *Canada Transportation Act* as including, "… with respect to a railway, any act necessary for the maintenance of the railway or the operation of a train". The panel concludes from this that a railway, in a physical sense, cannot be operated by anyone other than employees. It is inconceivable that section 17.2 would not bind the company when this section specifically refers to the company and when the operations in question are being undertaken by employees who are acting in the ordinary course of their duties.

[39] The construction and interpretation of the administrative monetary penalty provisions of the *RSA* and specifically section 17.2 must also be guided by the *RSA*'s stated objectives. These are clearly and concisely set out in section 3. They include the need to promote and provide for the safety and security of the public and personnel, and the protection of property and the environment, in railway operations; to recognize the responsibility of companies to demonstrate, by using safety management systems and other means at their disposal, that they continuously manage risks related to safety matters; and to facilitate a modern, flexible and efficient regulatory scheme that will ensure the continuing enhancement of railway safety and security.

[40] Limiting railway company liability for a safety breach to when the company is complicit or condones the acts would attract corporate liability only when it is proven that the company specifically directed or approved the failure or breach in question or, knowing of a safety risk and the likelihood of a violation, took no steps to avoid it. This approach would avoid corporate responsibility for safety breaches by employees when, for example, a railway company has lax safety management practices or gives lip service to the safety management plans required under the *RSA*. Restricting liability for violations in this way simply based on language in another section of the *RSA* dealing with offences does not make sense. Not only would it strip section 17.2 of any meaning, but it would also run counter to the clear objective in the *RSA* of making the railway company responsible for safety matters that are within its control and responsibility.

[41] In the post-Lac-Mégantic railway operating environment in Canada, it would be absurd to limit company liability to acts of complicity or condonation and absolve it in all other cases, as here, for the negligence of employees who are acting in the course of their duties. Vicarious liability is more than a question of which party has the burden of proof. It is fundamental to fostering a relentless and uncompromising railway safety culture in Canada—one that advances the *RSA* objectives of having companies operate in a safe and secure manner that protects the public and railway employees.

E. Due diligence

[42] The appellant argued that in the event the panel finds that there is the potential for vicarious liability in the violation provisions of the *RSA*, it can invoke the defence of due diligence. Citing *R. v. Sault Ste. Marie*, the appellant argued that it can escape liability for employee acts if it is shown that it exercised all reasonable care by establishing that (i) it had a proper system to prevent the commission of the violation and (ii) it took all reasonable steps to ensure the effective operation of the system.

[43] The appellant acknowledged that the defence imposes a burden on the defendant to demonstrate on a balance of probabilities that it took all reasonable steps to avoid the commission of the specific violations at issue.

[44] The Minister agreed on the existence of the defence as well as its scope. The point of departure between the parties lies in their view of the review member's assessment of the defence.

[45] The appellant argued that the Minister provided no explanation at the review hearing of how Cando's training and safety programs failed to fully comply with all relevant safety requirements. According to the appellant, the Minister's case is based solely on an unsupported opinion that if the safety-related incidents happened, then something must have been wrong. The appellant argued that such an after-the-fact assessment is not supportable in law. The appellant asserted that there was ample evidence before the review member, which he failed to consider, that shows that Cando had extensive safety training, monitoring, testing and follow-up, all within a culture that advocated safety first.

[46] The Minister claimed the record showed that the railway company did not take all reasonable steps to avoid the commission of the violations. The Minister asserted that either Cando never conducted efficiency testing at night (which is when the incident occurred) or the incident was the result of a series of mistakes by the entire Cando crew on duty that night, with the implication that their safety system was not effective.

Appeal panel finding

[47] The administrative monetary penalty provisions under the *RSA* assign railway company liability for safety violations committed by employees who are acting in the course of their duties in operating the railway. The company can avoid liability for an incident when it is able to demonstrate that it has taken all reasonable measures to ensure the effective operation of a safety system to prevent the incident from occurring.

[48] Just because a safety incident occurred does not necessarily mean that there were no reasonable safety measures in place. Similarly, it would be false to assume that if new safety measures are adopted after an accident, then the original measures were deficient and unreasonable. Instead, the assessment of due diligence must look at the overall railway company safety culture. There must be documented evidence of what that culture is, how it is implemented, whether there is any priority given to rail safety, whether there is safety training and how often it is carried out, and whether there is effective testing and monitoring. In applying the due diligence defence test, the assessment should include whether or not there is any specific training and testing on the matters in question in a particular violation. For example, even if there is a strong overall safety culture and program, it may still be deficient if there are gaps in its coverage.

