



## TRANSPORTATION APPEAL TRIBUNAL OF CANADA

**Citation:** *Canadian National Railway Company v. Canada (Minister of Transport)*,  
2022 TATCE 15 (Review)

**TATC File No.:** RO-0039-41

**Sector:** Rail

**BETWEEN:**

**Canadian National Railway Company**, Applicant

- and -

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

**Heard by:** Videoconference on June 14, 15 and 18, 2021

**Before:** Gary Drouin, Member

**Rendered:** March 16, 2022

### REVIEW DETERMINATION AND REASONS

**Held:** The Minister of Transport has demonstrated, on a balance of probabilities, that the applicant, Canadian National Railway Company, violated section 17.2 of the *Railway Safety Act*. Therefore, the monetary penalty of \$45,833.04 is upheld.

The total amount of \$45,833.04 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 determination.

## I. BACKGROUND

[1] By Notice of Violation – Contravention of Designated Provision – Issuance of Monetary Penalty (Rail Safety) dated June 4, 2019, Transport Canada (TC) assessed a total monetary penalty of \$45,833.04 against Canadian National Railway Company (CN). Schedule A to the Notice of Violation stated:

On or about December 10, 2018 at or near Langstaff, on the Bala Subdivision, Canadian National Railway operated railway equipment otherwise than in accordance with Rule 439 of the Canadian Rail Operating Rules that apply to Canadian National Railway when its employees failed to stop a movement at a STOP signal, thereby violating section 17.2 of the *Railway Safety Act*.

**Monetary Penalty: \$22,916.52**

On or about February 7, 2019 at or near Argolis, Ontario, on the Ruel Subdivision, Canadian National Railway operated railway equipment otherwise than in accordance with Rule 439 of the Canadian Rail Operating Rules that apply to Canadian National Railway when its employees failed to stop a movement at a STOP signal, thereby violating section 17.2 of the *Railway Safety Act*.

**Monetary Penalty: \$22,916.52**

**TOTAL PENALTY: \$45,833.04**

[2] On June 21, 2019, CN made a request for review to the Transportation Appeal Tribunal of Canada (Tribunal).

## II. ANALYSIS

### A. Issue

[3] The Tribunal must determine whether CN failed to stop a movement in violation of section 17.2 of the *Railway Safety Act (RSA)*.

[4] The Tribunal must also determine whether CN could establish the defence of due diligence.

### B. 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.

[6] It is alleged CN failed to comply with Rule 439 of the *Canadian Rail Operating Rules (CROR)*. This rule requires a rail company to stop at least 300 feet in advance of the STOP signal unless the movement has been authorized by Rule 564 or unless required to clear a switch, crossing, controlled location, or spotting passenger equipment on station platforms.

[7] *CROR* Rule 564, Authority to Pass Stop Signal, paragraph (a), provides that a train or transfer must have authority to pass a block signal indicating Stop.

[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. Did CN violate section 17.2 of the *RSA*?**

[9] Both the Minister and the applicant acknowledged that on December 10, 2018, at or near Langstaff, Ontario, on CN's Bala Subdivision, CN train crew operators failed to stop their train at a STOP signal in accordance with Rule 439 of the *CROR*, thereby violating section 17.2 of the *RSA*.

[10] Both the Minister and the applicant acknowledged that on February 7, 2019, at or near Argolis, Ontario, on CN's Ruel Subdivision, CN train crew operators failed to stop their train at a STOP signal in accordance with Rule 439 of the *CROR*, thereby violating section 17.2 of the *RSA*.

[11] In addition to CN having admitted to the violations, the evidence provided by the Minister also supports that the violation occurred. This is discussed in more detail below.

#### **(1) *Incident on December 10, 2018, at or near Langstaff, Ontario, on CN's Bala Subdivision***

[12] During testimony, Mr. Peter Hopper, Railway Safety Inspector at TC, described the track configuration near Langstaff on the Bala Subdivision (Exhibit M-3), the location of STOP signal 175E and the location where CN train Q10521-10 came to a stop, which was past the STOP signal. The information provided by Mr. Hopper was the result of three interviews with the train crew. The first with Locomotive Engineer Rod Kearney on January 7, 2019 (Exhibit M-4), the second with Conductor Ray Stohr on January 7, 2019 (Exhibit M-5), and the third with Manager Robert Eull (Exhibit M-6) on February 4, 2019.<sup>1</sup> All three individuals confirmed that they had passed the STOP signal without authority and there was no conflicting information in their respective statements.

