



## TRIBUNAL D'APPEL DES TRANSPORTS DU CANADA

**Citation:** *Canada (Minister of Transport) v. Quebec North Shore and Labrador Railway Company Inc.*, 2020 TATCE 18 (Appeal)

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

**Sector:** Rail

### BETWEEN:

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

- and -

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

[Official English translation]

**Heard by:** Written submissions on June 12 and 29, 2020, and on July 10, 2020

**Before:** George (Ron) Ashley, Member (chairing)

Michael Regimbal, Member

John Gradek, Member

**Rendered:** November 6, 2020

### APPEAL DECISION AND REASONS

**Held:** The appeal is dismissed. The appeal panel upholds the review determination that Quebec North Shore and Labrador Railway Company Inc. was not liable for a violation of rule 112(a) of the *Canadian Rail Operating Rules*.

## **I. BACKGROUND**

[1] On July 25, 2017, at mileage point 126.8 in the Wacouana subdivision, Quebec North Shore and Labrador Railway Company Inc. (QNS&L) train PH-651-L arrived at Mai Station, Quebec. The train consisted of two locomotives and 159 cars carrying iron ore destined for Sept-Îles. It stopped at this location to change engineers as well as add one locomotive that had been parked earlier at Mai Station.

[2] Upon stopping, the two locomotives were decoupled from the cars and transited south, along the main track, to a location 1,000 feet away. It was anticipated that the engineer would then back the locomotives into an adjacent siding for connection to a third locomotive. The third locomotive was situated about 1,000 feet south on the siding.

[3] The cars had been left on the main track by the QNS&L engineer prior to decoupling, where the engineer had applied five hand brakes. There was no push-pull or other brake test taken on the resting cars prior to his departure with the locomotives.

[4] Meanwhile, a second QNS&L engineer had stationed himself at the third locomotive parked on the siding, immediately west of the parked cars. He powered up the third locomotive, disembarked to the west side and awaited the arrival of the two detached locomotives that were to back down the siding from the turnout on the main track. The third locomotive was to be connected to the other two and the second engineer would then take over the switch by taking the three locomotives back to the main track and reconnect them to the cars that had been left parked.

[5] While he was awaiting the arrival of the two locomotives on the siding, he saw that a nearby signal (#1286) on the adjacent main track had turned red. He walked approximately 20 to 25 steps to the front of the parked third locomotive to investigate and saw that the parked cars were rolling independently, tripping the signal on the main track.

[6] At that point, the second engineer attempted to contact the first engineer who remained on the main track with the two locomotives. The attempt was designed to alert the first engineer to the roll whereupon the Sense and Braking Unit (SBU) radio signal located on the lead locomotives could be used to put the cars into an emergency stop. That communication was unsuccessful due to the first engineer communicating with QNS&L dispatch on a different radio frequency. By that time, the first engineer had also seen the red signal, although he was not aware of what had caused it. The tripped signal prompted the first engineer to communicate with dispatch in order to lift the signal.

[7] In the circumstances, being unable to contact the first engineer, the second engineer walked approximately 250 feet to the rolling cars. He crossed the main track, walking in front of the rolling cars and then alongside so that he could engage the air brake handle (tap) in order to release the air in the brake lines. As a result of this action, the cars stopped rolling 400 feet distant.

[8] Following an investigation into these events, Transport Canada (TC) issued a notice of violation with a monetary penalty of \$54,666.12 to QNS&L on January 8, 2018. TC alleges that QNS&L left rolling cars unattended on a main track without applying the required minimum

number of hand brakes or determining the number of hand brakes to be sufficient by testing their effectiveness. TC claims that the company had therefore violated rule 112(a) of the *Canadian Rail Operating Rules* and section 17.2 of the *Railway Safety Act*.

