



## TRANSPORTATION APPEAL TRIBUNAL OF CANADA

**Citation:** *Quebec North Shore and Labrador Railway Company Inc. v. Canada (Minister of Transport)*, 2019 TATCE 33 (Review)

**TATC File No.:** Q-0028-41

**Sector:** Rail

### BETWEEN:

**Quebec North Shore and Labrador Railway Company Inc.**, Applicant

- and -

**Canada (Minister of Transport)**, Respondent

**Heard in:** Montreal, Quebec, on November 15 and 16, 2018

**Before:** Gary Drouin, Member

**Rendered:** July 23, 2019

### REVIEW DETERMINATION AND REASONS

**Held:** The Minister of Transport has not demonstrated, on a balance of probabilities, that the applicant, Quebec North Shore and Labrador Railway Company Inc., violated rule 112(a) of the *Canadian Rail Operating Rules*. Therefore, the monetary penalty of \$54,666.12 is dismissed.

## **I. BACKGROUND**

[1] The event in this case was brought to the attention of Transport Canada (TC) when the Quebec North Shore and Labrador Railway Company (QNS&L) reported to the Transportation Safety Board an unintentional movement of equipment that occurred on July 25, 2017, at or near Station Mai. There was an internal investigation to obtain preliminary information about the incident and determine whether an effective push–pull test was conducted before the incident. TC, Quebec regional office, assigned an inspector to shed light on this situation to determine whether the Minister of Transport (Minister) would be justified in taking corrective action. Following an investigation, TC issued the Notice of Violation (Notice) that led to the request for review.

[2] Schedule A of the Notice dated January 8, 2018 alleges that on or about July 25, 2017, at mileage point 126.8 in the Wacouna subdivision, at or near Station Mai, near Sept-Îles, Quebec, QNS&L left equipment unattended on the main track without applying the minimum number of hand brakes required and determining them to be sufficient through an effectiveness test.

[3] Accordingly, the Minister alleged that QNS&L violated rule 112(a) of the *Canadian Rail Operating Rules (CRORs)* and section 17.2 of the *Railway Safety Act (RSA)* by operating a railway in violation with the rules established under sections 19 and 20 of the *RSA*, which apply to QNS&L.

[4] The Notice set an administrative monetary penalty (AMP) of \$54,666.12.

[5] On February 9, 2018, the Transportation Appeal Tribunal of Canada (Tribunal) received a timely request for review from the applicant.

## **II. ANALYSIS**

### **A. Legal framework**

[6] The Tribunal notes that section 17.2 of the *RSA* requires that railway companies comply with the rules made under sections 19 and 20 of the *RSA*. If they are not in compliance, they are committing an infraction or violation. According to the *RSA*, railway companies are responsible for ensuring that equipment left unattended is secured.

[7] The Tribunal also notes the emphasis on safety and security of the public and personnel pursuant to section 3 of the *RSA*, which reads as follows:

3 The objectives of this Act are to

(a) promote and provide for the safety and security of the public and personnel, and the protection of property and the environment, in railway operations;

(b) encourage the collaboration and participation of interested parties in improving railway safety and security;

[...]

[8] Sections 20 and 20.1 of the *RSA* allow a railway company—or a third party acting on behalf of this company—to make rules for the areas stated in the *RSA* and to file these rules with the Minister for approval. The *CRORs* are among the rules adopted under section 20 of the *RSA*. They came into effect on December 14, 2016. They set out the minimum safety standards for rail cars used by railway companies under TC jurisdiction.

[9] Rule 112(a) of the *CRORs* stipulates the actions a railway company must take to secure equipment left unattended to prevent it from moving unintentionally. Pursuant to rule 112(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.

[10] Rule 112(a) stipulates, in part, as follows:

- (a) When equipment, including a locomotive without an air source, is left unattended on a main track, subdivision track, siding or high risk location, at least the minimum number of hand brakes as indicated in the hand brake chart in (k) must be applied and determined to be sufficient through an effectiveness test described in (e), and at least one additional physical securement or mechanical device must be used. [...]

[11] Rule 112(e) requires the effectiveness of hand brakes to be tested according to the requirements listed, including a push–pull test. Rule 112(k) contains a table with the minimum number of hand brakes to apply to secure unattended equipment or movements based on the grade and total tonnage.

[12] Pursuant to section 40.1 of the *RSA* and paragraph 3(1)(b) of the *Railway Safety Administrative Monetary Penalties Regulations*, the *CRORs* are subject to the AMP regime laid out in sections 40.13 to 40.22 of the *RSA*.

[13] Pursuant to subsection 40.16(4) of the *RSA*, the Minister has the burden of proving the allegation in the Notice. Pursuant to subsection 15(5) of the *Transportation Appeal Tribunal of Canada Act*, “In any proceeding before the Tribunal, a party that has the burden of proof discharges it by proof on the balance of probabilities”.

## **B. Elements of the violation and AMP**

[14] The elements to prove for this violation can be summarized as follows: the date and location of the event, the identity of the railway company that committed the alleged violation, and the act or omission that constituted a violation.

