



## TRANSPORTATION APPEAL TRIBUNAL OF CANADA

**Citation:** *Canadian National Railway Company v. Canada (Minister of Transport)*,  
2022 TATCE 23 (Review)

**TATC File No.:** RQ-0052-41

**Sector:** Rail

**BETWEEN:**

**Canadian National Railway Company**, Applicant

- and -

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

[Official English translation]

**Heard by:** Videoconference on December 1 and 2, 2021

**Before:** John Gradek, Member

**Rendered:** April 28, 2022

### REVIEW DETERMINATION AND REASONS

**Held:** The Minister of Transport has proven, on a balance of probabilities, that the crew of CN train 149 contravened subsection 97(2) of the *Grade Crossings Regulations*. The administrative monetary penalty is upheld.

The total amount of \$70,500 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] On December 14, 2020, Transport Canada (TC) issued a Notice of Violation (Notice) with a penalty of \$70,500 to the Canadian National Railway Company (CN) for an alleged violation of subsection 97(2) of the *Grade Crossings Regulations*.

[2] Schedule A of the Notice states that:

On or about January 9th 2020, from approximately 06:00 to 07:00 at mile 0.04 of the Port of Montreal spur track of the Montreal subdivision, or thereabouts, the Canadian National Railway Company left railway equipment standing on a crossing surface for more than five minutes when vehicular traffic was waiting to cross it, thereby violating subsection 97(2) of the *Grade Crossings Regulations*.

**Administrative monetary penalty: \$70,500.00**

[3] On January 15, 2021, the applicant filed a request for a review of the Notice with the Transportation Appeal Tribunal of Canada (Tribunal).

## II. ANALYSIS

### A. Issue

[4] Did CN violate subsection 97(2) of the *Grade Crossings Regulations* on the date specified in the Notice?

### B. Legal framework

[5] Subsection 97(2) of the *Grade Crossings Regulations* concerns the obstruction of a public grade crossing:

(2) It is prohibited for railway equipment to be left standing on a crossing surface, or for switching operations to be conducted, in a manner that obstructs a public grade crossing — including by the activation of the gate of a warning system — for more than five minutes when vehicular or pedestrian traffic is waiting to cross it.

[6] Pursuant to section 40.1 of the *Railway Safety Act (RSA)* and subsection 2(1) of the *Railway Safety Administrative Monetary Penalties Regulations*, subsection 97(2) of the *Grade Crossings Regulations* is subject to the administrative monetary penalty regime set out in sections 40.13 to 40.22 of the *RSA*.

[7] Subsections 15(1) and 15(5) of the *Transportation Appeal Tribunal of Canada Act* provide that:

#### Nature of hearings

15 (1) Subject to subsection (2), the Tribunal is not bound by any legal or technical rules of evidence in conducting any matter that comes before it, and all such matters shall be dealt with by it as informally and expeditiously as the circumstances and considerations of fairness and natural justice permit.

[...]

**Standard of proof**

(5) In any proceeding before the Tribunal, a party that has the burden of proof discharges it by proof on the balance of probabilities.

[8] Pursuant to subsection 40.16(4) of the *RSA*, the Minister of Transport (Minister) has the burden of proving that the applicant is guilty of the charge set out in the Notice. The elements to be proven in relation to this violation are summarized as follows: the date and place of the event, the identity of the railway company that committed the alleged violation, and the act or omission that constitutes a violation.

**C. Did CN violate subsection 97(2) of the *Grade Crossings Regulations* on the date specified in the Notice?**

[9] The respondent provided a detailed summary of the evidence and witness testimony it planned to present to prove that CN contravened the *Grade Crossings Regulations*.

[10] The Minister called Mr. Jean Migneault, TC Railway Safety Inspector, as a witness to present his analysis of an incident that he heard about on the radio on his way back to his office on the morning of January 9, 2020. Upon contacting Mr. François Boucher, General Manager of Operations at CN, he was advised by Mr. Boucher that the problem was a train blocking the Bridge Street crossing in Montreal and that the crew was in the process of using a second locomotive to clear the crossing.

[11] The Minister submitted Exhibit M-1, a diagram of the Pointe St. Charles track provided by CN, to identify the crossing. The applicant objected to the introduction of this evidence, stating that the persons who allegedly created this diagram would have been compellable witnesses at the hearing. Since the document is a public document issued by CN, I ruled that it was admissible in evidence.

[12] The Minister filed Exhibit M-2, a “Google Earth” satellite image showing the location of the Bridge Street crossing.