## II. REVIEW DETERMINATION

[9] Following a review hearing that took place in Montreal on November 15 and 16, 2018, the review member concluded in his determination dated July 23, 2019, that the Minister of Transport (Minister) had not demonstrated that QNS&L had violated the rail car braking minimums for unattended equipment set out under rule 112(a). In his determination, the member concluded that one employee had been in close enough proximity to the parked cars and took effective action to stop their movement. Accordingly, the member determined that the braking requirements set out in rule 112 did not apply and there was no violation.

[10] The appellant argues that the review determination contained errors of fact and errors of mixed fact and law when it concluded that QNS&L had not left rail cars unattended. The appellant asks this appeal panel to find that the rule did apply, that QNS&L had violated it on that occasion, and that the railway company be held liable for an administrative monetary penalty of \$54,666.12.

## III. THE LAW

[11] While the rules regarding unattended railway equipment have since been amended, rule 112(a) at the relevant time provided, in part:

112 (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. When air brakes are used as an additional means of physical securement:

- (i) the air brake system must be charged to ensure proper brake application; and
- (ii) the brake pipe must be fully vented at a service rate or have an emergency application and, on freight equipment, the angle cock left open.
- (iii) the equipment may only be left unattended for up to a maximum of two hours.

[...]

[12] The question of what constitutes « unattended » is addressed in the preface to rule 112, subsection 112(i), which states:

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.

#### **IV. ISSUES ON APPEAL**

[13] The main issue on appeal was the interpretation of rule 112 of the *Canadian Rail Operating Rules*, specifically the terms “unattended” and “effective action”. The Minister argued that the rolling cars were not under the supervision of QNS&L employees, as none of the employees were close enough to intervene effectively to stop the uncontrolled movement. Even though the movement stopped after moving 400 feet, the Minister claims that the employees were not working as a team and that the intervention to stop the movement was not effective. As a result, the Minister submits that the employees were required to apply the minimum hand brakes as stipulated in the rules (eight brakes according to the Minister).

[14] QNS&L claimed that the equipment was not left unattended as there were employees close enough to intervene and stop the movement effectively.

##### **A. Standard of review applicable on appeal**

[15] The parties agree that the standard of reasonableness applies in this case, although there is some dispute as to the way to arrive at this conclusion. The appeal panel agrees with this review standard.

##### **B. Procedural point of appeal**

[16] The respondent argues that the notice of appeal was incomplete as it was not dated and, therefore, it is impossible to assess whether or not it was filed within the 30-day filing deadline.

[17] The Minister claims that the review determination is dated July 23, 2019, and that the notice of appeal was sent to the Transportation Appeal Tribunal of Canada Registrar by correspondence dated August 2, 2019. QNS&L acknowledged receiving the notice of appeal on August 7, 2019, which, the Minister states, is all within the 30 days prescribed.

[18] The appeal panel finds that the failure to include a date on the notice itself is an administrative oversight, and this extends to any misidentification of the QNS&L as appellant. Both are insignificant in the circumstances and are neither confusing nor misleading. As such, they are not critical to the timely filing of the appeal.

##### **C. First ground of appeal**

[19] The appellant argues that the member erred in his interpretation of rule 112, specifically on the meaning of attending equipment. The appellant makes the following arguments in support of his ground of appeal:

###### **(1) *The QNS&L employees were not aware of the rule***

[20] The issue here is whether or not the cars were left unattended within the meaning of rule 112. Employee knowledge, or confusion as was noted in the review determination, does not make something more or less attended.

[21] The appellant further argues that because QNS&L is permitted to operate with one-person crews, there is an increased burden on the company to properly educate employees. The panel acknowledges that one-person operating crews are an exception among federal railways in Canada. However, this does not make the cars in question here more or less attended.

**(2) *Conducting a switching operation rather than a “tie-up” does not affect the application of rule 112***

[22] The appellant claims that the review determination concluded in error that rule 112 does not apply during train switching operations. The appeal panel agrees. Rule 112 applies whether the movements or operations take place in a yard, siding or main track and whether or not they involve switching, temporary parking, permanent parking, crew change event or other. There are neither express nor implied exclusions set out in the legislation or rules. Certainly, any finding on any implied exclusion would be a high burden to meet in light of the paramount safety objectives set out in the *Railway Safety Act*.