[15] The date and location of the incident and the company involved are not disputed, nor is the fact that there was an unintentional movement. The dispute between the parties in this case revolves around the interpretation of rule 112 of the *CRORs* and more specifically the terms “unattended” and “take effective action”.

[16] The Minister’s position is that pursuant to rule 112(i) of the *CRORs*, when an employee is not in close enough proximity to take effective action to stop an unintentional movement, the movement is considered unattended. According to the Minister, the equipment was left unattended when there was an unintentional movement on July 25, 2017, because the QNS&L employees were too far away to take effective action. Accordingly, the Minister argued that the

requirements of rule 112(a) applied. The Minister's evidence attempted to demonstrate that when the train was left unattended, the number of hand brakes applied did not meet the requirements of the *CRORs*.

[17] As for the AMP, through the testimony of Suzanne Madaire-Poisson, Chief, Compliance and Safety, Rail Safety, TC, the Minister explained the factors that led to the AMP and the AMP amount. She noted that, although Inspector Mario Bernier recommended a "warning letter", the Director General opted for an AMP because she considered that there was no forgiveness for non-compliance with rule 112. Ms. Madaire-Poisson explained the aggravating factors for the penalty amount, including carelessness, the possibility of damages, and the fact that the applicant violated several rules during the alleged incident. She also explained the mitigating factors, including the fact that QNS&L made its regulations clearer, the fact that it assisted the Minister, the fact that it reported the violation to the Minister, and the fact that it admitted to the violation.

### **C. Securing equipment**

[18] Pursuant to rule 112, the number of brakes to apply depends on the weight of the equipment and the average grade of the terrain. Mr. Bernier confirmed that he did not know the average grade of Station Mai. However, Mr. Bernier determined based on Exhibit M-5, the train consist, that the weight of the train was just under 20 000 tonnes. Therefore, based on Exhibit M-6, a table of the number of brakes required based on the grade from rule 112, he determined that eight was the minimum number of hand brakes required, since the number of brakes required for a 20 000-tonne train starts at eight for a grade of zero.

[19] According to the information obtained by the Minister about the alleged incident, which the applicant did not contest, the unintentional movement was caused by insufficient action to secure the cars. Based on an interview with the QNS&L engineers who were present during the incident, Dave Patry and David Simard, on August 23 and 24, 2017 (Exhibits M-3 and M-7), the Minister stated that five hand brakes were applied on the cars left unattended on the main track.

[20] Moreover, the employees did not conduct an effectiveness test to determine whether the number of hand brakes applied was sufficient. Mr. Bernier referenced statements from interviews with the employees involved that he took from Exhibit M-4, Formal Investigation of QNS&L Employees. He concluded, without having been present at the interviews, and based on his interpretation of the facts, that Mr. Patry did not conduct a push-pull test pursuant to rule 112(e).

[21] Jean Migneault, TC inspector, Quebec region office, confirmed in the interview that Mr. Patry applied five hand brakes without performing a push-pull. He added that Mr. Patry told him he applied brakes in groups of 5, so 5, 10 or 15 depending on the situation, but did not know where this information or instruction came from. Mr. Migneault suggested that the engineers seemed to be somewhat confused about rule 112 and that their answers to questions about the application of this rule were vague.

[22] Kevin Mosher, rules and regulations specialist at QNS&L, confirmed that he was a certified locomotive engineer and added that Mr. Patry and Mr. Simard had the same certification. Mr. Mosher confirmed that Mr. Patry and Mr. Simard had access to the *CRORs*

manual, which included rule 112 (Exhibit R-1), and that they should therefore be familiar with this rule.

[23] Based on the testimony and evidence presented, the number of brakes applied was insufficient; moreover, QNS&L did not conduct the required push–pull test to confirm that enough brakes were applied. However, the applicant argued that the number of brakes applied and whether or not they were tested are irrelevant, since rule 112(a) did not apply under the circumstances. I agree with this argument.

#### **D. Interpretation and applicability of rule 112(a)**

[24] The Minister presented testimony and maps and photos of Station Mai (Exhibits M-1, M-2A, and M-2B), as well as Inspector Bernier’s notes (Exhibit M-3), which put the incident in context. At the time of the unintentional movement, the cut of cars was on the main track to the north of a signal. Mr. Patry was in the locomotive, which he had detached and moved south. Mr. Simard was on the ground beside another locomotive. Mr. Simard became aware of the movement when Mr. Patry said over the radio that the signal had turned red. He then crossed in front of the unintentional movement at a distance he deemed safe to turn on the tap on the cars to put the train in emergency and stop it.

[25] QNS&L’s position was that rule 112(a) of the *CRORs* did not apply, given that the equipment was not left unattended. More specifically, QNS&L attempted to demonstrate that its employees were close enough to take effective action to stop the unintentional movement. In addition, QNS&L claimed that in any case, the movement was effectively stopped.

[26] Mr. Mosher confirmed that he was present for QNS&L’s internal investigation, and his conclusion was that there was no violation of rule 112, since the train crew was switching for a new train configuration heading south, and therefore the train was not left unattended.

