



TRANSPORTATION APPEAL TRIBUNAL OF CANADA

Citation: *Canadian Pacific Railway Company v. Canada (Minister of Transport)*,
2021 TATCE 33 (Review)

TATC File No.: RO-0030-41

Sector: Rail

BETWEEN:

Canadian Pacific Railway Company, Applicant

- and -

Canada (Minister of Transport), Respondent

Heard by: Videoconference on May 11, 12 and 13, 2021

Before: George 'Ron' Ashley, Member

Rendered: November 15, 2021

REVIEW DETERMINATION AND REASONS

Held: The Notice of Violation dated April 11, 2018, as amended, issued to Canadian Pacific Railway Company, setting out an alleged breach of section 17.2 of the *Railway Safety Act* arising out of non-compliance with Rule 439 of the *Canadian Railway Operating Rules* and the imposition of a monetary penalty of \$64,600, is dismissed.

I. BACKGROUND

[1] By amended Notice of Violation (Notice) dated April 11, 2018,¹ Transport Canada (TC) assessed a monetary penalty of \$64,600 against Canadian Pacific Railway Company (CP). This was pursuant to subsection 2(1)² of the *Railway Safety Administrative Monetary Penalties Regulations*, and procedures in sections 40.14 to 40.22 of the *Railways Safety Act (RSA)*. Schedule A to the Notice stated:

On or about June 14, 2017 at or near Romford, Ontario, on the Cartier Subdivision, Canadian Pacific Railway Company allegedly operated railway equipment otherwise than in accordance with Rule 439 of the *Canadian [Rail] Operating Rules* that apply to Canadian Pacific Railway Company when its employees failed to stop a movement at STOP signal, thereby violating section 17.2 of the *Railway Safety Act*.

[2] Attached to the Notice was a chronology of previous violations, dated October 15 and 24, 2016; August 21, 2016; January 21, 2017; and June 14, 2017.

[3] On May 14, 2018, CP requested a review of the Notice by the Transportation Appeal Tribunal of Canada (Tribunal), pursuant to subsection 40.16(1) of the *RSA*.

II. ISSUES

[4] The Tribunal will examine the following issues:

1. Whether the facts demonstrate that Rule 439 of the *Canadian Rail Operating Rules (CROR)* was contravened, and
2. If the contravention is established, whether CP is nevertheless not liable as it exercised due diligence in having done everything reasonably possible to avoid the contravention.

III. ANALYSIS

A. Legal framework

[5] Section 17.2 of the *RSA* provides:

17.2 No railway company shall operate or maintain a railway, including any railway work or railway equipment, and no local railway company shall operate railway equipment on a railway, otherwise than in accordance with a railway operating certificate and — except to the extent that the company is exempt from their application under section 22 or 22.1 — with the regulations and the rules made under sections 19 and 20 that apply to the company.

¹ This amended Notice replaced the initial Notice of Violation dated March 8, 2018, that had identified the location as “near Brockville, Ontario” in error.

² The correct provision is subsection 2(1) of the *Railway Safety Administrative Monetary Penalties Regulations* since the designated provision is section 17.2 of the *RSA*. The Notice incorrectly refers to paragraph 3.1(b) (referring to designated provisions that are Orders or Rules).

[6] Item 6 of Part I, Schedule I of the *Railway Safety Administrative Monetary Penalties Regulations* names section 17.2 as a designated provision, the contravention of which may be proceeded with as a violation per sections 40.13 to 40.22 of the *RSA*. Under Schedule I, the maximum penalty for a corporation in violation of section 17.2 of the *RSA* is \$250,000. This is in line with section 40.1 of the *RSA* which also deals with penalties.

[7] Rule 439 of the *CROR* is identified in the Notice. This rule states, in part:

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.

[...]

564. AUTHORITY TO PASS STOP SIGNAL

(a) A train or transfer must have authority to pass a block signal indicating Stop.

[...]

