TRANSPORTATION APPEAL TRIBUNAL OF CANADA

Citation: *Canadian Pacific Railway v. Canada (Minister of Transport)*, 2019 TATCE 35 (Appeal)

TATC File No.: O-0024-41

Sector: Rail

BETWEEN:

Canadian Pacific Railway, Appellant

- and -

Canada (Minister of Transport), Respondent

Heard in: Toronto, Ontario, on December 6, 2018

Before: Mark Conrad, Member (chairing)

George R. Ashley, Member

John Gradek, Member

Rendered: August 28, 2019

APPEAL DECISION AND REASONS

Held: The appeal is dismissed. The appeal panel upholds the administrative monetary penalty issued to Canadian Pacific Railway Company. The panel also finds an additional mitigating factor was present that had not been included in Transport Canada's calculation of the penalty value; therefore, the amount of the penalty is reduced to $56,874.30.

The total amount of $56,874.30 is payable to the Receiver General for Canada and must be received by the Transportation Appeal Tribunal of Canada within 35 days of service of this decision.

I. BACKGROUND

[1] On March 8, 2017, the Minister of Transport (Minister) issued a Notice of Violation (Notice) with an administrative monetary penalty (AMP) to the appellant, Canadian Pacific Railway Company (CP). This was pursuant to paragraph 3(1)(b) of the *Railway Safety Administrative Monetary Penalties Regulations* and section 40.14 of the *Railway Safety Act* (*RSA*) with respect to contraventions of section 17.2 of the *RSA* and rule 439 of the *Canadian Rail Operating Rules* (*CRORs*).

[2] Schedule A of the Notice identifies the charges as follows:

> On or about October 24, 2016 at or near Smith Falls, Ontario, on the Belleville Subdivision, Canadian Pacific Railway Company allegedly operated railway equipment otherwise than in accordance with Rule 439 of the *Canadian Operating Rules* that apply to Canadian Pacific Railway Company when its employees failed to stop a movement at a STOP signal, thereby violating section 17.2 of the *Railway Safety Act*.
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> On or about October 15, 2016 at or near Toronto, Ontario, on the Mactier/Galt Subdivision, Canadian Pacific Railway Company allegedly operated railway equipment otherwise than in accordance with Rule 439 of the *Canadian Operating Rules* that apply to Canadian Pacific Railway Company when its employees failed to stop a movement at a STOP signal, thereby violating section 17.2 of the *Railway Safety Act*.
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> On or about August 21, 2016 at or near North Toronto, Ontario, on the North Toronto Subdivision, Canadian Pacific Railway Company allegedly operated railway equipment otherwise than in accordance with Rule 439 of the *Canadian Operating Rules* that apply to Canadian Pacific Railway Company when its employees failed to stop a movement at a STOP signal, thereby violating section 17.2 of the *Railway Safety Act*.

[3] The facts of the three incidents were not in dispute. Both parties accepted the facts as described in the Transportation Safety Board's (TSB) daily notification reports (Exhibits M-1, M-5, and M-8): the number of incidents, the dates they occurred, the locations they occurred at, and the fact that all three involved a failure by the CP operating crew to stop a train movement at a STOP signal. Additionally, both parties agreed that three separate crews were involved in the three incidents.

[4] The above incidents resulted in the issuance of an AMP of $61,749.24.

[5] CP requested a review of the Notice to the Transportation Appeal Tribunal of Canada (TATC or Tribunal) on April 11, 2017. A review hearing took place on November 2, 3, and 8, 2017. In a decision dated July 30, 2018, the review member upheld the violations but reduced the monetary penalty to $58,044.28 due to an additional mitigating factor.

[6] On August 29, 2018, CP made a request for appeal of the review determination to the TATC.

II. GROUNDS FOR APPEAL

[7] The stated grounds for appeal are that the review member[1] erred in law, or in fact, or a combination thereof, as follows:

> 1. failing to properly consider the lack of procedural fairness that was due to CP in light of the Minister's failure to follow its own stated policies and processes and instead, the Minister's imposition of arbitrary and unfair policies and processes;
> 2. failing to properly consider all relevant and material facts in relation to CP's preventative and corrective actions;
> 3. failing to properly apply the test of due diligence or reasonable care in accordance with established legal authorities; and
> 4. such other related and errors [sic].