[13] During his CN crew interviews on January 7, 2019, Mr. Hopper learned that both crew members had taken control of the train between two signals. According to Locomotive Engineer Kearney, the inbound crew did not convey any information such as an upcoming STOP signal or any other special instructions prior to passing on control of the train to Mr. Kearney and Conductor Stohr.

[14] In his interview, Mr. Kearney shared with Mr. Hopper that he was excited that Mr. Robert Eull, Manager, Rail Traffic Control Centre (RTCC), was riding the train with him as it would allow him to engage in conversation and interact with him. Mr. Kearney also added that

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<sup>1</sup> In Exhibits M-4, M-5 and M-6, the year in the date shows 2018. During the hearing, it was confirmed that this was a typographical error and that the year should be 2019.

the crew had been distracted by a woman standing at a grade crossing and they thought it could be a potential suicide.

[15] Mr. Kearney added in his interview that he had opened the window and made a gesture to the woman and continued talking to the conductor and the manager about the weekend until the conductor relayed that there was a STOP signal for which Mr. Kearney placed the train into emergency and slid through the signal by 22 feet. He also confirmed he was speeding at 23 mph in a 15-mph zone.

[16] Mr. Hopper also asked Mr. Kearney if, as an engineer, he thought there was anything he or CN could have offered to prevent such an occurrence from happening again in the future. Mr. Kearney answered that that day felt different, there was a lack of focus and the potential suicide had distracted him. He added that “[t]hese new conductors are not always in the game.”

[17] During Conductor Stohr’s interview, Mr. Stohr also mentioned that he had not seen the advance signal as they had taken control of the train between two signals. He added that when he saw the STOP signal, he alerted the locomotive engineer to “Soak it, stop signal”<sup>2</sup> and initiated the emergency broadcast.

[18] Mr. Hopper then asked Mr. Stohr if he felt that there were any distractions in the cab. Mr. Stohr replied that the engineer was talking a lot, but he continued to focus on his work.

[19] On February 4, 2019, Mr. Hopper interviewed Mr. Eull. When asked what signal indication he had on advance signal to Langstaff, Mr. Eull replied that he did not have any as he entered the locomotive in between signals. Once the train had departed, Mr. Eull explained that “[a]fter a couple of minutes we came around the corner at Langstaff and the signal was all red” and added he did not see any distraction prior to the incident.

[20] Mr. Hopper testified that the train crew had taken control of the train between two signals and were not prepared to stop according to *CROR* Rule 401.2:

**401.2 NO ADVANCE SIGNAL**

At locations where there is no advance signal to the signal governing movements into CTC or movements are re-entering CTC from a siding, all movements must approach the governing signal preparing to stop until it can be observed as displaying a more favourable indication than Stop

Had the crew complied with *CROR* Rule 401.2, it may have prevented them from going through the STOP signal without authority. In their statement, the crew added that the train crew with whom they exchanged train authority did not mention an upcoming STOP, but the crew did not ask if there were any special instructions or if there was anything they should be aware of, according to the transcript of the interview by Mr. Hopper.

[21] I also note that a video (Exhibit A-7) demonstrated the train travelling beyond the STOP signal.

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<sup>2</sup> In the field of railway transportation, “soak it” means “apply full emergency braking.”

**(2) Incident on or about February 7, 2019, at or near Argolis, Ontario, on CN's Ruel Subdivision**

[22] During testimony, Mr. Hopper described the track configuration near Argolis on the Ruel Subdivision (Exhibit M-10), the location of STOP signal 2129 Argolis and the location where CN train Q11531-06 had come to a complete stop, which was past the STOP signal. The information provided by Mr. Hopper was the result of two interviews with the train crew.

[23] The first interview was with Locomotive Engineer Travis Thomson on February 20, 2019 (Exhibit M-11). Mr. Thomson explained that he was using the washroom in the second unit rather than the one in the head locomotive for courtesy reasons when locomotive CN Q11531-06 failed to stop at the STOP signal, therefore exceeding the signal without authority. He added that there was no indication for a STOP signal at Argolis, otherwise he would not have used the facilities in the second unit.

[24] Mr. Thomson explained that once he returned to the head locomotive and realized that the train had passed a STOP signal, he immediately engaged in the "Emergency Call" to alert the Rail Traffic Controller (RTC) and other trains in the near area.

