TRANSPORTATION APPEAL TRIBUNAL OF CANADA

Citation: *Canadian National Railway v. Canada (Minister of Transport),* 2019 TATCE 52 (Appeal)

TATC File No.: H-0023-41

Sector: Rail

BETWEEN:

Canadian National Railway, Appellant

- and -

Canada (Minister of Transport), Respondent

Heard in: Montreal, Quebec, on March 21, 2019

Before: John Gradek, Member (chairing)

Charles Sullivan, Member

Michael Regimbal, Member

Rendered: December 6, 2019

APPEAL DECISION AND REASONS

Held: The appeal is dismissed pursuant to subsection 40.19(3) of the *Railway Safety Act.* The appeal panel upholds the administrative monetary penalty issued to Canadian National Railway.

The total amount of $117,332.16 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] By Notice of Violation – Contravention of Designated Provision – Issuance of Monetary Penalty (Rail Safety) dated February 5, 2017, and pursuant to paragraph 3(1)(b) of the *Railway Safety Administrative Monetary Penalties Regulations* and the procedures in sections 40.14 to 40.22 of the *Railway Safety Act (RSA)*, Transport Canada (TC) assessed a total monetary penalty of $117,332.16 against Canadian National Railway (CN) for two alleged violations of section 17.2 of the *RSA* involving railway equipment.

[2] The first alleged violation occurred on or about October 19, 2016, on the Brazeau Subdivision between approximately mile 0 and mile 25 in Lacombe County, near Blackfalds, Alberta. CN allegedly contravened Part II, Subpart D, rule V(d) of the *Rules Respecting Track Safety* when each rail was not bolted with at least two bolts at each joint in Classes 2 through 5 track. The monetary penalty was $45,833.04.

[3] The second alleged violation occurred on or about October 20, 2016, on the Camrose Subdivision between approximately miles 75 and 95.1 in Camrose, Alberta. CN allegedly contravened Part II, Subpart D, rule V(d) of the *Rules Respecting Track Safety* when each rail was not bolted with at least two bolts at each joint in Classes 2 through 5 track. The monetary penalty was $71,499.12.

[4] On February 28, 2017, CN requested that the Transportation Appeal Tribunal of Canada (TATC/Tribunal) review Transport Canada's decision. The review hearing took place on January 24 and 25, 2018 in Edmonton, Alberta. In a determination dated October 22, 2018, the review member upheld both violations and the total monetary penalty of $117,332.16.

[5] On November 20, 2018, CN made a written request to the TATC for an appeal of the review determination. The substantive grounds for appeal include:

1. The review determination erred in concluding that the Minister of Transport proved the alleged violations on the balance of probabilities.
2. The Tribunal erred by applying a standard of perfection and not one based on reasonable care or due diligence.
3. The Tribunal erred in its interpretation of Part II, Subpart D, rule V(d) of the *Rules Respecting Track Safety.*

[6] On January 18, 2019, the TATC advised the parties of an appeal hearing scheduled for March 21, 2019 in Montreal, Quebec.

II. STATEMENT OF FACTS

[7] The facts involving the two incidents were not in dispute. In particular, CN did not dispute that during an inspection on the Brazeau subdivision as described in the Notice of Violation, 34 instances of missing bolts were detected at joints on conventional jointed track, and

on the Camrose subdivision as described in the Notice, 11 instances of missing bolts were detected at joints on conventional jointed track.

III. ANALYSIS

[8] At the appeal hearing, the appellant argued the review member in fact made four errors in the initial review, rather than the three originally cited in the request for appeal:

1. misinterpretation of the *Rules Respecting Track Safety* by concluding that a single missing bolt is automatically a violation of the rules;
2. wrongly concluding that the Minister discharged his burden of proof for the alleged violation;
3. wrongly rejected the defence of due diligence by moving from a strict liability to absolute liability; and
4. refusing to review the amount of the monetary penalty in the absence of evidence for two of the aggravating factors.

[9] The appellant stated that the arguments related to the defence of due diligence and the penalty amount applied only in the event that the panel rejected the first two appeal grounds.