III. ANALYSIS

A. Standard of review

[8] The appellant's representative argued that a standard of correctness should apply, referencing *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190, where the Supreme Court identified two standards of review: correctness and reasonableness. The appellant argued the errors made by the member in the initial hearing were errors in law, failure to properly consider procedural fairness (which the Minister allegedly breached by not following his own written policies), and failure to properly apply the test of due diligence or reasonable care. These grounds, the appellant's representative argued, warranted a review standard based upon correctness.

[9] The Minister's representative agreed with CP that the standard of review should be one of correctness—that the matter at hand is one of law.

Appeal panel finding

[10] In *Billings Family Enterprises Ltd. v. Canada (Minister of Transport)*, 2008 FC 17, the Federal Court of Canada found that an appeal panel is directed to give considerable deference to a review member on findings of fact and credibility but is entitled to take its own view on questions of law.

> [29] The issue of deference, according to the Minister, lies in the Appeal Panel's apparent willingness to consider *de novo* the amount of the penalty imposed on BFEL for operating an air transport service. I am of the view that the TATC Appeal Panel was explicitly authorized by Statute to advance its own opinion as subsection 8.1(3) of the *Aeronautics Act* provides that the Appeal Panel […] "… may substitute its decision for the determination appealed against."
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> [30] Indeed, I think this position is consistent with what was said by the Supreme Court in *Paul v. British Columbia (Forest Appeals Commission)*, 2003 SCC 55 … at paragraphs 43 and 44. That

[1] In the request for appeal, the appellant suggested that the Minister had erred in the review decision, rather than the review member; I take this to be a simple error and have referred to the review member when appropriate.

> was an appeal within an administrative scheme to a specialized appeal panel, a panel one would think would be expected to use the expertise its members were required to have.

[11] The panel agrees with the parties that the appropriate standard of review for questions of law is correctness. The panel will assess the review determination on the standard of correctness, and if the panel determines that the decision was not correct, it will conduct its own analysis of the matters at issue.

B. Due diligence and failing to consider all relevant and material facts

[12] At the appeal hearing in December 2018, the appellant requested that the appeal panel take judicial notice of CP's overall safety statistics from 2005–2015 as posted on CP's website, specifically identifying, on the one hand, a 65% decline in accidents caused by equipment and a 33% decline in track-related accidents, but, on the other hand, an 11% increase in accidents caused by human error. CP noted the latter was cause for concern and gave rise to its lobbying efforts to implement regulations regarding in-locomotive voice and video recorders, for which they also asked the Tribunal to take judicial notice. CP's efforts included collaborating with Transport Canada (TC) and other parties regarding advanced types of train control systems. CP argued before the appeal panel that its awareness of the increase in human error-caused accidents and consequent lobbying efforts were both part of the company having taken all reasonable steps to address the escalation.

[13] The appellant argued the appeal is about CP's adherence to the established principles of a due diligence defence, noting a 99.999% company-wide historical compliance rate with signal rules, a formalized training program, and a series of actions taken following the first incident on August 21, 2016. The appellant also identified CP's internal operating requirement of a 100% result to pass signals testing and the fact that historically it had regarded rule 439 of the *CRORs* as a "cardinal rule". While it no longer categorizes the rule as such, CP's representative confirmed upon questioning by the panel that it continues to regard the rule as a "serious" one.

[14] The appellant argued that the review member's decision failed to address factors cited in *R. v. Weyerhaeuser*, 2000 BCPC 227 (*Weyerhaeuser*), which noted the following relevant due diligence factors to be considered:

> [a] the preventative systems in place;
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> [b] the efforts made to address the problem;
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> [c] the promptness of the response;
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> [d] the industry standards;
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> [e] matters beyond the control of the accused;
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> [f] the foreseeability of the incident.

[15] Citing *R. v. Sault Ste. Marie*, [1978] 2 S.C.R. 1299 (*Sault Ste. Marie*), the appellant accepted that the legal test is whether or not it "… took all reasonable steps to avoid the particular event". While CP acknowledged that human error existed in each of the three incidents giving rise to the notice of violation in this case, it argued that it took all reasonable steps to avoid the offending conduct and that due diligence does not require perfection. The appellant further argued, referring to the review determination, that "There is nothing in the decision that

said there was something lacking in the actions of CP", and that in finding that a defence of due diligence had not been made out, the review member should have identified "some step that should have been taken that was reasonable". The appellant cited *R. v. DeForest*, 2013 SKPC 30, noting "Due diligence does not require that an individual guarantee that an offence will not occur; rather, the individual is required to demonstrate that she took 'all reasonable steps'".