[25] The second interview was with Conductor Locomotive Operator (CLO) Kyle Kostiw on February 20, 2019 (Exhibit M-12). Mr. Kostiw explained in great detail the situation in the cab during the moments prior to noticing that the control signal 2129 Argolis indicated a STOP signal. He mentioned that he tried to bring the train to a stop but was unable to as he began the maneuvers too late and passed the stop signal without authority.

[26] As demonstrated during the interviews by Mr. Hopper, Mr. Thomson and Mr. Kostiw acknowledged that they had proceeded beyond the STOP signal without authority, thereby violating *CROR* Rule 439. This was also acknowledged and demonstrated by CN taking disciplinary measures against both employees for contravening to *CROR* Rule 439.

[27] During cross-examination, Mr. William Glass, Senior Engineer Service Officer for CN's Eastern Canada Division, testified that the train crews of CN train Q11531-06 and CN train Q10521-10 failed to stop at the STOP signal, therefore exceeding the signal without authority, thereby violating section 17.2 of the *RSA*.

[28] Since CN has conceded to the violations and based on the evidence and the testimonies confirming the non-compliance to *CROR* Rule 439 without any contradictory information by all parties involved, I find that in both incidents, the Minister has proven, on a balance of probabilities, that the trains stopped past the stop signal without authority, thereby contravening *CROR* Rule 439 and that CN violated section 17.2 of the *RSA*.

**D. Prior incidents of CN *CROR* Rule 439 violations presented by the Minister**

[29] The Minister brought to the attention of the member a series of incidents that it argued demonstrated that the operating crews were not prepared and failed to recognize the proper sequencing of signals.

[30] Through testimony, Mr. Hopper introduced Exhibit M-16, TC Notice dated July 30, 2018, that he had drafted, signed and issued to CN, identifying six (6) incidents of non-compliance with *CROR* Rule 439 on December 15, 2017, December 17, 2017, January 11, 2018, March 26, 2018, June 23, 2018, and June 27, 2018. This notice also made reference to an incident on July 19, 2018, where the emergency application of the train brakes upon encountering a stop signal resulted in the derailment of four freight cars.

[31] Mr. Hopper's notice also mentioned that on June 27, 2018, the stop signal had been passed because the operating crew members had fallen asleep. In CN's reply dated August 11, 2018 (Exhibit M-17), Mr. Tom Brown, Assistant Vice President Safety, clarified that, with respect to the incident which occurred on June 27, 2018, CN's findings following an investigation of the incident, as confirmed by a third-party expert, had determined that the crew was impaired, not asleep, resulting in the violation that day.

[32] CN's reply also included information on remedial actions taken by the company. Employees were immediately removed from service and an investigation into the circumstances was conducted. Corrective measures were taken such as coaching, supplementary training and, in some cases, formal discipline up to and including dismissal.

[33] Through testimony, Mr. Hopper spoke to a TC Letter of Warning dated October 12, 2018 (Exhibit M-18), sent to CN which made reference to four (4) additional *CROR* Rule 439 violations on January 20, 2017, April 11, 2017, June 24, 2017, and August 27, 2017.

[34] The applicant did not object to the introduction of these exhibits and acknowledged the occurrence of these incidents in correspondence with the Minister. This information was part of TC's Rail Safety Enforcement Decision-Making Checklists (Exhibits M-7 and M-13). However, during closing arguments by CN, it was mentioned that the other non-compliances to Rule 439 cited in Exhibits M-7 and M-13 should not be considered because they were not proven and there was not enough evidence to determine whether they were similar to the incidents in question.

[35] In response to the history of non-compliances during arguments, the Minister mentioned that the administrative monetary penalty (AMP) program was not to punish the railway but rather to encourage CN to address non-compliance issues. The Minister added that CN was well aware of the history of non-compliance to Rule 439 and they did not address it, including the two incidents that are part of the AMP presented before the Tribunal. Given that CN acknowledged the prior violations in their communication with TC, I have considered these prior incidents as relevant to the defence of due diligence and the assessment of the penalty.

#### **E. Did CN establish a defence of due diligence?**

[36] Both the Minister and CN acknowledged that a violation of section 17.2 of the *RSA*, arising out of a breach of *CROR* Rule 439, is a strict liability offence whereby once the violation is established, the due diligence defence is available to CN. In this regard, the onus was on CN to show that, on a balance of probabilities, the company exercised all reasonable care to prevent these two violations by (i) ensuring a safe railway operation system was in place, and (ii) ensuring its effective operation.