[23] While the appeal panel does not agree with the review determination on this point, this does not detract from the panel’s overall finding that the review determination was reasonable when it concluded that the rail cars here were not left unattended.

**(3) *The review determination erroneously accepted that the two QNS&L employees worked as a team and as such they jointly attended the cars that had been left on the main track***

[24] The review determination noted the railway company’s assertion that the cars were attended because two employees were working together upon the train’s arrival at Mai Station.

[25] The appeal panel finds that this assertion is only partially true. The evidence shows there was a rupture in communication at the moment the parked cars started to roll. The first engineer became unreachable at that point because he switched radio channels. This event occurred at a critical point when the first engineer was maneuvering the locomotives more than 1,000 feet away. As a result, he was not proximate and was neither attending the cars nor able to effectively stop them from rolling. Certainly, he did not even know they were rolling and had simply contacted central dispatch in order to lift the red signal he observed on the main track.

[26] While the two employees started off as a team, this ended once their communication broke down. At that point, they were no longer jointly attending the cars. Certainly, they were not being attended by the first engineer.

[27] The review determination ultimately finds that one employee, Mr. David Simard, who, as the second engineer, was in close enough proximity to the cars and took effective action to stop the movement. This is a reasonable finding and is not predicated on the review member accepting that the two employees acted as a team throughout.

**(4) *The second engineer did not have a visual on the equipment, so he could not have been attending the cars***

[28] On the question of line-of-sight, the review determination noted that the second engineer was posted beside the parked locomotive, on a siding that was adjacent to the parked cars. At

that spot “he had a **partial view** of the movement (out of the corner of his eye)” [emphasis added].

[29] The review determination concluded that the second engineer was aware the cars were near him, could see the train and was attentive to the surrounding environment. He became aware of a problem when he heard the first engineers’ radio communication to the effect that the signal had turned red whereupon he also saw that the signal had turned red. The determination then concluded that he was able to take immediate corrective action to stop the unintended movement.

[30] These findings are not unreasonable.

**(5) Mr. Simard was not “two steps” away from the rolling cars and as such could not have been attending the railway cars**

[31] This argument presumes that the proper attendance on parked railway cars is one of **extremely** close proximity.

[32] Attendance of rolling stock within the meaning of rule 112(a) requires an assessment of how long it takes for employees to **intervene efficiently, effectively and safely**. This includes a look at the terrain at the site, an employee’s distance from the cars, the existence of any obstacles to get to them, the number of rolling cars, their weight, their speed and the grade of track. Taken together, these determine whether the employee can get to the cars safely, how long it takes to get into position to initiate activity to control the movement and how long it takes to stop the unintended movement.

[33] Accordingly, the appeal panel finds that proximity is only one, albeit important, element. In the present case, the evidence shows that the one employee, Mr. Simard, was reasonably positioned close by to view and take the necessary corrective action. The review determination finding on this point is not unreasonable.

**(6) The action to stop the movement was not effective and the fact that the rolling cars were ultimately stopped cannot be used as evidence to show the extent of any surveillance and effective action**

[34] The appeal panel finds that the distance the cars actually rolled, the duration of the roll, and how the cars are ultimately stopped are all relevant to an assessment of effectiveness within the meaning of rule 112(a). One might speculate as to what would have happened if the signal had not tripped here or if the cars had rolled 1,000 feet and not 400 feet. However, speculation cannot pre-empt a consideration of what actually happened. Here, the issue is whether or not the second engineer was able to effectively stop the cars from continuing to roll.

[35] The review determination concluded that the rolling cars—in terms of roll distance, duration and result, as well as how they were stopped—distinguishes the facts from those that arose in the Lac-Mégantic incident. Once again, this is not an unreasonable finding.

[36] An appeal panel can be mindful of what might have been more effective ways to stop the cars from rolling. For example, the first engineer might have been able to use the radio-

controlled SBU for an emergency stop and this might have been the most effective action. This, however, does not make the second engineer's action ineffective. Rule 112(a) does not stipulate that the action be the most effective.