[16] The Minister's representative countered, claiming that there is a "heavy burden of proof" that exists with due diligence, citing in support the reasoning set out in *Sault Ste. Marie, Samson v. Canada (National Revenue)*, 2007 FC 975, and *R. v. Alexander*, 1999 CanLII 18928 (NL CA) (*Alexander*). The Minister argued that CP actions prior to the first incident were only general in nature and failed to target the loss of situational awareness that occurred with the CP operating crews in the three incidents cited in the Notice. The Minister's representative further argued, citing *Alexander*, that

> [18] The defence of due diligence requires the acts of diligence to relate to the external elements of the specific offence that is charged. The accused must establish on a balance of probabilities that he or she took reasonable steps to avoid committing the statutorily-barred activity. It is not sufficient simply to act reasonably in the abstract or to take care in a general sense. In *R. v. Kurtzman (1991)*, 1991 CanLII 7059 (ON CA), 50 O.A.C. 20; 4 O.R.(3d) 417 (C.A.), Tarnopolsky, J.A., observed at p. 429 that "The due diligence defence must relate to the commission of the prohibited act, not some broader notion of acting reasonably." […]

[17] Keith Shearer and Anthony Marquis, both CP senior officials during the relevant time period, testified at the review hearing of CP's internal training programs that existed prior to the three incidents. They also identified measures implemented as a result of the first incident: safety blitzes, system bulletins, rules of the week, additional road foremen positions, a personal visit to the site by Mr. Marquis, and reduced speed limits prior to passing "clear to stop" and "limited to stop" signals, among others.

[18] Introduced at the review hearing was TSB Railway Investigation Report R16T0162 regarding the August 21, 2016 incident (Exhibit A-16). The report notes the locomotive engineer and conductor had both been tested multiple times between January 2015 and August 2016, with both individuals passing all but one test, which was not related to signal recognition. The report also identified that during this time period the locomotive engineer had five tests with a company officer on main line track, and the conductor had one such test.

[19] There were no similar reports filed regarding the incidents of October 15 or 24, 2016.

[20] Testimony provided at the review hearing by Mr. Shearer and Mr. Marquis identified that train rides are "what our officers, our management staff do"—that is, supervisors or managers ride with the crew confirming behaviours or reinforcing expectations. They also identified an internal CP standard that every employee is "ridden with" at least once a year. Mr. Marquis noted he had reviewed the affected employees' training records, including records of efficiency testing, train rides and familiarization, and that "everything was as we would expect it to be". He did not clarify what he meant by that.

[21] Mr. Shearer and Mr. Marquis did not introduce any training records for the six crew members involved in the three incidents in support of this testimony.

[22] Introduced at the review hearing by the Minister's representative were notes from interviews undertaken as part of the Minister's investigation with four of the six crew members involved in the three separate incidents (Exhibits M-3, M-4, M-10, and M-11). Shane Taylor, the conductor of the train involved in the August 21 incident, indicated he had not had a company officer ride with him since he qualified as a conductor in 2012. Mr. Taylor's statement is not aligned with the TSB report, which cited a single test by a company officer on main line track between January 2015 and August 2016. Mr. Taylor further indicated that he had been employed by CP for "about six or seven years" but that his "actual work experience [was] about six or seven months". The figure of six to seven months is also out of alignment with the TSB report, which indicates actual work time of approximately 15 months.

[23] Steve Munt, the locomotive engineer for the October 24 incident, indicated he believed it had been "three or four years ago or more" when he had last had a company officer ride with him on main line track. Sean Delarge, the conductor of the train involved in the October 24 incident, stated the last time a company officer had ridden with him on main line track was March 2015 during his qualifying trip as a conductor.

[24] The TSB report found the following regarding the conductor involved in the August 21 incident:

> After returning from a 9-month lay-off in March 2016, the conductor requested and received a number of familiarization trips. Although these trips were granted, all took place in yards. The conductor had not operated on the North Toronto Subdivision for more than 9 months, and the familiarization trips given did not aid in improving his familiarization.
>
> As well, after returning from a lay-off on 20 August 2016, the conductor was advised by a crew dispatcher that it was unlikely the company would grant additional familiarization trips after a lay-off of only 5 weeks. Because of the difficulty he had experienced obtaining familiarization trips in the past, the conductor did not request further trips from his manager immediately upon his return, despite not being fully comfortable operating on the North Toronto Subdivision.

[25] The TSB report indicated the conductor was supplied a green vest by CP to convey his lack of experience to fellow crew members. The report also noted the conductor had requested additional familiarization trips on two previous occasions and, "After encountering resistance to these requests, the conductor escalated the requests through the union and was then provided with the additional familiarization trips". It is unclear from the report when these two previous occasions took place.