(a) Rule 112(d)

[49] Section 112(d) sets out requirements related to unattended equipment as follows:

> **112. Leaving Equipment Unattended**
>
> In the application of this rule:
>
> > (i) Equipment is considered unattended when an employee is not in close enough proximity to take effective action to stop the unintentional moving of equipment.
>
> [...]
>
> (d) When equipment is left unattended on non-main track, at other than a yard, siding, subdivision track, or high risk location, a sufficient number of hand brakes must be applied and determined sufficient through an effectiveness test described in (e). Special instructions must indicate the minimum hand brake requirements for these locations where equipment is left unattended.

[50] In terms of the rule 112(d) violation, there was extensive evidence tendered relative to Cando's approach to safety matters. The training, administrative procedures and periodic efficiency testing of employees performing their duties demonstrate the existence of a robust training program and task auditing procedures. These were all systematically and comprehensively documented throughout the relevant time period and filed as evidence of the pre-event corporate safety culture and practices. It is clear that Cando was not simply giving lip service to questions of safety in the operation of the railway. There was clear and specific evidence filed by Cando of its rigorous training, testing, monitoring and follow-up of car safety management, specifically on the proper braking requirements for the positioning and parking of railcars. Monthly and employee-specific reports were completed on an ongoing basis, and these were filed by Cando in support of it having undertaken the requisite due diligence.

[51] Consistent with the requirements of an effective safety management system, the company took remedial action when the efficiency testing target of five tests per month per location was not achieved during the month of January 2016. This shortfall was detected immediately, and the number of efficiency tests was increased during the next month. This was done in order to catch up to the monthly quotas established in November 2015. These matters were not simply paper exercises designed to pad the record of safety measures undertaken. The evidence shows that they were undertaken in good faith, properly documented at the relevant times as part of business recording, and monitored systematically by supervisors.

[52] There was clear and convincing evidence of Cando's supervisory unannounced or covert observations, which were conducted at various times of day. This was undertaken so as to observe crews performing their duties "the way they normally do it," that is, when there is no direct supervision around. Evidence highlighted in the appeal hearing shows that relevant evening/night testing was conducted that would have applied to the crew who were on duty on the night of March 1, 2016. The testing was specific to the need for requisite securement of stationary railcars.

[53] The appellant stated that the improper braking procedures and subsequent runaway of the tank car were due to employee negligence. It was admitted that all three employees knew better. The evidence shows that they had been trained on the proper safety procedures but ignored them on the night in question. Shortcuts were taken that should not have been, assumptions made that should not have been made and were clearly wrong, and attempts at correction were ill-advised and improper. Indeed, the attempt to capture the runaway tank car made a bad situation worse. These three employees individually and together were at fault when they carried out their operating duties on the night in question. There is no evidence of Cando supervisors condoning, being complicit in, or being party to their actions. On the contrary, as far as safety management systems go, certainly as it relates to car positioning and braking in Regina, the evidence demonstrates that Cando took safety seriously. It had a rigorous, effective and relentlessly pursued safety management system in place at that location for ensuring the safe positioning of cars in yards.

[54] In terms of the test laid out in *R. v. Sault Ste. Marie*, the evidence shows that for railcar positioning requirements, Cando exercised all reasonable care by having established a proper system to prevent the commission of the violation in Regina. It had taken and documented all reasonable steps to ensure the effective operation of this part of its rail system. Specifically, all reasonable steps were taken to avoid the unattended runaway of tank car GATX 67963 on the night in question. While there was a significant breach of rule 112(d) of the *CRORs*, it is one that the company has successfully defended by showing that it had taken all reasonable care.

(b) Rule 125

[55] The breach of rule 125 of the *CRORs* is another matter. It is a separate violation and one for which Cando is liable.

[56] While the training programs Cando had in place were extensive, there was nothing before the panel to show that they dealt adequately with basic emergency reporting measures. The three employees here proceeded incorrectly in calling in this emergency. It is not clear that they even knew about rule 125. Cando's safety management training and policy were clearly deficient.