**(7) *The cars rolled 400 feet, and this proves that their stoppage was ineffective***

[37] As set out above, the appeal panel agrees that the longer the roll of the cars, the more ineffective their stoppage. The location of the roll can also be important in assessing effectiveness. For example, the existence of any nearby railway crossings over busy roads carries a heightened risk element and, therefore, a sharper sense of what is "effective". Notwithstanding, and given the obvious consequences that can arise from runaway cars, the rule underlies a fundamental safety requirement—that crews be acutely aware of how they are to safely handle parked or resting railway cars.

[38] In the present case, the review determination found that the extent of the slow roll does not point to an ineffective stoppage. This is not an unreasonable finding.

**(8) *The review determination unreasonably concluded that the action was effective where the stoppage of the cars was only made possible by the second employee placing his own safety at risk by walking in front of the rolling cars in order to get to the emergency brake***

[39] There is no blanket rule against walking in front of rail cars and Transport Canada witnesses at the hearing said only that it is "neither encouraged nor recommended".

[40] The issue here is whether or not the review determination properly concluded that Mr. Simard was able to safely and effectively cross the tracks in front of the rolling cars. The review determination noted Mr. Simard's evidence as being important on this point. He said he crossed the path of the cars, they were rolling slowly, and he made a judgment call—that he could easily, and without undue haste and risk, safely cross. This finding is not unreasonable.

**D. Second ground of appeal**

[41] The appellant submits that the member erred in his assessment of the operation of the brake system. Specifically, the appellant disagrees with the following conclusion: "the evidence and Mr. [Mario] Bernier's testimony confirmed that **all that had to be done** to effectively stop the train was to flip a switch" [emphasis added]. The appellant submits that the stopping of the equipment was by chance and not a consequence of Mr. Simard's action.

[42] The respondent replies to this allegation that the only evidence related to the brakes was that of the witness Mr. Denis Dionne, supplemented by the examination of the witness Mr. Kevin Mosher. The respondent adds that this was the only evidence presented before the member and that it was not challenged by independent evidence or in cross-examination.

[43] It is speculative to consider that, had the emergency brakes on the lead car not worked because the brake lines had been vacated, that the cars would not have been stopped by Mr. Simard. It is also speculation as to whether or not Mr. Dave Patry in the lead locomotives may have quickly become aware of the moving cars and used the locomotive-based radio signaling to stop the roll.

[44] A review determination must rely on the presented facts that existed. The appeal panel agrees with the review member that Mr. Simard's resort to the emergency brake tap was efficiently done and was effective in safely stopping the roll. This is a reasonable finding.

#### **E. Conclusion**

[45] The appeal panel concludes that the review member did not err in fact and law in his interpretation of rule 112 when he determined that the QNS&L cars parked at Mai Station on the night of July 25, 2017, were not left unattended. The review member did not commit any error of fact when he concluded that the rolling cars were stopped effectively where the stoppage was, in part, attributable to air having been left in the brake lines of the parked cars prior to their rolling. These were the circumstances at the time of the incident and, as such, the actions that were taken must be reviewed, and what might have been observed in different circumstances should not be subject to speculation.

[46] The appellant asked that the administrative monetary penalty of \$54,666.12 be imposed on QNS&L in the event the appeal is granted. QNS&L did not cross appeal on either the propriety or amount of the penalty.

[47] As the appeal is dismissed, it is not necessary for the appeal panel to address either issue.

#### **V. DECISION**

[48] The appeal is dismissed. The appeal panel upholds the review determination that Quebec North Shore and Labrador Railway Company Inc. was not liable for a violation of rule 112(a) of the *Canadian Rail Operating Rules*.

November 6, 2020

(Original signed)

Reasons for the appeal decision: George (Ron) Ashley, Member (chairing)

Concurred by: Michael Regimbal, Member  
John Gradek, Member

Appearances

For the Minister: Micheline Sabourin  
For the applicant: Michel Huart