[26] The TSB report ultimately identified the following as a "finding as to risk":

> Following extended workplace absences, if additional familiarization trips are not made available to operating employees to ensure that they are fully comfortable with their designated territory, crew members may not be sufficiently prepared, increasing the risk of train accidents.

Appeal panel finding

[27] The appeal panel will make a preliminary comment on the statistics and lobbying efforts referred to in CP's appeal submissions. No objection was made to their inclusion and little prejudice results to the Minister in noting them. That being said, the Tribunal cautions that these are not facts that can be judicially noticed, particularly on appeal.

[28] With respect to the due diligence defence, the review member found that

> [126] […] As per the Supreme Court in *R. v. Sault Ste. Marie*, [1978] 2 SCR 1299, exercising all reasonable care is establishing a proper system to prevent the commission of the offence and taking reasonable steps to ensure the effective operation of the system.
>
> [127] Therefore, the Tribunal finds that not all reasonable care was exercised by the applicant to prevent the violations.

It was the review member's determination that the initiatives presented by CP had not proven effective in preventing the commission of continued violations. In evaluating the review member's finding, the appeal panel considered the record with respect to the due diligence defence.

[29] In addition to reviewing the record with respect to the due diligence defence, the appeal panel also considered section 3 of the *RSA*, which recognizes the objectives of the Act, specifying in subsection 3(c):

> **3** The objectives of this Act are to
>
> […]
>
> **(c)** recognize the responsibilities of companies to demonstrate, by using safety management systems and other means at their disposal, that they continuously manage risks related to safety matters; […]

[30] Since the tragic rail safety events at Lac Mégantic and the resulting changes in regulatory safety laws for the Canadian railway industry, railways have had a greater level of accountability for the quantity and quality of crew training and expertise.

[31] While CP stated that its internal "HomeSafe" program was "starting right around this time" (of the incidents) and its lobbying for an in-locomotive voice and video recorder regulation was ongoing, CP did not identify additional concrete actions taken prior to the first of the incidents to counter the self-identified 11% increase in incidents resulting from human error. While the evidence shows that CP was aware of the problem, it offered only general assertions as to its safety culture, broad program descriptions, and an overall historical record. There was no evidence provided of any specific measures undertaken to address the human error issues and none to specifically address operating crew attention to stop signals prior to the first of the three incidents before the panel.

[32] When there are safety violations, as here, and when crews ignore stop signs while operating a railway, the panel cannot simply rely on broad assertions from senior company officials that the operating practices were effective and that everything was in order. The ongoing increase in CP's human error-related accidents further calls this assertion into question. When safety issues have been identified that involve the public as well as CP operating crews, there must be clear and convincing evidence that everything is indeed safe.

[33] The appeal panel notes the absence of detailed training or other safety records introduced into the evidentiary record by the appellant. While the panel accepts the generalized safety culture testimony of Mr. Shearer and Mr. Marquis of CP, the lack of training records relative to the crew members in question or operating crews more generally does not permit any corroboration of their testimony. A review of those records would demonstrate to this panel

whether indeed, and as Mr. Marquis put it, "everything was as we would expect it to be". The panel believes that thorough and comprehensive written records of crew training should be standard operating practice, and the absence of such corroborating evidence at the review hearing detracts from the weight that the panel can give to Mr. Shearer and Mr. Marquis' testimony.

[34] The panel acknowledges the statements of the crew members. Despite an inconsistency between Mr. Taylor's statement and the TSB report, there was sufficient consistency in the evidence relative to three crew members involved in the incidents, who were asked as to the recentness of train rides with company managers or supervisors. The evidence was that training or familiarization trips on main line or secondary track were rare, stale or dated.

[35] Applying the factors set out in *Weyerhaeuser*, the panel finds that while a preventative system was in place, it was not adequate. Without a set of meaningful measures to indicate improvements in this area, these human error-related incidents were more than just speculative, and when the first incident arose, repeats were a certainty.

[36] The absence of tangible on-the-ground efforts by the railway to address the problem of human error prior to the August 21, 2016 incident and the absence of adequate familiarization trips on unfamiliar territory—including in one case the refusal to provide such trips upon reasonable request—point to there not being a fully effective preventative system in place. Importantly, the panel takes note of the seriousness of the rule in question, which CP officials also maintained; given this, one would expect to see training records pertaining specifically to this rule or associated signal recognition rules to support the defence of due diligence. This rule is particularly important given that the TSB identified as a 2016 Watchlist item its concerns over the fact that "accidents resulting from errors when following signal indications continue to occur" (Exhibit A-16, Railway Investigation Report R16T0162).