A. Standard of Review

[10] The appellant's representative submitted that a standard of correctness should apply to the first three grounds of appeal and that the standard of reasonableness should apply to the fourth ground of appeal.

[11] The Minister's representative argued that the standard of correctness should apply to grounds one and three, and that the standard of reasonableness should apply to the second and fourth grounds of appeal.

Appeal Panel Findings

[12] The panel agrees that the appeal grounds one and three will be assessed on the standard of correctness. The panel agrees that ground four will be assessed on the standard of reasonableness.

[13] The panel finds that ground two will be assessed on the standard of reasonableness as the question of whether the Minister presented sufficient evidence to prove the violation on the balance of probabilities involves assessing the evidence in light of the law. The Minister's representative made the argument referenced in *Dunsmuir v. New Brunswick*, 2008 SCC 9, at para 47 that reasonableness is a deferential standard animated by the principle that "certain questions that come before administrative tribunals do not lend themselves to one specific, particular result. Instead, they may give rise to a number of possible, reasonable conclusions".

B. The Tribunal erred in its interpretation of Part II, Subpart D, rule V(d) of the *Rules Respecting Track Safety*

[14] The appellant argued that the reviewing member misinterpreted the *Rules Respecting Track Safety* by concluding that if one single bolt is missing, it automatically is a violation of Part II, Subpart D, rule V(d), even without the railway knowing about the missing bolt.

[15] In addition, the appellant argued that the reviewing member completely ignored or did not turn his mind to Part I, section 6.2 of the *Rules Respecting Track Safety*, approved by the Minister of Transport on November 25, 2011 for several companies, including CN, through the Railway Association of Canada. The appellant, at the hearing, interpreted the section as follows:

> So only when the railway company becomes aware of the noncompliance through inspection, through car geometry inspection and visual inspection, and it is **only** when they become aware that they have to fix the problem. If they don't fix the problem, then yes, they would be in violation. [emphasis added]

[16] The appellant further argued that:

> … it is only when, through the inspection that you find your missing bolts that you bring the line into compliance. If you fail to do that, then your violation materializes, then your violation crystallizes, not before that.

[17] The appellant argued that bolts fail as a matter of daily operations of trains on jointed track and that it would be difficult to immediately replace failed bolts upon occurrence. The appellant concluded that missing bolts were an everyday occurrence and that best-effort handling of such incidents was the most practical solution.

[18] The Minister's representative argued that the literal interpretation of the rule is clear: when each rail end on Class 2 jointed track is not bolted with at least two bolts, a railway company is automatically in non-compliance with the rule. The Minister's representative further stated that when there is no doubt as to the meaning of the rule, nor any ambiguity in its application to the facts, the rule must be applied as it reads.

Appeal Panel Finding

[19] The appeal panel accepts the Minister's position, presented at the review hearing, that rail joints are a fundamental part of the railway infrastructure and their maintenance is critical for the safe operation of trains on such structure. Rail joints that are not properly maintained can fail and have caused derailments. Missing bolts in rail joints can be detected visually and electronically. The *Rules Respecting Track Safety* clearly state the physical condition of a safe rail structure:

> Part II – Track Safety Rules
>
> Subpart D – Track Structure
>
> Scope: This subpart prescribes minimum requirements for ballast, crosstie, track assembly fittings, and the physical condition of rails.
>
> Section V. Rail joints
>
> (d) in the case of conventional jointed track, **each rail must be bolted with at least two bolts at each joint in Classes 2 through 5 track** [emphasis added], and with at least one bolt in Class 1 track.

[20] There is **no allowance** stated in the *Rules Respecting Track Safety* for the number or percentage of missing bolts that could be permitted in track structure. The rules, agreed upon by the rail industry including CN in 2011 and published by the Minister of Transport in 2012, state unequivocally that each joint must have two bolts securely attached. Anything less would require the railway to operate such affected track with a lower level of operating service, reduced load or reduced speed, until such time as the missing bolts have been properly installed.

[21] In reviewing the review member's determination, the appeal members have taken notice of the brief discussion on the meaning to be given to Part II, Subpart D, rule V(d) of the track safety rules and that the appellant argued that the Minister of Transport's interpretation of this section of the rules was overly restrictive and unrealistic. The appeal members uphold the Minister of Transport's application of discretion in applying the rules and do not find these violations overly restrictive or unrealistic.

