TRANSPORTATION APPEAL TRIBUNAL OF CANADA

Citation: *City of Ottawa carrying on business as Capital Railway v. Canada (Minister of Transport),* 2020 TATCE 20 (Appeal)

TATC File No.: H-0029-43

Sector: Rail

BETWEEN:

City of Ottawa carrying on business as Capital Railway, Appellant

- and -

Canada (Minister of Transport), Respondent

Heard by:	Written submissions
Before:	George (Ron) Ashley, Member (chairing) Gary Drouin, Member Michael Regimbal, Member
Rendered:	November 23, 2020

APPEAL DECISION AND REASONS

Held: The appeal is dismissed. The appeal panel upholds the administrative monetary penalty issued to the appellant.

The total amount of $56,250 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] In a Notice of Violation (Notice) dated March 14, 2018 and 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,* the Minister of Transport (Minister) assessed a monetary penalty of $56,250 against the City of Ottawa carrying on business as Capital Railway (Capital Railway) for an alleged contravention of the *Canadian Rail Operating Rules (CRORs).*

[2] The Notice specified:

> On or about November 23, 2017, on the Ellwood Subdivision in or near Ottawa, Ontario, the City of Ottawa carrying (sic) business as Capital Railway (Capital Railway), operated railway equipment on a railway otherwise than in accordance with Rule 439 of the *Canadian Rail Operating Rules* that apply to Capital Railway, when it failed to stop train C7 at signal 28 East displaying Stop, thereby violating section 17.2 of the *Railway Safety Act*.

[3] Capital Railway requested a review of that Notice and a review hearing was held before a member of the Transportation Appeal Tribunal of Canada (Tribunal). Following that hearing, the review member upheld the allegations and the monetary penalty set out in the Notice. The review determination, dated September 5, 2019, concluded that Capital Railway had not exercised all reasonable care by establishing a proper system to prevent the commission of the offence and by taking reasonable steps to ensure the effective operation of the system.

[4] Capital Railway now appeals that determination.

II. APPEAL GROUNDS

[5] The stated grounds are:

a. The review member erred in law with respect to the defence of due diligence, and

b. The review member's assessment and imposition of the monetary penalty was unreasonable because it failed to account for an effective mitigating measure, one that counteracted an instance of human error by quickly and safely stopping train C7.

[6] The appellant asks this panel to set aside the Notice of Violation and monetary penalty, or in the alternative, to reduce the amount of the penalty by an appropriate amount. The Minister argues that the appeal be dismissed and the review determination be confirmed, with no mitigation of the penalty imposed.

III. NEW EVIDENCE

[7] Capital Railway requested that the appeal record be supplemented by the addition of the affidavit of Mr. Troy Charter, Director of Transit Operations with the City of Ottawa Transportation Services Department. That affidavit, dated May 5, 2020, sets out four matters that he states are relevant and material for the appeal and that were not otherwise in evidence before the review member. The Minister did not object to this addition.

[8] In a ruling dated May 22, 2020, the Tribunal granted the request, noting that questions of relevance and weight could be addressed by the parties as part of their written submissions in the appeal. The appellant's factum was submitted on May 28, 2020 and that of the Minister on July 3, 2020. The appellant did not file a reply.

IV. REGULATORY PROVISIONS

[9] The review determination correctly sets out the relevant legal framework:

[10] Section 17.2 of the *RSA* provides, in part, that "no railway company shall operate or maintain a railway … and no local railway company shall operate railway equipment on a railway, otherwise than in accordance with a railway operating certificate and … with the regulations and rules made under sections 19 and 20 that apply to the company".

[11] Paragraph 3(1)(b) of the *Railway Safety Administrative Monetary Penalties Regulations* (the regulations) provides that a violation of a rule in force under section 19 or 20 of the *RSA* may be proceeded with as a violation in accordance with sections 40.13 to 40.22 of the *RSA*.

[12] Rule 439 of the *CRORs* is a designated provision to which the administrative monetary penalty provisions apply; it stipulates:

> Stop - Stop.
>
> OPTIONAL: Unless required to clear a switch, crossing, controlled location, or spotting passenger equipment on station platforms, a movement not authorized by Rule 564 must stop at least 300 feet in advance of the STOP signal.

[13] Rule 564, in turn, provides:

> **Authority to Pass Stop Signal**
>
> (a) A train or transfer must have authority to pass a block signal indicating Stop.

[14] The parties have not raised Rule 564 as an issue in this case and it is accepted that such authority did not exist. Rather, the appeal focuses on the due diligence defence and the mitigating measures that may be applicable to the amount of the penalty imposed.