[37] CN argued that it had met the requirements of the due diligence test set out in *R. v. Sault Ste. Marie*, [1978] 2 SCR 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....

[38] CN argued that it subscribes to railway safety as a fundamental, non-negotiable value in ensuring compliance with rules. Its evidence aimed to demonstrate that CN took all reasonable measures to prevent the violations with robust training at its Winnipeg Campus, refresher courses and special instructions, in addition to the Educational Notice – Rule 439 / Stop Signal Violation (Exhibit A-22) issued by CN Eastern & Western Regions Operating Practices.

[39] The Minister argued that CN has not met the due diligence requirements because of CN's disconnect between the many violations and the lack of action taken by CN to eliminate risks such as the lack of training on loss of focus, the crew not working as a team, lack of peer-to-peer refresher training, no evidence of a situational awareness refresher training and no human factor training in the simulator training.

[40] The Minister explained that CN did not present to the Tribunal relevant material or initiatives taken on how it was addressing human behaviour, distraction and prioritizing/organizing activities in the train locomotive such as when and where activities should not occur by train crews for Rule 439 in this particular area. CN did not specifically develop or address a behaviour review to address the matter other than discipline and a nationwide bulletin which did not seem to address the rule violations as they continued.

[41] CN presented exhibits in addition to testimony by Mr. Glass to demonstrate how CN provides training to future locomotive engineers, conductors and other trade employees. Mr. Glass testified that the education was provided either in class or through "hands-on" training at their Training Campus in Winnipeg which consisted of train operations within a secured perimeter on campus.

[42] Mr. Glass presented the following exhibits to demonstrate the quality of the training materials used at the CN Winnipeg Campus:

- Exhibit A-15: New Conductor Training – Power Point – *CROR* General Rules
- Exhibit A-16: Locomotive Engineer Training Course – Module 2
- Exhibit A-17: "Ahead of the Train" Training Video
- Exhibit A-18: Locomotive Engineer Training Course – Module 7
- Exhibit A-19: Locomotive Engineer Training – Instructor Workbook with Teaching Notes
- Exhibit A-20: Transportation *CROR* Recertification – Day 2

[43] CN also argued that their disciplinary methods to enforce compliance were severe and provide an incentive for locomotive engineers, conductors and other employees to comply with rules set out by the company. Mr. Glass testified that the train crews were immediately dismissed from duty without pay or benefits and, in the event that CN would rehire them, they would need to go through retraining. Exhibit A-11 identified Mr. Kearney's disciplinary history that included two suspensions. The exhibit relating to Mr. Stohr, Exhibit A-12, shows his disciplinary action was for five weeks only.

[44] CN argued that it had done all it reasonably could have done and should not be held responsible for the actions of the employees. It provided a multifaceted approach to education, training and monitoring, including maintaining focus, situational awareness safety briefings, safety blitzes and more.

[45] The Minister mentioned that CN provided training at the beginning of an employee's career but with time, employee complacency and routine with the rules prevail, and CN did not provide refresher courses to address human factors.

[46] CN asked, "What more could CN have done?" and argued the fact that CN relies on humans to operate trains and they can't be supervised 24 hours a day. However, it maintained that it has taken all reasonable steps regarding training and skills to stop the trains as required.

[47] Rule 439 was identified by the railway industry in both Canada and the USA, the industry's unions and the Minister of Transport as a "**cardinal rule.**" Non-compliance with a cardinal rule such as *CROR* Rule 439 can cause harm, danger, death and hazard to the environment. The number of non-compliances of this Rule 439 in a short period of time should have alerted CN that the existing training, train crew monitoring and disciplinary actions were not addressing the root cause of the non-compliances to Rule 439. An example of what appears to be a missing link between existing training/supervision and human behaviour/employee compliance would be an employee leaving the head locomotive in a strategic high-risk zone to go to the bathroom. Another example would be engaging in a non-work-related conversation when approaching a high-risk area and not focusing on train speed and exceeding the track speed limit.

[48] A rail system, such as the CN system, contains a series of interlocking elements which includes training, monitoring, oversight and discipline. It requires not only maintaining the existing education and awareness elements for safe railway operations, but also requires continuous updates, evaluation and adjustments to meet changes in the industry and human behaviour as society and human behaviour evolve.