[22] Based on the standard of correctness in reviewing the member's determination, this ground of appeal is dismissed.

C. The review determination erred in concluding that the Minister of Transport proved the alleged violations on the balance of probabilities

[23] The appellant presented the argument that the reviewing member made a fatal error in concluding "that the Minister discharged his burden of proof for the alleged violation, and misapplied the legal framework applicable to the issue". Namely, CN argued that the fact that the review member misapplied section 6.2 of the *Rules Respecting Track Safety* i.e., when CN brought the line of track back into compliance and that the Minister of Transport, in its issuance of a violation, did not find any evidence that CN deliberately neglected to initiate mitigating action resulting from the discovery of missing bolts; CN considered this to be a fatal error.

[24] The Minister countered that there exists enough evidence to justify the reviewing member's conclusions that the Minister of Transport had proven the alleged violations on a balance of probabilities through the track inspection reports and the testimony of CN's staff during the review hearing.

Appeal Panel Finding

[25] The Supreme Court of Canada discussed the concept of balance of probabilities in *R. v. Layton*, 2009 SCC 36, [2009] 2 S.C.R. 540, at paragraph 28, as follows:

> [28] The concept of balance of probabilities could also have been explained with reference to the civil standard of proof. R. D. Wilson, N. J. Garson and C. E. Hinkson's *Civil Jury Instructions* (2nd ed. (loose-leaf)), at § 4.7.4, provides the following sample instruction for explaining balance of probabilities to a civil jury:
>
> 4. What does "proof on a balance of probabilities" mean? It does not mean proof beyond a reasonable doubt — that standard of proof applies only in criminal trials. In civil trials, such as this one, the party who has the burden of proof on an issue must convince you that what he or she asserts is more probable than not — that the balance is tipped in his or her favour. You must examine the evidence and determine whether the party who has the burden of proof on an issue is relying on evidence that is more convincing than the evidence relied on by the other side. In short, you must decide whether the existence of the contested fact is more probable than not.

[26] The review member found no evidence introduced by CN to dispute or disprove the evidence that there were missing bolts on the portions of track in the subdivisions that had been inspected. In the review member's determination, he concluded that the Minister of Transport had proven the alleged violations on the balance of probabilities.

[27] The panel respects the findings of the review member on this issue and will not substitute them with its own opinion of the facts. Based on the standard of reasonableness, this ground of appeal is dismissed.

D. The Tribunal erred by applying a standard of perfection and not one based on reasonable care or due diligence

[28] The appellant's arguments focused on the reviewing member's disregard of the work practices that CN employed with the respect to track inspections and the corresponding effort to replace missing bolts discovered during these inspections. The appellant argued that "CN does go over and above to find those missing bolts and bring the line back into compliance". The appellant further argued that CN has a strong safety culture as demonstrated by company publications that describe safety as a priority for CN.

[29] The appeal panel notes the rules covering track inspection records:

> Part II – Track Safety Rules
>
> Subpart F – Inspection
>
> Section 10. Inspection Records
>
> 10.2 Each record of an inspection under Part II, Subpart F, sections 2,3,6 and 7 must be prepared on the day the inspection is made and signed by the person making the inspection. Records must specify the track or tracks inspected, the date of inspection, location and nature of any deviation from the requirements of TSR [Track Safety Rules], and the remedial action taken by the person making the inspection.

[30] At no time during the reviewing member's hearing did CN provide any written or electronic data confirming the results of inspections carried out by qualified track inspectors detailing the extent of track inspections undertaken in the subdivisions identified in the alleged violations, nor did CN provide data to confirm the remedial action that was allegedly taken upon discovery of missing bolts. The appellant argued that the sum of efforts such as bolt blitzes, bolt patrol, walking the line to repair missing bolts, along with regular and special track inspections, should be considered as complying with due diligence with respect to the *Rules Respecting Track Safety* or the *Railway Safety Act*.