V. THE FACTS

[15] The facts are not disputed.

[16] Capital Railway is a federal railway, operating a transit operation with full and part-time operators. Trains are run by one-person crews, where operators are also bus operators in the city of Ottawa. They receive special railway training further to initial classroom instruction and on-the-job training, as well as some refresher training.

[17] On November 23, 2017, Capital Railway was operating train C7, a light rail passenger train known as the O-Train, on what is identified as the Trillium Line. The railway line at the

time was an eight-kilometre, north-south passenger line located slightly west of the downtown area of the city of Ottawa.

[18] At approximately 17:53h on that date, train C7, travelling southbound, approached and stopped at a passenger station known as Confederation Station. Following the unloading/loading of passengers at that point, the train proceeded on its journey. In so doing, it passed alongside and beyond a rail operating signal that was situated immediately south of the loading platform. That signal, known as signal 28, was non-permissive; that is, the signal displayed a red indicator throughout the relevant approach and passing-by of train C7.

[19] Once that stop signal had been passed, an automatic emergency brake system on the train engaged, effectively stopping the train beyond signal 28. The train stopped in advance of an upcoming intersection (diamond or interlock) with a VIA Rail line.

[20] Signal 28 controlled the Capital Railway train's entry to the railway interlocking with the Beachburg Via Rail subdivision. When train C7 overran the red signal, VIA Rail train 644, travelling eastward and inbound for Ottawa at the time, was approaching the diamond. The VIA train took evasive action by braking to stop before crossing the intersection.

[21] Train C7 was stopped by an automatic activation of the onboard special emergency braking equipment, known as the Indusi system. That system utilizes detectors in the form of magnets located on the track and on the train which activate an automatic emergency brake application on the train if a red signal is traversed.

[22] There was no collision and train C7 did not physically occupy the diamond. Prior to restarting and continuing its southbound journey, the rail operator in C7 who had missed the red signal was replaced.

[23] Capital Railway has been involved in a number of alleged breaches of Rule 439 dating back to November 2015. Some of these instances include warning letters sent to the railway company by Transport Canada inspectors. Arising out of an event that took place in May 2017, there was one Notice of Violation and administrative monetary penalty issued to the railway company for breach of Rule 439. The penalty was paid.

VI. ANALYSIS

A. Standard of Review

[24] Capital Railway states that the applicable standard of review is one of correctness for questions of law relating to the defence of due diligence. The Minister agrees with this characterization, stating that "[d]ue diligence is of central importance to the legal system as a whole and is usually reviewed on a correctness standard".

[25] The appeal panel finds that the standard of review in this appeal as it relates to the defence of due diligence will be one based on correctness. This is consistent with the rationale set out in *Canada (Attorney General) v. Friesen*, 2017 FC 567, which concluded that the standard of correctness applies to questions of law.

[26] On the questions of the assessment and amount of the monetary penalty, Capital Railway claims that the applicable review standard is one of reasonableness. The Minister does not dispute this, stating that these questions involve the facts in this case and their application to the legal principles surrounding the assessment of penalties.

[27] The appeal panel finds that the standard of review in this appeal shall be one of reasonableness on questions relating to the administrative monetary penalty. This is consistent with the *Friesen* decision.

B. Ground 1 - Due Diligence

[28] The appellant relies heavily on employee or human error, citing in support cases that establish the importance of the existence of back-up measures, or countermeasures, since human error is inevitable.[1] Because of this inevitability, the appellant asserts that it embraced the Indusi emergency braking system as a "back-up system" which, it says, offsets or counterbalances any errors otherwise committed by train operators. This, according to the appellant, is ample evidence of the company having exercised due diligence.

[29] Apart from the Indusi system as evidence going to the question of due diligence, the appellant also submits as evidence of its due diligence: the operator of train C7 was fit for duty, he was qualified, stated that he was not distracted at the time, was not fatigued, was not speeding or otherwise out of control, had no prior Rule 439 violations, was not engaged in any complex or novel procedure, knew as a universal rule that a red signal means stop and that he was professionally trained. It was, according to the appellant and in spite of these factors, inevitable human error that led to the operator's mistake. Given such inevitability, the railway company chose, in its words, to "counteract" the fallible human side of the operating equation by introducing safety equipment that would emergency-stop a train following instances of operator failure.