B. Burden of proof

[8] Pursuant to subsection 40.16(4) of the *RSA*, the burden is on the Minister of Transport (Minister) to prove the allegations. The standard of proof is on the balance of probabilities, in accordance with subsection 15(5) of the *Transportation Appeal Tribunal of Canada Act*.

C. The facts

[9] TC witness, Railway Safety Inspector Mr. Peter Hopper, stated that on June 14, 2017, near Sudbury, Ontario, on the CP Cartier Subdivision, CP train GPS-14 was travelling east on the CP track after leaving the local yard. Approximately four miles out of Sudbury and while travelling at approximately 30 mph, it proceeded past an advance “clear-to-stop” signal at Moonlight (signal 744-1). That signal was one of a progression of signals and this one alerted the two-person crew to an imminent stop signal situated approximately two miles further east (signal 724-1).

[10] Based upon interviews he conducted on July 27 and September 1, 2017, following the incident (Exhibits M-4 and M-5), Mr. Hopper indicated that the engineer and the conductor in the cab, Messrs. Barry Brunette and Jim Rotar respectively, were both familiar with the operating territory and both admitted on this occasion to having seen the clear-to-stop signal. Upon seeing that signal, they orally communicated the signal to each other in the cab (conductor telling engineer and engineer acknowledging back) and the conductor radio-advised both CP Railway Traffic Control (RTC) as well as the general CP communication lines, a wide-angle frequency for CP personnel in the area.

[11] This was confirmed in interviews conducted with the crew further to a CP internal investigation conducted on June 22, 2017³ (Exhibits A-1 and A-2).

³ Both Exhibits A-1 and A-2 show the date of completion as June 22, 2016; however, it was acknowledged at the review hearing that the correct date is June 22, 2017.

[12] Mr. Hopper stated that although the crew were aware of the clear-to-stop signal, the train did not slow down in anticipation of the upcoming stop.

[13] Rather, the train sped up, from approximately 30 mph at the clear-to-stop signal to 35.6 mph immediately before the emergency brakes were applied prior to passing the stop signal. CP witness Mr. Jason Wilkerson, who at the time was General Manager, CP Eastern Region, also testified that this was contrary to CP internal operating requirements that stipulated an immediate slowing to 30 mph.

[14] Ultimately, and about 1,000 feet ahead of the stop signal, Mr. Rotar sighted the stop signal. He alerted the engineer, Mr. Brunette, who immediately brought the train into an emergency stop situation. The train stopped approximately five car lengths beyond the stop signal. The CP internal interview notes indicated that the train stopped seven or eight car lengths past the stop and Mr. Wilkerson stated that it was 10 rail cars and two locomotives beyond.

[15] The interview notes undertaken with the crew by Mr. Hopper, as well as those conducted internally by CP, show that the crew confirmed they missed the stop because they were distracted with other things. There were some clerical errors in the consist departing Sudbury that had to be cleared up by the crew, which were completed post-briefing in the CP yard. There was also a change in operating plans with this particular train.

[16] Interview notes also show that the train was a non-revenue ballast train. As such, it was too heavy to operate eastward on the contiguous Canadian National Railway Company (CN) line (east directional flow) so the operating plan was changed to enable the train to operate on the CP trackage against the current of traffic (ACOT). This change required the crew to undertake a number of tasks, including contacting CN RTC to advise they would no longer be transiting the CN trackage, as well as to advise CP RTC seeking clearance to run ACOT on the contiguous CP Parry Sound Subdivision. The change also had to be documented, which involved some paperwork.

[17] Mr. Hopper indicated that no accidents arose out of these events. A local level road crossing (Chisholm Street) was blocked for approximately one hour while the train was seeking requisite authorities to proceed.

[18] Both crew members were well rested. Mr. Wilkerson also stated that there was no impairment to line of sight due to weather or track layout and there was no evidence of atmospheric conditions or other circumstances that otherwise obscured vision or attention. There was no evidence of equipment failure or malfunction.