[49] The two rule violations in question were not caused by new employees with minimal years of experience or travelling on unknown territory. The train crews in both incidents were experienced and were knowledgeable of the territory as stated in several exhibits, including crew interviews (R. Kearney, 31.75 years of service; R. Stohr, 4.5 years of service; T. Thomson, 25 years of service; K. Kostiw, 8 years of service). There were no weather or other environmental conditions that could have contributed to the incidents as seen in videos presented during testimony. There was no apparent faulty equipment or communication failure from the control centre (crew called the emergency call which was received by dispatch) that could have



contributed to employee non-compliance with Rule 439. Radio communication was performing as it should, and track conditions were good.

[50] In addition to these two Rule 439 non-compliances, CN was aware of other non-compliances to Rule 439 as demonstrated in CN's reply to Inspector Hopper on August 11, 2018, informing him that CN had taken or was taking actions to address this matter. Despite the evidence of several prior violations of Rule 439, there is no evidence to suggest that CN turned their mind to any additional training to address those incidents, or to prevent further incidents from occurring, such as the ones at issue before the Tribunal.

[51] CN also brought to the attention of Mr. Hopper that the Rule 439 violation that occurred on July 19, 2018, was due to both crew members being impaired while performing their duties, thereby being aware of the non-compliant situation.

[52] During the hearing, CN did not highlight any specific sections within the training documents provided in their exhibits or other initiatives that were specifically addressing situational awareness, prompt decision-making processes or methodology to address unforeseen or spontaneous critical situations while maintaining full control and focus on train operation and handling, for example, how to address situations such as potential suicide while maintaining focus on signals. Another example was during crew change on December 10, 2018, near Langstaff, the inbound crew and change crew were more preoccupied with having a casual conversation than exchanging safety information such as an upcoming STOP signal, as demonstrated by the locomotive engineer who appeared to be more interested in having someone new to talk with during the trip rather than studying, evaluating, preparing and focusing on safe railway operations for his time of duty. A second example from this incident was the distraction that led to the violation of Rule 401.2, which contributed to the violation of Rule 439.

[53] CN did not provide the Tribunal with evidence demonstrating whether CN had adjusted or introduced either new or amended training to address the lack of situational awareness in this incident, for example, psychoanalysis and human behaviour studies on how to improve team work by the cab crew, analytical process and methodology to foresee potential safety issues and taking initiative beyond the notes or crew information such as providing or requesting from crew change of control of upcoming alerts, signals, track work and more.

[54] CN was unable to clearly demonstrate how it is addressing what appears as a systematic behaviour of repeated non-compliance with *CROR* Rule 439. Therefore, in the case presented before the Tribunal, I find that CN did not demonstrate, on a balance of probabilities, that the company established the defence of due diligence as it did not exercise all reasonable care to avoid these two violations. Specifically, I find that CN did not take reasonable care to establish a proper system to prevent commission of the violations and did not take reasonable steps to ensure the effective operation of the system.

## **F. Amount of the monetary penalty**

[55] Ms. Suzanne Madaire-Poisson, former Chief, Compliance and Safety, Rail Safety, TC, explained the factors and the calculations that led to the AMP and the AMP amount. She explained the aggravating and mitigating factors for the penalty amount which also included

additional information received from the inspector (Exhibit M-21). It was also mentioned that an additional aggravating factor should have been added but due to human error by the Minister, an additional \$14,583.00 was omitted.

[56] The calculation of the AMP was well explained by the Minister. The basic amount and all of the aggravating and mitigating factors were well presented and explained, which clearly showed the administrative procedures and the contributions from all levels of management, including the inspector, to issuing the AMP. I agree with this assessment. Furthermore, although the witness mentioned there should have been an additional aggravating factor of “harm or could cause harm” and this was an oversight by the Minister, the additional \$14,583.00 is not recommended to be added to the amount of the penalty.

[57] During arguments, CN mentioned that additional mitigating factors should be considered. After reviewing all of the facts, which included the testimonies and exhibits, I do not recommend adding mitigating factors that would reduce the amount of the penalty.

### **III. DETERMINATION**

[58] The Minister of Transport has demonstrated, on a balance of probabilities, that the applicant, Canadian National Railway Company, violated section 17.2 of the *Railway Safety Act*. Therefore, the monetary penalty of \$45,833.04 is upheld.

[59] The total amount of \$45,833.04 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 determination.

March 16, 2022

(Original signed)

Gary Drouin  
Member

Appearances

For the Minister:	Micheline Sabourin
For the Applicant:	Kristen MacDonald