[37] Applying *Sault Ste. Marie*, at page 1331:

> Where an employer is charged in respect of an act committed by an employee acting in the course of employment, the question will be whether the act took place without the accused's direction or approval, thus negating wilful involvement of the accused, and whether the accused exercised all reasonable care by establishing a proper system to prevent commission of the offence and by taking reasonable steps to ensure the effective operation of the system.

Again, the panel finds it is left with broad assertions of safety culture from CP management, interview notes and the TSB report. Staff training and monitoring records, which may have aided CP's arguments, were not presented as evidence.

[38] The panel agrees with the review determination and finds that CP did not prove, on a balance of probabilities, that it exercised due diligence, in that it did not take all reasonable steps to ensure an offence would not occur.

C. Procedural fairness

[39] The appellant's arguments regarding procedural fairness focused on three themes:

1. The TATC has jurisdiction to decide on the procedural fairness of TC's administrative processes;

2. CP held legitimate expectations that TC would adhere to the terms contained in its published process guidelines; and
3. It was unfair and prejudicial to CP's ability to prepare a proper defence when TC included three incidents in one AMP, making it unclear to CP whether it was being charged three times for three different offences or once for one offence with three sets of supporting evidence.

These arguments will be addressed separately.

(1) TATC jurisdiction

[40] In terms of CP's available appeal rights, CP argued that at the time of issuance of the notice of violation it did not have the legal capacity to seek a judicial review of TC's processes because section 28 of the *Federal Courts Act* (*FCA*) does not identify TC as a body for which the Federal Court of Appeal can undertake judicial review—asserting that the Tribunal is the appropriate body to hear and make determinations on issues of procedural fairness. CP repeated that, should the panel find a lack of procedural fairness in the processes leading up to the notice of violation, the AMP should be considered a nullity and "incapable of being enforced", or referred back to the Minister for further review.

[41] The Minister's representative argued that the TATC has limited jurisdiction in respect of reviews and appeals, as expressly provided for under the *RSA*, which does not include findings of procedural fairness. The Minister's representative cited section 40.18 of the *RSA*:

> **40.18** At the conclusion of a review, the member of the Tribunal who conducts the review shall without delay inform the Minister and the person alleged to have committed a violation
>
> > **(a)** that the person has not committed a violation, in which case, subject to section 40.19, no further proceedings under this Act shall be taken against the person in respect of the alleged violation; or
> >
> > **(b)** that the person has committed a violation and, subject to any regulations made under paragraph 40.1(b), of the amount that must be paid to the Tribunal by or on behalf of the person and the time within which it must be paid.

[42] The Minister's representative argued that the TATC's jurisdiction is very specific: the Tribunal must determine whether a violation has been committed or not. There is no other review or appeal power, either express or implied, supporting CP's requested remedy that the TATC declare the AMP a nullity or otherwise refer it back to the Minister for reconsideration. The Minister's representative disagreed with CP's interpretation of the *FCA*, arguing that, should CP have wished the AMP to be nullified based on an alleged lack of procedural fairness at the TC level, it could have applied for judicial review at that early stage of the enforcement process pursuant to section 18 of the *FCA*. The Minister's representative raised the doctrine of jurisdiction by necessary implication, and argued that Parliament would not have implicitly conferred jurisdiction on the Tribunal when it explicitly granted jurisdiction to the Federal Court.

Appeal panel finding

[43] Subsection 40.16(1) of the *RSA* reads:

> **40.16(1)** A person served with a notice of violation that wishes to have the facts of the alleged contravention or the amount of the penalty reviewed shall, on or before the date specified in the notice – or within any further time that the Tribunal on application may allow – file a written request for a review with the Tribunal.

[44] This is to be read in conjunction with section 40.18 of the *RSA*, which delineates the TATC's mandate as one that requires the TATC to find that a violation has or has not been committed. Under section 40.18, a review member does not have the right to simply send a notice of violation back to TC for review or reconsideration.