[30] The respondent argues that the leading authority on the defence of due diligence is *R. v. Sault Ste. Marie (City),* [1978] 2 S.C.R. 1299. That case, according to the Minister, clearly establishes that due diligence as a defence is available to a corporation charged in respect of an act committed by an employee. But, that defence can only be successful if it is shown that the corporation exercised all reasonable care by establishing a proper system to prevent the commission of the contravention and that it took all reasonable steps to ensure the effective operation of the system. In the present case, the Minister argues that this standard was not met regardless of the effectiveness of the Indusi braking system, notably because the system is not preventative in nature.

[31] Dealing first with the general safety systems in effect at the railway, the appeal panel accepts that Capital Railway is exceptional among federal railways operating in Canada in that it is permitted to operate with one-person crews. Most railways must operate with two members on a train, where a second crew member can offset what the appellant has here characterized as the inevitability of "human error"; that is, when an error is committed by one crew member the

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[1] (*R. v. Gulf of Georgia Towing Co. Ltd.* (1979) CanLII 483 (BC CA) and *R. v. Island Industrial Chrome Co. Ltd*., 2002 BCPC 97).

second can take avoidance action. Accordingly, having no such employee backup (when there is only one employee operating the train) sharpens the need for an ongoing attention to operator training on all safety matters. This is especially so in the case of Capital Railway, as its trains are frequently operated by relief or temporary drivers whose primary responsibilities are to operate buses in the city of Ottawa.

[32] The review determination canvasses the evidence introduced relative to operator training at the railway, including that of the operator of train C7 on the night the red signal was passed. The determination acknowledges the employees' record of training, retraining and refresher courses but concludes that the evidence presented does not constitute a "proper system to prevent commission of the offence", it only demonstrates a "fragmented and non-systematic approach to training" (para. 43). The determination also finds that the evidence did not point towards a "comprehensively documented" training program and that there was no "clear and specific evidence" of a "rigorous training, testing, monitoring and follow-up" (para. 44).

[33] The appeal panel agrees with this finding. While Capital Railway questioned both the general and specific evidence on training presented at the hearing by the Minister, it did not present its own witnesses on this. Overall, the evidence demonstrates an inadequate attention to safety in the single-crew operation of passenger trains by part-time drivers.

[34] The review member considered relevant case law on what constitutes an adequate employee training system for a railway operation. These cases point to the need for a comprehensive and ongoing safety program that is fully documented and tested: *Cando Rail Services Ltd. v. Canada (Minister of Transport)*, 2019 TATCE 3 (Appeal); and *Canadian National Railway Company v. Canada (Minister of Transport)*, 2019 TATCE 5 (Appeal). The appeal panel agrees with the review member that, according to the evidence, Capital Railway does not meet this standard. This failure is even more notable given the company's recent record of previous warnings and the one undisputed infraction, specifically in regard to Rule 439.

[35] The appellant cites the evidence tendered at the hearing on the operator's personal situation at the time, including his overall health, state of mind, his attention and manner of operation of train C7. This specific evidence is not convincing on the overall question of due diligence and the company having a proper and ongoing safety system in place to avoid the contravention of Rule 439.

[36] Overall, one would expect far more attention to safety matters, especially for trains to stop at red signals and especially given what the appellant categorizes as the "universal" nature of the rule known by bus and train operators that "red is prohibitive". The need for a systemic and comprehensive safety program is all the more acute given what the appellant categorizes as the certainty of operator "human error", especially when this is combined with the prevalence of part-time operators and the company's historical safety record on Rule 439 compliance.

[37] The appellant heavily relies on the Indusi emergency brake system as part of its due diligence on rail operating safety matters. The review member examined the available evidence on the technical aspects of that system and overall, was not convinced that it was adequate to prevent non-compliance (para. 48). The appeal panel agrees.

[38] There was little technical evidence available on how the Indusi system functions. Nevertheless, it is clear that it worked as intended in the present case. It triggered an emergency stop once the train bypassed the red signal. The evidence shows that the train physically stopped south of the signal and before the intersection with the VIA Rail diamond. Rule 439 is what is known in the Canadian railway industry as a "cardinal operating rule" and it is very specific on what is required. It prescribes that stopping must be "at least 300 feet in advance of the STOP signal". The fact that train C7 ultimately stopped without accident and before the VIA diamond is irrelevant to whether or not the violation took place.

[39] While the railway company's adoption of the Indusi system is notable, it is a safety system that only engages after a red signal has been bypassed. It does nothing to prevent the contravention from arising in the first place; it is only a corrective measure. As such, in and of itself, it is not an adequate and proper railway safety system that will prevent the commission of operating offences or contraventions, per the test in *R. v. Sault Ste. Marie*. It may, in given circumstances, prevent an accident or collision from taking place, however, it is not pre-emptive of the need for ongoing comprehensive operator education, training and monitoring, especially on railway signal compliance. As far as safety matters go, the railway company is not absolved from establishing a rigorous systemic safety program and culture simply because it has invested in after-the-fact accident avoidance equipment. The risks of not complying are significant, especially where, as here, there was an approaching VIA train that was also forced to take evasive action.