[13] The Minister filed Exhibit M-3, which is the email sent by Mr. Migneault on January 10, 2020, to Mr. Darrin Dobie, the superintendent for CN’s Montreal Region, requesting a set of data to support the analysis of the incident in question.

[14] Mr. Migneault testified that a letter of non-compliance concerning the incident was sent on February 6, 2020, to Mr. Dobie, requesting a response on an action plan to avoid a recurrence.

[15] The Minister submitted Exhibit M-4, an undated letter from Mr. Dobie in response to the letter of non-compliance issued by Mr. Migneault. In his letter, Mr. Dobie confirms that a CN train stopped at the Bridge Street crossing in Montreal due to mechanical defects on a locomotive on that train. The letter states:

CN would like to highlight that it takes issues such as this seriously and shares Transport Canada’s interest in reducing these incidents. CN has reviewed its records on the incident in question and **confirms that it occurred as a result of a mechanical failure**. CN considers this to be a one-time incident and does not expect a recurrence. **CN recognizes the sensitivity of this crossing**

**and has put in place measures to help ensure, to the extent possible, that the crossing is not occupied during peak traffic hours.** [emphasis added]

[16] I have noted this exhibit and I note that CN acknowledged the occurrence of the January 9, 2020, incident and the seriousness of this event. I also acknowledge that CN will take action to prevent the blocking of crossings during peak periods.

[17] Following the incident, Mr. Migneault completed a *Decision-Making Checklist*, a TC document that is used to determine whether a recommendation for investigation should be made. The Minister submitted this list as Exhibit M-5.

[18] Mr. Migneault completed the checklist by recommending to his supervisor that an investigation be conducted, and the supervisor confirmed this recommendation to the TC regional unit.

[19] The Minister submitted Exhibit M-6, the *Justification for Enforcement Action – Railway Safety*, a document which contains the details supporting this recommendation.

[20] I have reviewed the analyses presented by Mr. Migneault in these exhibits and accept the conclusions he reached. His analyses of the facts of the incident are credible and are conclusions that I find acceptable.

[21] The Minister called to the witness stand Mr. Simon Dubreuil, a railway safety inspector and specialist in railway signals and crossings at TC. Mr. Dubreuil elaborated on railway crossing technology and the recording of events related to the operation of railway crossing signals.

[22] Mr. Dubreuil submitted Exhibit M-7, a document containing the operational data for the Bridge Street crossing, confirming the activation of the system at 5:39 a.m. on January 9, 2020, to signal the arrival of a train, and the release of the crossing at 7:01 a.m. on January 9, 2020.

[23] The Minister called Mr. Reno Gallant, a railway safety inspector specializing in railway equipment at TC, to the stand. Mr. Gallant interpreted and analyzed documents submitted as Exhibit M-8 concerning the mechanical condition of locomotive CN 2511, the lead locomotive on train 149 at the time of the January 9 incident at the Bridge Street crossing.

[24] Mr. Gallant expressed his opinion of the actions taken by the crew of train 149 to activate the change of train control for the second locomotive on the train, a procedure that, according to Mr. Gallant, would have taken approximately 15 minutes.

[25] The Minister called as a witness Mr. Jean Nodorakis, an investigator with the enforcement unit in TC's Quebec Region. Mr. Nodorakis outlined the specific conditions of subsection 97(2) of the *Grade Crossings Regulations* that he relied upon in his investigation of this incident.

[26] Mr. Nodorakis submitted Exhibit M-9, a document describing the CN system in the Montreal Region. Mr. Nodorakis indicated that the Bridge Street crossing was located at

Mile 0.04 of the Port of Montreal spur. I accept this evidence as establishing the location of the incident at the Bridge Street crossing.

[27] Mr. Nodorakis then introduced Exhibit M-10, a document from CN containing the description of the train operating on January 9, 2020, train 149. Exhibit M-10 indicates the overall length of this train and confirms that the locomotive identification number was CN 2511. I accept this document as evidence that describes the characteristics of CN train 149 on January 9, 2020.

[28] Mr. Nodorakis introduced Exhibit M-11, a document from CN detailing the movements of locomotive CN 2511 on January 9, 2020. Mr. Nodorakis noted that locomotive CN 2511 is associated with the operation of train 149 with a departure from the Port of Montreal. He also noted that locomotive CN 2511 on train 149 was at a complete stop from 6:05 a.m. to 7:00 a.m. on January 9, 2020, at Mile 3.4 of CN's Montreal subdivision.