[45] The doctrine of jurisdiction by necessary implication has been set out by the Supreme Court of Canada in *ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board)*, 2006 SCC 4, where the Court found at paragraph 51:

> … the powers conferred by an enabling statute are construed to include not only those expressly granted but also, by implication, all powers which are practically necessary for the accomplishment of the object intended to be secured by the statutory regime created by the legislature …

[46] A review hearing is a hearing of the facts regarding the matter at hand. This frequently includes not just the probative value of the available evidence, but also evidence, presented by the Minister, of the process leading to the issuance of a notice of violation. The Tribunal can consider arguments—here those of CP—respecting the facts of the alleged contravention, including the event itself and the interactions between the appellant and TC surrounding that event. To the extent that these interactions are relevant to determining whether the person has committed the violation and if so, the amount of the penalty to be paid, as contemplated by section 40.18 of the *RSA*, evidence of and arguments about those interactions form part and parcel of the Tribunal's mandate in conducting reviews and appeals under the *RSA*.

[47] The review member was silent on this point. The appeal panel finds that hearing this complaint and the arguments involved is part of the Tribunal's mandate to conduct reviews and appeals under the *RSA*.

(2) Legitimate expectations

[48] The appellant asserted that TC had informed the Canadian rail industry, in guidelines shared with industry via a conference call, that a letter of warning would be issued prior to the issuance of an AMP. CP introduced TC guidelines into the evidentiary record in support of this contention. Suzanne Madaire-Poisson, Chief, Compliance and Safety at TC, testified that a conference call with the Railway Association of Canada did occur and that CP participated in that call.

[49] CP argued that a letter of warning notifies the company or individual that a contravention of a designated provision is being alleged and that this gives the company an opportunity to respond and to take corrective or pre-emptive action where necessary to demonstrate safety compliance.

[50] CP argued that the AMP itself was fundamentally defective, as TC failed to follow published procedures when it bypassed the letter of warning phase of enforcement. Basically, CP

argued that the letter was a mandatory step in the enforcement process, one that had to be adhered to before a notice of violation could legally be issued. TC's failure to first issue a letter of warning made the notice of violation that was ultimately issued a nullity. On that account, CP argued that the TATC must simply send the entire matter back to TC, as there is nothing properly before the TATC to review.

[51] CP argued, "… when they [TC] stopped following it, they didn't give any notice". The appellant believes that due to TC not following its own guidelines, CP was not able to provide information to meet the legal standard of due diligence that would have persuaded the Minister to realize they should not impose an AMP.

[52] Based on the above, the appellant argued that TC set legitimate expectations on the part of CP that it would follow its guidelines and that it would allow CP the opportunity to outline its due diligence defence before issuing an AMP.

[53] In support of its argument, the appellant cited *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 (*Baker*):

> … in Canada, if a legitimate expectation is found to exist, this will affect the content of the duty of fairness owed to the individual or individuals affected by the decision. If the claimant has a legitimate expectation that a certain procedure will be followed, this procedure will be required by the duty of fairness …

[54] The Minister's representative argued the *RSA* is silent on how an AMP is to be issued. There is no statutory reference to the issuance of a letter of warning prior to the issuance of a notice of violation. The Crown cannot bind itself by policy guidelines, as doing so would fetter the Minister's discretion.

Appeal panel finding

[55] One purpose of a letter of warning is to notify the company of an alleged contravention of a designated provision. In the matter at hand, CP self-reported each of the incidents to the TSB. As such, the company was aware of the incidents and, as per the testimony of CP witness Mr. Marquis, initiated its own follow-up activities with respect to each.

[56] Another purpose of a letter of warning is to elicit a response from the company as to how it intends to address the contravention. The same purpose applies to a notice of threat to safety.

[57] Subsection 31(1) of the *RSA* requires that

> **31(1)** If a railway inspector is of the opinion that a person's conduct or any thing for which a person is responsible constitutes a threat to the safety or security of railway operations or the safety of persons or property, the inspector shall inform, by notice sent to the person and to any company whose railway operations are affected by the threat, the person and the company of that opinion and of the reasons for it.

[58] Submitted into the evidentiary record as Exhibit A-4 was a notice to CP issued by TC Railway Safety Inspector Peter Hopper. The notice was issued October 31, 2016, and addressed to Keith Shearer, General Manager, Operating Standards and Regulatory Affairs, CP. The notice identified the incidents of August 21, 2016, October 15, 2016 and October 24, 2016. The notice further identified the resultant threat to safe railway operations, specifying that this caused a

hazard as it "elevate[d] the risk of derailments and collisions". The notice requested a response as to how CP intended to resolve these hazards.