[19] Inspector Hopper stated that the crew missed the stop signal because they were preoccupied with railway-driven requirements relating to the change in operating authority. This included the Form 125 and radio communication duties, undertaken here at the time of passing the clear-to-stop signal. These, he stated, distracted the crew from the imperative of preparing to stop the train as necessary.

[20] Mr. Wilkerson admitted the crew was distracted at the time, without explanation, as the prevailing duties were not out of the ordinary in terms of operating requirements. The crew, he stated, were simply thinking about “other things” and not paying attention to the priority of

preparing to stop and ultimately stopping in advance of the stop signal. He indicated that there was no company direction or imperative that the paperwork be undertaken upon departure of a train and certainly not at the time of advancing to the stop signal. He indicated it is “in essence just a form” that is to be completed “during the duration of their trip ... and before their final destination”.

D. Contravention of Rule 439

[21] Mr. Hopper’s testimony established, and CP counsel admitted, that on June 14, 2017, near Sudbury, Ontario, on the CP Cartier Subdivision, CP ballast train GPS-14 was travelling east on the CP track after leaving the local yard. Approximately four miles out of Sudbury and while travelling at approximately 30 mph, it proceeded past an advance “clear-to-stop” signal at Moonlight (signal 744-1). That signal was one of a progression of signals and this one alerted the two-person crew to an imminent stop signal situated approximately two miles further east (signal 724-1).

[22] The crew, however, failed to slow the train down in anticipation of the stop. About 1,000 feet before the stop signal, they commenced an emergency braking and the train rolled beyond the stop point by more than five car lengths. An adjacent public roadway was blocked for approximately one hour before the train continued on.

[23] Rule 439 of the *CROR* requires the train to stop 300 feet in front of a stop signal. There was no evidence showing that the movement was authorized under Rule 564 or that it was required to clear a switch, crossing, controlled location or spotting of passenger equipment on station platforms. This was a violation of Rule 439, and therefore a violation of section 17.2 of the *RSA*.

E. Due diligence

[24] TC and CP acknowledged that a violation of section 17.2 of the *RSA*, arising out of a breach of Rule 439, is a strict liability offence whereby once the violation is *prima facie* established, the due diligence defence is available to CP. In this regard, the counsel acknowledged that the onus is on CP, on a balance of probabilities, to show that the company exercised all reasonable care to avoid the commission of the offence terms of: (i) ensuring a safe railway operation system was in place, and (ii) ensuring its effective operation.

[25] This approach is consistent with the reasoning set out in *R. v. Sault Ste. Marie*, [1978] 2 S.C.R. 1299:

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. The availability of the defence to a corporation will depend on whether such due diligence was taken by those who are the directing mind and will of the corporation,

[26] It is an approach that is also followed in recent railway cases cited by the Minister's representative.⁴

[27] I agree that this is a strict liability offence. Once the established facts *prima facie* demonstrate the existence of an infraction, the onus shifts to CP to establish that it exercised all reasonable care to prevent these two crew members, on June 14, 2017, from missing the stop signal at 724-1 Romford.

[28] I find that consist changes and operating changes encountered by this operating crew at the outset of departure from Sudbury on that date are a normal part of railway operations. The change in the power as well as the operating change to travel ACOT on the directional track were such changes. There is also no evidence indicating that CP management directed or expected this crew to undertake the necessary paperwork at that time. I accept the evidence of Mr. Keith Shearer, Assistant Vice President, CP Safety and Sustainability, that the paperwork only had to be completed by the end of the assignment.

[29] Acting on their own account then, the crew decided to take care of the paperwork arising out of such changes at what turned out to be a critical operating point. While they were alert to the clear-to-stop signal and properly communicated this to each other and RTC, from that point on, they simply failed to recognize time and space.

[30] The crew was distracted here. The question then becomes whether or not CP, as a railway company, has a sustainable due diligence defence relative to this crew's failure to act or, as CP witnesses called it, the crew members' "sloppiness" in failing to correctly stop this train.