[31] The appellant further argued that the TATC appeal decision in *Cando Rail Services Ltd. v. Canada (Minister of Transport)*, 2019 TATCE 3 (Appeal) (*Cando*) dated February 5, 2019, established that the due diligence defence can be successfully demonstrated by providing that "Cando had extensive safety training, monitoring, testing and follow-up, all within a culture that advocated safety first."

[32] The Minister's representative argued that the Supreme Court decided in *R. v. Sault Ste. Marie*, [1978] 2 S.C.R. 1299, that the defence of due diligence is available to a corporation

charged in respect of an act committed by an employee if it exercised all reasonable care by establishing a proper system to prevent the commission of the violation and that it took all reasonable steps to ensure the effective operation of the system.

[33] The Minister's representative argued that the defence of due diligence is a difficult one to establish because it imposes a heavy burden on the defendant, in this case the appellant, to demonstrate on a balance of probabilities that he or she took all reasonable steps to avoid committing the specific violation at issue. The Minister's representative concluded that the appellant failed to demonstrate, on a balance of probabilities, that it had a proper system in place and that it took all reasonable steps to ensure the effective operation of the system.

[34] The Minister's representative argued that the appellant's evidence focused only on showing reasonable care in the general conduct of CN's affairs. The Minister's representative further argued that the appellant never tendered clear and specific evidence related to the training and testing of employees on the matter in question or related safety systems that they had in place for ensuring compliance with the track safety rules.

Appeal Panel Finding

[35] In reviewing the appellant's reference to the *Cando* appeal decision (at paragraphs 50-54), the appeal panel found that Cando had established a comprehensive safety-first system within their operating practices. This system not only included training but also the monitoring of the effectiveness of the work undertaken, as well as reviewing the documentation associated with work accomplished by employees.

[36] CN did not provide the reviewing member or the appeal members with documentation that reflected the work completed by track inspectors, relying primarily on statements that the bolts get replaced when they are noticed to be missing.

[37] While the appellant did present the methodologies used by CN in track inspections, the appeal members were not presented with CN inspection reports that documented the efforts to identify missing bolts, an issue that was also noted by the reviewing member. The appeal members conclude that there was no sufficient or compelling evidence presented to demonstrate that the appellant had exercised all reasonable care and, on the basis of a standard of correctness, this ground of appeal is denied.

E. Refusing to review the amount of the monetary penalty in the absence of evidence for two of the aggravating factors

[38] The appellant argued that the administrative monetary penalty was wrongly assessed as it pertains to key routes on the subdivisions where the violations occurred. The appellant further argued that the number of occurrences where missing bolts were identified by the Minister of Transport was statistically very low, and that an occurrence of a missing bolt would not necessarily result in a track geometry incident. The appellant stated that "there is no evidence that it is more dangerous and that harm could have resulted [from a missing bolt]."

[39] The Minister's representative argued that the frequency and variety of trains operating on key routes where there has been a number of missing bolts does in fact lead to the application of

aggravating factors. The Minister's representative further argued that the reviewing member was correct in his interpretation of key routes and the impact that missing bolts could have on track geometry and potential incidents.

Appeal Panel Finding

[40] The presence of the observed number of missing bolts on key routes affecting key trains is of particular concern to the appeal members, who have concluded that missing bolts have resulted in track geometry failures and subsequent train derailments.

[41] The appeal members find that the reviewing member did not err in his interpretation of the application of aggravating factors associated with missing bolts on key routes and this ground of appeal is dismissed.

IV. DECISION

[42] The panel agrees with the arguments presented by the Minister.

[43] The panel finds that the review determination with respect to the amount of the monetary penalty was reasonable and the appeal is dismissed pursuant to subsection 40.19(3) of the *Railway Safety Act.* The appeal panel upholds the administrative monetary penalty issued to Canadian National Railway.

[44] The total amount of $117,332.16 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.

December 6, 2019

(Original signed)

Reasons for the appeal decision:	John Gradek, Member (chairing)
Concurred by:	Charles Sullivan, Member
	Michael Regimbal, Member

Appearances

For the Minister:	Eric Villemure

	Micheline Sabourin
For the Applicant:	Yannick Landry