[59] A notice from a railway inspector and a letter of warning are distinct administrative measures, but both provide the recipient with an opportunity to respond to a perceived rail safety matter by outlining actions taken or to be taken by the railway to mitigate the identified risks. Exhibit A-5 is CP's response. Dated November 15, 2016 and addressed to Inspector Hopper, the response is signed by Lori Kennedy, Director Regulatory Affairs, CP. Ms. Kennedy—in two paragraphs—notes that CP takes safety seriously, that investigations were undertaken after each incident, that the root cause was human factor related—specifically failure by crews to comply with rules—and that crew members were disciplined accordingly. The response also notes that no systemic issue was found as a root cause, but that CP would continue to focus on safe train handling and work to ensure all crews in the Ontario Region follow rule 34 of the *CRORs* (fixed signal recognition and compliance). Additionally, attention to detail and in-cab communication would be stressed with all crews and monitored by management.

[60] As an official response to the inspector's notice of a threat to safety, CP's letter failed to identify in any granular way the actions taken or initiated to address the identified risks. Rather, the response took a general approach, basically declaring that TC should trust CP's ability to generally take care of its operating safety and stop signal compliance under the *CRORs*. The broad-brush testimony of CP senior officials at the review hearing further reflects that approach.

[61] No evidence was introduced indicating that the notice had been rescinded by the inspector, only that he was satisfied with the actions to date but would continue to monitor the situation over the coming months. There is nothing in the inspector's response or in his subsequent actions to reasonably convey to CP that the safety risks identified in his notice had been adequately dealt with and the matter resolved. While the inspector testified that ongoing monitoring found no further violations, he also stated that "we're still monitoring".

[62] The review member did not specifically identify the issue of legitimate expectations. However, he did note that the Minister "… has the authority to use these tools to ensure compliance as a means of deterrence, and in this case issued a Notice of Violation to ensure compliance after three violations of the same nature had occurred". This speaks to the Minister's authority to use its tools and processes so as to best address compliance issues, which in the matter at hand would include moving directly to issuance of a notice of violation.

[63] This is not the first time that TC has issued a notice of violation without first issuing a letter of warning. At the review hearing, Ms. Madaire-Poisson testified that TC moved directly to a notice of violation with respect to Cando Rail Services Ltd., with a notice of violation dated March 21, 2016 (*Cando Rail Services Ltd. v. Canada (Minister of Transport)*, 2017 TATCE 10 (Review)).

[64] The *RSA* is silent on how an AMP is to be issued. There is no statutory or regulatory reference to the issuance of a letter of warning prior to the issuance of a notice of violation. Rather, the process appears only in a TC guidance document. While the guidance document does indicate that a letter of warning serves to

> - […] State the Minister's intention to issue a Notice of Violation (AMP) if the non-compliance is not remedied; and
> - Require the company to respond with corrective actions taken or intended within up to 7 calendar days of issuance

It also identifies factors for selecting an enforcement tool, which include the risk level of the non-compliance. In the case at hand, CP confirmed that the identified incidents were "serious" infractions. In addition, the occurrence of three incidents in the same geographic area and within a compact time frame, one of which led to a collision between two trains, was an aggravating factor.

[65] In other words, the guidance document references discretion in how TC might proceed in any particular case. There is no mandated or prescribed template. The combination of factors present in each case is used to determine an appropriate enforcement approach for the immediacy and severity of the risks identified.

[66] TC's actions here did not exactly correspond to the proposed enforcement stages set out in its shared guidance document. Yet it is clear that the identified seriousness and timing of the incidents correspond to an elevated level of risk. Inspector Hopper's notice to CP specified the seriousness with which TC was taking the matters at hand. CP had a full and fair opportunity to respond to that notice and outline in detail any and all steps it was taking to reduce the risk of subsequent rule 439 violations.

[67] If, however, there is any fairness question outstanding, the panel notes that procedural fairness is not an absolute. Rather, it varies depending on statutory context and risk. The fairness test set out in *Baker* makes it clear that procedural fairness is a sliding scale where

> Greater procedural protections, for example, will be required when no appeal procedure is provided within the statute … The more important the decision is to the lives of those affected and the greater its impact on that person or those persons, the more stringent the procedural protections that will be mandated …

[68] The panel does not find the enforcement process used by TC here to be unfair to CP; nor was there a legitimate expectation by CP that an AMP would only follow a letter of warning. The use of discretion is identified in the TC guidelines. Having said this, the panel notes that going forward there could be a clearer articulation by TC of that discretion and of the need for specific enforcement measures to be based on the risks present in each particular case.

(3) Inclusion of three incidents in one AMP

[69] Citing *Sault Ste. Marie*, the appellant stated, "In my opinion, the primary test should be a practical one, based on the only valid justification for the rule against duplicity: does the accused know the case he has to meet, or is he prejudiced in the preparation of his defence by ambiguity of the charge?" The appellant argued it did not know the case to meet and, therefore, it was prejudiced in preparing its defence.