[27] Mr. Mosher defined “tie-up” as parking equipment for some time, and added that in a “tie-up” rule 112(a) applies. However, he stated that the switching that occurred on July 25, 2017 was not a “tie-up” but a switching operation to allow the new train to continue on to Sept-Îles.

[28] In fact, the applicant did demonstrate through testimony and evidence that it was a case of switching to reconfigure the train, which was continuing on to Sept-Îles, and there was no mention in the testimony or evidence of the cars being parked for a length of time.

[29] QNS&L argued that another reason not to ask how many brakes were applied or conduct the push–pull test was that the two employees working as a team considered themselves to be attending to the train, so they did not need to apply rule 112(a).

[30] On the one hand, Mr. Bernier determined based on his experience that Mr. Patry could not see the train and added that the darkness limited his vision. Mr. Migneault also stated that Mr. Patry did not have a view of the train. On the other hand, Mr. Simard explained using visuals where he was at various points in the switching operations. He explained that he was walking back and forth while waiting for the locomotive so he could help connect it. Mr. Simard added that he had a partial view of the movement (out of the corner of his eye) and confirmed that he

was near the movement. Consequently, although Mr. Patry could not see the train, Mr. Simard could.

[31] In addition, QNS&L reminded everyone that general rule C of the *CRORs* states as follows:

C Employees must:

- (i) be vigilant to avoid the risk of injury to themselves or others;
- (ii) expect a movement, track unit or equipment to move at any time, on any track, in either direction;

[...]

It argued that this rule reflects Mr. Simard's actions, as he was walking back and forth, allowing him to see in various directions in an area that was lit.

[32] QNS&L's interpretation of rule 112 differs from TC's in that the parties do not agree on the correct interpretation of the concept of being left "unattended". QNS&L stated that according to rule 112(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", and that on July 25, 2017, the trains were attended and undergoing switching, since the employees were in close proximity and able to stop the trains.

[33] Mr. Mosher gave his definition of the ability to take effective action and provided examples of situations where someone was able to take effective action and situations where they were not. He confirmed that in the situation on July 25, 2017, the engineers had the ability to take effective action, since there were no barriers to them accessing the movement to stop it.

[34] Michel Huart, QNS&L's representative, referred to an internal document prepared by TC to analyze the violation (Exhibit R-2, Administrative Monetary Penalties (AMP) Decision-Making Checklist), in which TC reported that Mr. Patry said in his interview with TC inspectors that the movement was not unattended because he could put the equipment in emergency using the train's Sense and Braking Unit (SBU), and Mr. Bernier explained that as long as air remained bottled in the equipment, it was possible to take action and put the train in "emergency".

[35] Denis Dionne, Rail Operations Supervisor, explained using Exhibit R-4, a diagram of the brake system, and Exhibit R-5, a picture of the car brake tap, how the brake system works, where the brakes are on the cars and what happens when they are applied. Mr. Dionne explained that there are two options for braking an unintentional movement. The first, which Mr. Simard used because he was close to the movement, is to activate the SBU. This option effectively stopped the movement during the incident. A second option is to send a radio signal from the locomotive to put the movement in emergency and thus stop it. The quickest and most effective method, in his opinion, is the one Mr. Simard used, which is to walk beside the movement and open the tap to put the train in emergency.

[36] Mr. Simard confirmed that the train was moving very slowly, since he had time to cross the track and apply the emergency brake. As a joke, during the company's internal investigation, he apparently said he would have had time to tie his boots before the movement reached him.

[37] Rule 112(i) clearly states that equipment is considered unattended when an employee is not in close enough proximity to take effective action to stop the unintentional moving of equipment. QNS&L argued that the concept of proximity must be read with that of being able to take effective action. It added that the evidence and Mr. Bernier's testimony confirmed that all that had to be done to effectively stop the train was to flip a switch. According to uncontested testimony from more than one witness, Mr. Simard effectively stopped the movement using the tools available to him. Moreover, the applicant highlighted the fact that there is a difference between a runaway train like in the Lac Mégantic incident and a movement during regular train switching operations.

[38] The Minister argued that pursuant to rule 112, which was in effect at the time of the alleged incident, an employee who is not in close enough proximity to take effective action to stop an unintentional or unattended movement is in violation of rule 112. The Minister also argued that the engineers were not in close enough proximity, since Mr. Simard had to cross the track in front of the unintentional movement to stop it. Mr. Bernier added that the train triggered a red signal, which was not compliant, and went over the authorized boundaries. However, based on the Minister's and applicant's testimony and evidence, Mr. Simard, who was in close enough proximity, took effective action to stop the movement.

[39] The Tribunal finds that QNS&L correctly interpreted rule 112, that it demonstrated that the movements were attended, and that the need to apply eight brakes did not apply during the train switching operations.

### **III. DETERMINATION**

[40] The Minister of Transport has not demonstrated, on a balance of probabilities, that the applicant, Quebec North Shore and Labrador Railway Company Inc., violated rule 112(a) of the *Canadian Rail Operating Rules*. Therefore, the monetary penalty of \$54,666.12 is dismissed.

July 23, 2019

(Original signed)

Gary Drouin

Member

Appearances

For the Minister: Micheline Sabourin

For the Applicant: Michel Huart