(1) *Due diligence – nature of evidence*

[31] There are a number of preliminary points to be made relative to this defence in this case. First, the fact that there has been a breach of Rule 439 does not mean that CP did not have reasonable measures in place. Second, CP's conduct after the event that represents a reaction to the infraction (e.g. suspension of the crew members and their re-training upon their return to work) is not conclusive that CP's system had been deficient and unreasonable.

[32] There must also be granular safety evidence, beyond broad assertions by senior railway company officials, that the systems in place are reasonable. On this point, CP senior officials stated that CP's record for signal compliance was 99.99%, and this is in spite of other recent Rule 439 infractions. While this kind of broad evidence may be part of a due diligence defence, alone, it is not sufficient to show that reasonable programs were in place, or not in place, to avoid the commission of a specific contravention.

⁴ Including: *Canadian National Railway Company v. Canada (Attorney General)*, 2020 FC 1119; *Cando Rail Services Ltd. v. Canada (Minister of Transport)*, 2019 TATCE 3 (Appeal); *City of Ottawa carrying on business as Capital Railway v. Canada (Minister of Transport)*, 2020 TATCE 20 (Appeal); *Canadian Pacific Railway v. Canada (Minister of Transport)*, 2019 TATCE 35 (Appeal).

(2) CP's overall safety management system

[33] The evidence submitted, both oral and documentary, relative to CP's overall safety management system (SMS) shows that it is attentive to requirements of the *CROR*. There were four CP witnesses in this case who testified on matters covered in CP's SMS.

[34] Mr. Shearer described CP's SMS at a macro level. He stated that CP is an "industry leader" based on the companies' record of accident prevention. It is a system, he stated, involving 12 elements that include accountability, safety rule compliance, risk identification and assessment, knowledge management, crew scheduling and continual improvement. Within these parameters he testified that training, retraining, testing and monitoring of operating crews in particular was ongoing and essential.

[35] Mr. David Phillips, an instructor in the CP technical training department, provided more granular evidence on the training, qualification and requalification standards set up at the company. He testified that these were rigorous, demanding and systematic. In the case of Messrs. Rotar and Brunette, as conductor and engineer respectively, he stated that their training records (Exhibits A-5 and A-6) demonstrate compliance with those standards.

[36] Mr. David Guerin, Director of Labour Relations at CP at the time, testified on the evolution of CP's operating crew discipline policies and process. He indicated that these had changed in March 2017, moving away from a demerit point suspension system to a more flexible one. The new approach, he stated, was more effective in achieving deterrence, accountability and "due diligence". My review of this new policy (Exhibit A-9) and its application to Messrs. Brunette and Rotar in the present case, as more fully set out below, show that the new system conveys a calibrated and immediate cause-and-effect approach.

[37] Mr. Wilkerson testified on the training, discipline and monitoring systems in place at CP and existent for these two employees. His testimony shows that CP's systems are focused on learning, retention, consequence and risk avoidance.

[38] Based on the evidence provided by these CP witnesses, I find that CP's overall SMS is an extensive one. But due diligence requires direct, clear and specific evidence of CP having acted reasonably to prevent the commission of the specific violation in issue – which here is the alleged contravention of Rule 439.

(3) Training

[39] Operating and safety training is a key aspect of due diligence. It must be adequate, ongoing, and specific. I find that it is present in this case. The records of the conductor and the engineer show that there was *CROR* training throughout their tenure at CP. There was initial training at time of hire, orientation and then requalification or retraining courses. In the case of the engineer, requalification training and testing was in March 2015 and for the conductor, in April 2016. CP witness Mr. Phillips stated that training for recertification for employees like Messrs. Brunette and Rotar takes place approximately once every 2.5 years. This accords with the training evidence provided relative to these two employees. While the training and re-training modules themselves were not filed as evidence, the notations set out in Exhibits A-5 and A-6 illustrate the breadth of the matters covered and specifically refer to signal compliance.

[40] This was a crew-specific event. The crew had been trained not to miss stop signals directly, through rules comprehension and learning, and indirectly through application and judgment testing. In the case of Mr. Brunette, his training records show rules comprehension and learning took place in 2001, 2007, 2010, 2012 and 2015. In the case of Mr. Rotar, his records show that this occurred in 2007, 2010, 2012, 2014 and 2016.