[70] The appellant argued that, by combining multiple incidents in one notice of violation, TC made it unclear as to whether CP was being charged three times for three different offences, or

once for one offence with three sets of evidence to support the allegation, and that in so doing it amplified the AMP.

[71] The Minister argued that CP was not prejudiced in preparing its case on account of three incidents being processed under one notice of violation, noting that the Minister had to prove all three incidents occurred or risk losing its case. The Minister further argued that, had TC issued three separate notices of violation, one for each instance, CP could have a faced a total AMP of $180,000.

Appeal panel finding

[72] The review member found as follows:

> [129] With respect to concerns expressed by the applicant that they believe each rule violation should have been issued separately to provide the applicant opportunity to demonstrate to the Minister remedial actions taken for each incident, the Minister decided to do otherwise and "bundle" all three violations. This being said, the applicant had all the opportunity and liberty during the hearing to present, for the member's consideration, remedial actions taken for each violation separately to address the Minister's concerns. Hence, the applicant also "bundled" testimonies and evidence.

[73] The Minister had the option to proceed with each incident individually, whereby the monetary penalty facing CP could have reached $180,000. As compliance tools go, the approach selected by the Minister had the lesser potential impact on CP. Had the Minister proceeded solely with the first incident, the value of that penalty could have been reduced, according to Ms. Madaire-Poisson's testimony, by $14,583 (the value of the aggravating factor assessed due to there having been more than one violation of the same rule). However, if the first incident alone was subject to an AMP, it could also be argued that the second incident would have been treated as an individual AMP, which would have had a base value of $75,000 before aggravating and mitigating factors were applied, and the AMP for the third incident would have had a base value of $125,000 before aggravating and mitigating factors were applied.

[74] There is no obscurity or ambiguity in the notice of violation. CP was advised, and the evidence shows CP knew, that all three incidents pertained to one rule, rule 439 of the *CRORs*, and arose out of the failure of three separate crews operating in geographic proximity to comply with this rule, all within a two-month period. CP had the right to respond to the allegations for each occurrence, and it chose to submit a single, aggregated response to the allegations. Only one overall breach was charged, the gravamen of which was "failing to stop". In its response to Inspector Hopper's request in the notice dated October 31, 2016 that he be advised how CP intends "to resolve these hazards or conditions in order to mitigate the threat identified", CP had the opportunity to provide details as to its actions, but instead chose to respond with only six sentences that spoke in general terms to its actions.

[75] The review member also stated, "Although the applicant would have preferred receiving a Notice of Violation for each violation of Rule 439 of the CRORs, the Minister has the authority to proceed with more than one violation on one Notice of Violation". The panel agrees with the review member. The panel does not find the inclusion of the three incidents in one notice of violation created prejudice to CP.

D. Conclusion

[76] The panel dismisses the appeal. CP has not established, on a balance of probabilities, the defence of due diligence, in that it did not take all reasonable steps to ensure the violation would not occur; the enforcement process used by TC here was not unfair; and the inclusion of three incidents in one notice of violation did not create any prejudice to CP.

[77] The panel does find an additional mitigating factor, consistent with the review member's finding. TC failed to consider the safety improvements made by CP in calculating the value of the AMP. While these were insufficient to warrant an overall successful due diligence defence, they are nevertheless noted. The panel therefore reduces the AMP by an additional six per cent. However, the panel adjusts the mathematical equation used in the review determination to align with that described by the TC witness Ms. Madaire-Poisson in her testimony at the review hearing: $81,249 minus $81,249 times (.06 per mitigating factor times 5 mitigating factors) equals $56,874.30.

IV. DECISION

[78] The appeal is dismissed. The appeal panel upholds the administrative monetary penalty issued to Canadian Pacific Railway Company. The panel also finds an additional mitigating factor was present that had not been included in Transport Canada's calculation of the penalty value; therefore, the amount of the penalty is reduced to $56,874.30.

[79] The total amount of $56,874.30 is payable to the Receiver General for Canada and must be received by the Transportation Appeal Tribunal of Canada within 35 days of service of this decision.

August 28, 2019

(Original signed)

Reasons for the appeal decision: Mark Conrad, Member (chairing)

Concurred by: George R. Ashley, Member

John Gradek, Member

Appearances

For the Minister:	Eric Villemure
	Micheline Sabourin
For the Appellant:	Matthew Macdonald
	Cassandra P. Quach