[29] Mr. Nodorakis presented Exhibit M-12, a "Google Earth" satellite image on which Mr. Nodorakis had drawn the location of train 149 from the point where locomotive CN 2511 was stopped. He concluded that because of the length of train 149, the Bridge Street crossing had been blocked by that train's cars.

[30] I have considered these three exhibits, M-10, M-11 and M-12, and the evidence of Mr. Nodorakis in concluding that, on the balance of probabilities, train 149 came to a stop on January 9 at Mile 3.4 of the CN Montreal subdivision and that train 149 was blocking the Bridge Street crossing.

[31] Mr. Nodorakis submitted Exhibits M-13 and M-14, two audio recordings of traffic reports issued by the Canadian Broadcasting Corporation, which describe major congestion at the Bridge Street crossing due to a stopped train. These reports at 6:10 a.m. and 6:37 a.m. on January 9, 2020, outlined the delays motorists were experiencing due to the blockage at the Bridge Street crossing and advised listeners to avoid all roads leading to the crossing.

[32] Mr. Nodorakis submitted Exhibit M-15, a report from the CN police service, which indicated that a CN train coordinator advised them that there was a blockage at the St. Ambrose Street and Bridge Street crossings due to the stopped train 149. This same report indicated that the Bridge Street crossing was cleared at 7:02 a.m. on January 9, 2020, which is confirmed by a report from one of the CN police service constables who was on site.

[33] I find that the Minister has proven, on a balance of probabilities, that the Bridge Street crossing was blocked by CN train 149 on January 9, 2020, for a period in excess of 5 minutes while motor vehicles were waiting to cross, thereby contravening subsection 97(2) of the *Grade Crossings Regulations*.

**(1) CN's objections**

[34] During the presentation of the testimony of the Minister's witnesses, the applicant repeatedly objected to the admissibility of TC's witness testimony during the hearing.

[35] Although the applicant argued that all the evidence and all the testimony were merely conclusions, opinions, impressions and interpretations, I have ruled that the testimony and exhibits tendered during that testimony are admissible in evidence.

[36] I dismissed the applicant's objections and stated that the evidentiary value of the testimony would be assessed at the time of determination. I explained that the Tribunal was applying section 15 of the *Transportation Appeal Tribunal of Canada Act*, that "the Tribunal is not bound by any legal or technical rules of evidence in conducting any matter that comes before it", and that in considering natural justice, I wanted to hear the parties, so TC's witness testimony was admitted and that I would give the necessary weight to that testimony as well as to the evidence filed by TC.

[37] Further, in a decision from the Federal Court of Appeal in the case of *Canada (Attorney General) v. Mills (F.C.A.)*, [1984] F.C.J. No. 917, the Court noted that hearsay is admissible in administrative tribunals:

Contrary to what was assumed by the Chief Umpire, boards of referees, like other administrative tribunals, are not bound by the strict rules of evidence applicable in criminal or civil courts; they may, therefore, receive and accept hearsay evidence.

[38] I believe that TC's witnesses presented their professional interpretations of various documents that they accumulated during their investigation and that these documents represent the facts concerning the January 9, 2020, event.

[39] In considering all of the witness testimony presented by the Minister, I give significant weight to the credibility and reliability of these witnesses and the exhibits presented by TC. I have admitted TC's witness testimony and find that its witnesses were truthful and that, on the balance of probabilities, CN contravened subsection 97(2) of the *Grade Crossings Regulations*.

## (2) *Nonsuit motion*

[40] At the close of the Minister's witness testimony, the applicant filed a nonsuit motion. The applicant argued that, based on the evidence introduced by the Minister, there was no admissible evidence relating to the content of the statements and documents to establish the elements of the contravention. All of the Minister's evidence was hearsay when it came to their content.

[41] The Minister asked the following question: What is the test that this tribunal must apply in order to decide on this nonsuit motion? To answer this question, the Minister referred to the decision of the Ontario Court of Appeal in *FL Receivables Trust 2002-A v. Cobrand Foods Ltd.*, 2007 ONCA 425 (CanLII), which states at paragraph 35:

First, if a plaintiff puts forward some evidence on all elements of its claim, the judge must dismiss the motion. Second, in assessing whether a plaintiff has made out a prima facie case, the judge must assume the evidence to be true and must assign "the most favourable meaning" to evidence capable of giving rise to competing inferences.

[42] Paragraph 36 of the same decision states:

In other words, on a non-suit motion the trial judge should not determine whether the competing inferences available to the defendant on the evidence rebut the plaintiff's prima facie case. The trial judge should make that determination at the end of the trial, not on the non-suit motion.