(4) *Safety testing*

[41] In my opinion, due diligence also requires that there should be ongoing field-level testing by railway supervisors of operating crews, and this can include evidence of covert monitoring for safety rule adherence. I accept the evidence of testing results (Exhibits A-7 and A-8) which shows that both crew members were subject to CP's ongoing "Efficiency Testing" ("e-testing") program, where they were monitored routinely by supervisors. Mr. Shearer stated that the program was implemented on a "regular basis" to all operating employees and was "systematic". This testing included unannounced in-cab rides with supervisors ("ride-alongs") as well as covert monitoring via radio broadcasts and in-the-field observation including radar testing at signals. While there is no specific reference to Rule 439 in these records, I accept Mr. Shearer's statement to the effect that all of the rules (being tested) cannot be listed and that compliance with signal and stopping rules would be included as part of the observations.

[42] CP witness Mr. Phillips also confirmed that the testing included, among other things, rule and procedure compliance within normal operating conditions as well as those arising out of contrived or "unexpected" signal set-up conditions. I accept that this would include Rule 439 compliance.

[43] Testing records filed by CP (Exhibit A-12) show that this kind of testing was broadly applied to a host of operating functions in the Cartier and Parry Sound Divisions for operating employees. This accords with Mr. Shearer's statement to the effect that e-testing takes place in excess of 500,000 times a year across the CP network.

[44] On the key issue here of crew "focus" or "situational awareness", CP witness Mr. Wilkerson confirmed that monitoring crew communications was a component in the testing. He testified that crews were monitored to ensure alertness to task through their giving advance notice to central dispatch (RTC) on approaching signals as well as a coincident exchange between engineer and conductor in the cab. In other words, in addition to complying with the operating signals, crews must demonstrate that they are, and were here, alert in advance of the coming tasks. I accept this as credible due diligence evidence.

[45] The Minister's representative stressed that even if CP has a strong SMS program in place, it is still deficient because of coverage gaps. Specifically, she argued that CP had failed to provide specific training on "situational awareness". I do not find that such a gap exists in the present case.

[46] Situational awareness, "focus" or "priority of tasks" is integral to the safety systems CP had in place. I accept the evidence of Messrs. Phillips, Shearer and Wilkerson to the effect that training on rules compliance means recognition of operating signs/signals, understanding what they require and then judgment to respond appropriately. This especially includes crew

communication requirements about *approaching* signals, which includes communication between themselves as well as with dispatch – all to demonstrate alertness and readiness to comply.

[47] Although no training module entitled “situational awareness” was filed as evidence, it is clear that CP’s e-testing program for operating crews is aimed at rule knowledge, attention, reaction and consequence. Inherent in this is that crews must stay alert in order to properly comply with all operating rules. In the case of these two crew members, the compliance and awareness testing were conducted for Mr. Brunette on eight occasions between December 2016 and April 2017, and for Mr. Rotar, on 16 occasions during the first five months of 2017. No fail-to-stop events were identified.

[48] I find that covert monitoring by supervisors that is ongoing and documented, as here, is paramount to a due diligence defence for *CROR* compliance. If crews are aware that they will be monitored at any given time, they are more prone to remain at all times acutely vigilant to operating rule compliance. This is especially true when discipline consequences flow from non-compliance.

(5) *Employee discipline*

[49] An effective and efficient discipline system for employee misconduct is an essential part of a railway companies’ SMS and its due diligence. It should show that the consequences for rule contraventions are metered in terms of kind of misconduct, frequency and severity. Mr. Guerin’s evidence was tendered as representing CP’s disciplinary policy that applied to operating crews. He testified that it was a new system, in force as of March 2017, and it replaced the pre-existing demerit point system. He indicated that it was designed, in part, to deal with the kind of Rule 439 events that CP crews encountered elsewhere in Ontario in 2016 and which were identified in the Notice of Violation at issue in the present case.

