TRANSPORTATION APPEAL TRIBUNAL OF CANADA

Citation: *Canadian National Railway Company v. Canada (Minister of Transport)*, 2022 TATCE 50 (Review)

TATC File No.: RQ-0054-41

Sector: Rail

BETWEEN:

Canadian National Railway Company, Applicant

- and -

Canada (Minister of Transport), Respondent

Heard by: Videoconference on May 30 and 31 and June 1 and 3, 2022

Before: George 'Ron' Ashley, Member

Rendered: October 5, 2022

REVIEW DETERMINATION AND REASONS

Held: The Minister of Transport has not proven, on a balance of probabilities, that the applicant violated section 17.2 of the *Railway Safety Act* and paragraph 19.1(b) of the *Railway Freight Car Inspection & Safety Rules*. The monetary penalty is dismissed.

The Minister of Transport has not proven, on a balance of probabilities, that the applicant violated subsection 15(1) of the *Railway Safety Management System Regulations, 2015*. The monetary penalty is dismissed.

I. BACKGROUND

[1] By Notice of Violation – Contravention of Designated Provision – Issuance of Monetary Penalty (Rail Safety) (Notice of Violation) dated March 25, 2021, Transport Canada (TC) assessed a total monetary penalty of $237,498.00 against Canadian National Railway Company (CN). Schedule A to the Notice of Violation stated:

> 1. On or about June 2nd and 4th 2020, in the vicinity of Shawinigan QC, or thereabouts, the Canadian National Railway Company (CN) maintained a railway otherwise than in accordance with section 4.2 of the *Railway Freight Car Inspection & Safety Rules* (the *Freight Car Safety Rules*) that apply to CN, thereby violating section 17.2 of the *Railway Safety Act* (hereinafter, the Act), namely by failing to ensure that safety inspections were performed by a certified car inspector on freight cars formed up on, or added to, outbound trains 46621 02 and 46621 04, prior to leaving the Garneau safety inspection location.
>
> **Administrative monetary penalty: $52,083.00**
>
> 2. On or about May 11th 2020, in the vicinity of Shawinigan QC, or thereabouts, CN maintained a railway otherwise than in accordance with paragraph 19.1 (b) of the *Freight Car Safety Rules* that apply to CN, thereby violating section 17.2 of the Act, namely by implementing a change to the list of safety inspection locations, by removing the Garneau location from that list, less than sixty (60) days after it had filed such a change with the Department of Transport.
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> **Administrative monetary penalty: $52,083.00**
>
> 3. On or about May 11th 2020, CN failed to conduct a risk assessment when a proposed change to its railway operations, namely the removal of Garneau, QC from the list of safety inspection locations, could affect the safety of the public or personnel or the protection of property or the environment, thereby violating subsection 15(1) of the *Railway Safety Management System Regulations, 2015*.
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> **Administrative monetary penalty: $133,332.00**

[2] On September 29, 2021, CN made a request for review to the Transportation Appeal Tribunal of Canada (TATC or Tribunal).

II. PRELIMINARY ISSUES

[3] At the outset of this review hearing, counsel for CN and the Minister of Transport (Minister) jointly advised that the first allegation, that relating to section 4.2 of the *Railway Freight Car Inspection & Safety Rules (Freight Car Safety Rules)*, was not to be subject to this review. The matter had been dealt with outside of these proceedings. Accordingly, this review only deals with the second and third allegations outlined in the Notice of Violation.

[4] Counsel for CN also advised that two of their witnesses would like to testify in French, and it was acknowledged that this was acceptable to the Minister's counsel.

III. ANALYSIS

A. Issues

[5] The Tribunal must determine whether CN violated section 17.2 of the *Railway Safety Act (RSA)* and paragraph 19.1(b) of the *Freight Car Safety Rules*.

[6] The Tribunal must also determine whether CN violated subsection 15(1) of the *Railway Safety Management System Regulations, 2015* (SMS regulations).

B. Legal framework

[7] 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.

[8] Section 4.2 of the *Freight Car Safety Rules* provides:

> 4.2 Safety inspections shall be performed by certified car inspector(s) at safety inspection locations
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> (a) where trains are made up;
>
> (b) on cars added to trains;
>
> (c) where cars are interchanged.
>
> Such inspections may occur before or after a car is placed in a train at that location.