[40] The appeal panel agrees with the review determination and finds that the appellant did not prove, on a balance of probabilities, that all reasonable steps had been taken to establish a proper system to prevent the contravention.

C. Ground 2 – Administrative Monetary Penalty

[41] The appellant argues that the amount of the monetary penalty should have been reduced by the review member because the Indusi system operated effectively. On this point, the appellant highlights the evidence of the rail safety inspector who testified that he would have regarded the system as a mitigating factor on the amount of the monetary penalty. The appellant argues that the effectiveness of the system warrants more than a standard "six per cent reduction" in the amount of the penalty.

[42] The appellant argues that mitigation is also warranted because of the railway company's good safety record on Rule 439 since November 2017, combined with the fact that the Trillium line will be closed for two and a half years resulting in the diamond ultimately being eliminated. In other words, according to the company, there is zero risk of any repeat of red signal violations at signal 28.

[43] The respondent submits that the company's recent safety record on Rule 439, the closure of the railway line and future elimination of the diamond should receive little weight as mitigating factors.

[44] The appeal panel will review this question on a standard of reasonableness, giving deference to the review member's determination.

[45] The review member acknowledged the Indusi system as a possible fifth mitigating factor but then rejected it due to the lack of evidence regarding how it works as well as the ability of an operator to override the system (paras. 54 and 55). As referenced earlier in this decision, while the technical evidence is limited, it is clear that the system worked as it should. Nevertheless, it is also clear that it acts as a secondary or back-up system, one that is only triggered after a stop signal is passed. The primary safety management tool has to be one that is focussed on rule compliance, particularly one that establishes an unflinching attention to operating signals and compliance. This is achieved by proper safety training for operators. While the Indusi system can relieve the operator, and the railway company, from the serious consequences of missing a signal, it does nothing to relieve the company from missing a signal in the first place by creating and maintaining a paramount safety culture that includes effective and ongoing safety training.

[46] The administrative monetary penalty program established under the *RSA* is designed to further the objectives that are set out under section 3 of the legislation. Avoiding accidents through rule compliance by a railway company and its employees falls exactly within that objective. The Indusi system may pre-empt accidents from happening or certainly reduce their likelihood, but it does not pre-empt or mitigate the need for rule compliance in the first place. Accordingly, the appeal panel agrees with the review member that the Indusi system is not a mitigating factor in the circumstances of this case. For the above reasons, the review member's finding is reasonable.

[47] The appellant also argues that the imposition of the monetary penalty would require a municipal government to "tap into increasingly scarce funds" (para. 66, factum). Further, the appellant argues that it is not necessary to impose the penalty in order to change its behaviour with respect to signal adherence; two reasons are provided: the company has since demonstrated sustained compliance; and, the planned removal of the diamond/ building of a new grade separation will eliminate the potential for recurrence.

[48] The appeal panel acknowledges that the railway company is, at least in part, municipally funded. This does not detract from the need for proper ongoing rule training and safety compliance. While the appellant's post-violation compliance is noted, it cannot be considered as a factor in the assessment of the current penalty, as there had not been demonstrated compliance at the time of the violation. And regarding planned construction, while the VIA/Capital Railway crossing will be grade-separated and signal 28 may be removed, there remain other stop signals along the corridor; these require compliance going forward. Accordingly, post-violation compliance and future structural changes to the line at this specific location are not mitigating factors.

D. Conclusion

[49] The review determination dated September 5, 2019 determined that Capital Railway did not demonstrate, on a balance of probabilities, that they had exercised all reasonable care by establishing a proper system to prevent the contravention of Rule 439 (failing to stop at a red signal) and by taking reasonable steps to ensure the effective operation of the system. This is a correct finding based upon the evidence presented.

[50] The review determination upheld the imposition of a monetary penalty in the amount of $56,250. This is a reasonable finding.

VII. DECISION

[51] The appeal is dismissed. The appeal panel upholds the administrative monetary penalty issued to the appellant.

[52] The total amount of $56,250 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.

November 23, 2020

(Original signed)

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

Concurred by: Gary Drouin, Member

Michael Regimbal, Member

Appearances

For the Appellant: Stuart Huxley
For the Respondent: Eric Villemure