[43] The Minister argued that the Tribunal is not in a position where it would have to rule on the evidentiary value, preponderant value, conclusive value, and direct value of the evidence. The Minister submits that there is evidence of each element and that the Tribunal is bound to deny the nonsuit motion.

[44] I accepted the Minister's submissions on the validity of a nonsuit motion at this point in the hearing and accepted the evidence as sufficient and credible to proceed with the elements of this hearing.

[45] In considering this nonsuit motion, I also relied on section 15 of the *Transportation Appeal Tribunal of Canada Act*, and in particular subsection 15(1), which states that "the Tribunal is not bound by any legal or technical rules of evidence in conducting any matter that comes before it".

[46] In considering all of the evidence presented by the Minister, I give significant weight to the credibility and reliability of these witnesses and the exhibits presented by TC.

[47] I dismiss the nonsuit motion as presented by the applicant based on my reliance on the testimony of TC's witnesses and their interpretations and analyses of the events that took place on January 9, 2020, at the Bridge Street crossing in Montreal. On the balance of probabilities, the event did occur and caused a delay of more than five minutes to motorists waiting at the crossing.

### (3) *CN's witness testimony*

[48] The applicant called Mr. Kyle Baker as a witness. Mr. Baker is Senior Manager of the Car Department, Mechanical, in the Champlain Division at CN. While not having direct responsibility or authority over train movements in the territory of the alleged incident, Mr. Baker was asked by CN counsel to describe how he would approach discussing the situation with train operating personnel to determine what initiatives would be applicable in such an event.

[49] Mr. Baker did confirm that he was not familiar with the locomotive technologies that would have expedited the movement of a train to clear sidings. He did opine about typical actions that he believed would have been taken.

[50] Mr. Baker was asked his view by CN counsel on the dispatch and inspection practices of locomotives prior to train departure. Mr. Baker stated that he was not familiar with train procedures, but he had enough CN experience to understand the delays that are typically incurred by locomotive failure.

[51] Mr. Baker stated that blocking a crossing is a "bad thing" and described his understanding of what CN personnel would be doing in response the moment a crossing is blocked.

[52] The purpose of this review is to determine whether CN contravened subsection 97(2) of the *Grade Crossings Regulations*. There is no need to undertake a causal analysis or to find solutions to this contravention. Had CN wished to present a due diligence defence to demonstrate

its best efforts to mitigate the impact of the crossing blockage, I would have taken these arguments into consideration. This was not done.

[53] I have concluded that CN relied simply on an argument of admissibility of testimony and evidence and, on this point, CN missed an opportunity to demonstrate its efforts to minimize the occurrence of such blockages.

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

[54] Pursuant to section 40.1 of the *RSA* and subsection 2(1) of the *Railway Safety Administrative Monetary Penalties Regulations*, subsection 97(2) of the *Grade Crossings Regulations* is subject to the administrative monetary penalty regime set out in sections 40.13 to 40.22 of the *RSA*.

[55] Mr. Nodorakis submitted his calculations of the amount in accordance with the relevant provisions, which provide for a maximum amount of \$250,000 in the case of a corporation. For a first offence of this type, Mr. Nodorakis applied a 70% reduction, for a total of \$75,000.

[56] Mr. Nodorakis confirmed that there were no aggravating factors.

[57] Mr. Nodorakis considered one mitigating factor, CN's compliance with TC staff requests and its adherence to the time allotment. For this mitigating factor, a reduction of 6%, or \$4,500, was applied to the monetary penalty, for a total of \$70,500.

[58] The base amount and all aggravating and mitigating factors were well presented and explained, showing very clearly the application of administrative procedures and the contributions of all levels of management, including the inspector, to the issuance of the administrative monetary penalty.

[59] The applicant requested that the monetary penalty be reduced at my discretion if there is an issue of admissibility of testimony or evidence. Given the testimony of TC's witnesses and the lack of specific testimony from CN, no reduction was applied.

### **III. DETERMINATION**

[60] The Minister of Transport has proven, on a balance of probabilities, that the crew of CN train 149 contravened subsection 97(2) of the *Grade Crossings Regulations*. The imposition of an administrative monetary penalty is upheld.

[61] The total amount of \$70,500 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.

April 28, 2022

(Original signed)

John Gradek  
Member

Representations

For the Minister:     Micheline Sabourin  
For the Applicant:    Brian Lipson