[57] Counsel for the appellant claimed some confusion in the rule caused the problem. This panel specifically rejects that argument as unsubstantiated. A properly trained person would have understood rule 125 and the reasons for it. Similar provisions exist in radio procedure across modes and internationally. It is possible that in an age of cell phone use, the continuing requirement for proper radio procedure training has been overlooked. However, a safety management system that does not properly address emergency radio procedures is inadequate, as is a system that does not provide site-specific standard operating procedures in a multi-frequency environment.

[58] The *CRORs* specifically include both a duty to inform other units of an emergency and a duty to warn others who the person reporting may not even know are affected. This is the purpose of rule 125. This is why it is a "life and limb rule" and why the use of alternate means, such as cell phones, could not meet the requirement of rule 125. In fact, company training should have included a requirement to broadcast the nature of the emergency on all relevant channels periodically for as long as the emergency could endanger others. Both CN yard employees and CP crews operating in the vicinity could have been put at risk in this case.

[59] The company has not presented any sort of documentation that would substantiate a due diligence defence. Given its ability to do so with respect to the violation of rule 125, we must infer that no such documentation or training exists. Since the due diligence defence requires evidence, the panel concurs with the review member that the company is liable.

[60] The panel upholds the review member's finding. It is unambiguous that this was an emergency situation and that the communications protocols established for emergencies under rule 125 should have been used but were not. A defence of due diligence could have been brought forward, but no such defence was offered beyond a claim that the rules were unclear. The panel rejects that argument.

F. Administrative monetary penalty

[61] For the rule 112(d) allegations, the review member upheld the Minister's assessment of a monetary penalty, but reduced it by $3,999.96 because of mitigating circumstances. The review determination imposed a penalty of $50,666.16.

[62] This penalty is set aside, given that the panel has found that Cando exercised all reasonable care to avoid the employee acts of improper securement that caused the tank car to roll away unattended.

[63] For the rule 125 breach, the review member upheld the Minister's assessment of a monetary penalty but reduced it by $3,999.96 to $50,666.16 as a result of mitigating circumstances. The appeal panel upholds this determination. The evidence shows that Cando advised the Transportation Safety Board (TSB) the next morning, and this early notification is a mitigating factor. The TSB, in turn, advised the Minister.

[64] The appellant argued that the AMP regime for railways is unfair because the penalty amounts are much higher than those that apply in other transportation modes. The panel finds that its task in an appeal hearing is to rule on a case-by-case basis using the prevailing legislation and regulations. Any arguments on policy and penalty comparability should be addressed to the Minister through the relevant channels, including the Railway Association of Canada.

[65] Rule 125 is clear, and it is fundamental. Compliance is absolutely critical to avoid risk to railway property, personnel and the public. Counsel for the appellant argued that the Cando crew took immediate, aggressive and successful measures to communicate this danger situation effectively to all parties concerned. The panel disagrees.

G. Conclusion

[66] The panel allows the appeal, in part, and dismisses the Notice of Violation against Cando in regard to the breach of rule 112(d) of the *CRORs*. The evidence demonstrates that Cando was duly diligent in having taken all reasonable steps to avoid the particular events that gave rise to the issuance of the Notice. Accordingly, the penalty rendered by the review member is also rescinded.

[67] The panel dismisses the appeal relative to the review member's finding that there was a breach of rule 125 of the *CRORs*. The evidence failed to demonstrate that Cando was duly diligent in having taken all reasonable steps to avoid the particular events that gave rise to the issuance of the Notice. The monetary penalty directed by the review member in the amount of $50,666.16 is a reasonable assessment given the seriousness of the violation, and it is upheld.

IV. DECISION

[68] The appeal is allowed in part. The appeal panel dismisses the administrative monetary penalty of $50,666.16 for the violation of rule 112(d) of the *CRORs*. The appeal panel upholds the administrative monetary penalty of $50,666.16 for the violation of rule 125 of the *CRORs*.

[69] The amount of $50,666.16 is payable to the Receiver General for Canada and must be received by the Transportation Appeal Tribunal of Canada within 35 days of the service of this decision.

February 5, 2019

(Original signed)

Reasons for the appeal decision:	George Ron Ashley, Member (chairing)
Concurred by:	Michael Regimbal, Member
	Raymon Kaduck, Member

Appearances

For the Minister:	Micheline Sabourin and Eric Villemure
For the Appellant:	Joe Barnsley and Travis DeLaronde