[50] Mr. Guerin stated that the earlier system was one where rule contraventions could be overlooked if an employee’s demerits had not accumulated beyond set limits. The new system is one that can lead to more serious and immediate discipline, as here, in suspensions, when infractions are serious. An effective disciplinary policy and its integrity in terms of application is one that supports proper employee operating conduct and the company’s due diligence. In this case, according to their disciplinary records (Exhibits A-3 and A-4), the engineer and the conductor both received suspensions under the new system.

[51] I accept this evidence as showing CP had an effective disciplinary policy and was duly diligent in its application. It was applied here immediately and was consistent with the stated rules. And it is a new policy, implemented as part of an effective due diligence response to the earlier Rule 439 infractions. Compared to the earlier policy, sanctions are immediate and significant for employee breach of serious rules. This is more consistent with ensuring safe conduct and operating rule compliance. Under the previous policy, sanctions may not arise at all, depending on demerit points accumulated.

(6) *Simulator training*

[52] CP indicated that in-cab simulator training was an integral part of crew training as a means of ensuring ongoing rule compliance. Counsel for the Minister argued that as far as simulators are concerned, there was nothing to show that they specifically deal with crews not paying attention to their job, or “situational awareness”. Counsel argued that the best evidence on this, which was absent, would have included such things as human factor training, testing materials, videos, decks or exam results.

[53] CP witness Mr. Phillips testified that simulator training had evolved to the point that it now can offer subdivision-specific graphics and application, and was proving to be a valuable addition to developing and ensuring crew awareness. To the Minister’s point, CP did not provide much greater detail. I do not, however, draw a negative inference from this. While in-cab simulations can be an important part of training and ensuring rule compliance, when it comes to due diligence, I attach more weight to ongoing field-level testing, especially covert monitoring and discipline.

(7) *Loss of focus due to familiarity with territory*

[54] In concluding her argument, counsel for the Minister suggested that both individuals were very familiar with the CP operations out of Sudbury and that this familiarity resulted in a lackadaisical approach to their operating duties. It is correct to say that they were both very familiar with the territory. The engineer had been actively operating in CP’s Cartier Subdivision for at least 18 years, and the conductor for 10 years. The evidence does not show, however, that they have been derelict or “sloppy” in their duties in the past. Their disciplinary records do not show any chronic deficiencies and do not forecast any Rule 439 breaches or other neglect.

[55] These two crew members arrived at work on June 14, 2017, “fit for duty” and well rested. They were not compromised to properly undertake their operating duties and there is no evidence to show that crew scheduling was an issue or that they were pushed by management, for example, to achieve corporate “on-time performance” goals. On this latter point, train GP-14 was a non-revenue ballast train, so achieving on-time delivery for customers was not an issue. Training and re-training records for these individuals accord with a strong education program undertaken systematically. These all point to CP being duly diligent.

F. Conclusion

[56] Overall, I find that CP was duly diligent in creating and then ensuring an operating safety system for this particular crew that was aimed at operating rule compliance, and this includes compliance with Rule 439. The training and re-training for these two crew members, testing, crew scheduling, CP’s in-the-field monitoring of operating crews and an enhanced disciplinary program, when taken together, point to this conclusion.

[57] The Notice of Violation dated April 11, 2018, as amended, imposing a monetary penalty of \$64,600 is hereby dismissed. Accordingly, it is not necessary to assess the propriety of the amount of the monetary penalty otherwise imposed.

IV. DETERMINATION

[58] The Notice of Violation dated April 11, 2018, as amended, issued to Canadian Pacific Railway Company, setting out an alleged breach of section 17.2 of the *Railway Safety Act* arising out of non-compliance with Rule 439 of the *Canadian Railway Operating Rules* and the imposition of a monetary penalty of \$64,600, is dismissed.

November 15, 2021

(Original signed)

George ‘Ron’ Ashley
Member

Appearances

For the Minister:	Micheline Sabourin
For the Applicant:	Alan Blair
	Kunal K. Nand