[9] Paragraph 19.1(b) of the *Freight Car Safety Rules* provides:

> 19.1 A railway company shall file with the Department
>
> […]
>
> (b) safety inspection locations as outlined in subsection 4.2 of these Rules. The railway company shall file any changes to the list of safety inspection locations to the Department sixty (60) days prior to implementing such changes;

[10] Section 3.21 of the *Freight Car Safety Rules* defines a "safety inspection location" as "a location designated by a railway company where safety inspections are performed."

[11] Subsection 15(1) of the SMS regulations provides:

> **15 (1)** A railway company must conduct a risk assessment in the following circumstances:
>
> **(a)** when it identifies a safety concern in its railway operations as a result of the analyses conducted under section 13;
>
> **(b)** when it proposes to begin transporting dangerous goods, or to begin transporting dangerous goods different from those it already transports; or
>
> **(c)** when a proposed change to its railway operations, including a change set out below, may affect the safety of the public or personnel or the protection of property or the environment:

> **(i)** the introduction or elimination of a technology, or a change to a technology,
>
> **(ii)** the addition or elimination of a railway work, or a change to a railway work,
>
> **(iii)** an increase in the volume of dangerous goods it transports,
>
> **(iv)** a change to the route on which dangerous goods are transported, or
>
> **(v)** a change affecting personnel, including an increase or decrease in the number of employees or a change in their responsibilities or duties.

[12] Pursuant to subsection 40.16(4) of the *RSA*, the burden is on the Minister to prove the case. The standard of proof is on the balance of probabilities, as per section 15(5) of the *Transportation Appeal Tribunal of Canada Act*.

C. First issue – Did CN violate section 17.2 of the *RSA* and paragraph 19.1(b) of the *Freight Car Safety Rules*?

[13] The Tribunal must determine whether CN violated section 17.2 of the *RSA* and paragraph 19.1(b) of the *Freight Car Safety Rules*. Paragraph 19.1(b) of the *Freight Car Safety Rules* provides, in part, that the railway company shall file "any changes to the list of safety inspection locations" further to the requirement to conduct inspections set out in section 4.2 of the *Freight Car Safety Rules*. The locations themselves are ones that are designated for the purpose consistent with section 3.21 of the *Freight Car Safety Rules*.

[14] The allegation is that CN breached paragraph 19.1(b) of the *Freight Car Safety Rules*, as set out in the Notice of Violation, "namely by implementing a change to the list of safety inspection locations, by removing the Garneau location from that list, less than sixty (60) days after it had filed such a change with the Department of Transport."

[15] The facts giving rise to this allegation are not disputed although the interpretation of the facts and the import of the regulatory requirement are subject to disagreement.

[16] On March 23, 2020, TC issued to CN a Rail Safety Equipment Notice (Exhibit 5) further to inspections undertaken on CN railway cars in the Quebec region earlier that year. That notice identified a number of defects found in CN cars, notably at CN's Garneau Yard, and concluded that the defects constituted a threat to railway operations and presented an overall threat to safety. TC witness Mr. Reno Gallant, Regional Safety Inspector at TC, reiterated this finding at the hearing and stated that the notice remains in effect today.

[17] CN's Garneau Yard is located in northern Quebec and at the time was a designated safety inspection location, identified as such in a list maintained by CN pursuant to sections 19.1 and 3.21 of the *Freight Car Safety Rules*. Inspections had been carried out at that location by CN further to section 4.2 of the *Freight Car Safety Rules*. It is CN's list of certified car inspection (CCI) locations, and CN's proposal to remove Garneau from the list, that is at the heart of this allegation.

[18] In early 2020, and as a result of reduced CN traffic in northern Quebec attributed at least in part to the COVID-19 pandemic, CN officials decided to delist Garneau as a designated safety inspection location. Internal CN planning e-mails dated April 29, 2020 (Exhibit 13), show that CN expected a phased-in approach to this delisting. Three phases were set out, starting with

Phase 1 to be effective May 5, 2020, whereby "[a]ll the Garneau and Senneterre freight are going into RDP [Rivière-des-Prairies] to get switched out." Phase 2 has trains bypassing Garneau (north and southbound) within the following 10 days and Phase 3 has "[l]ocals/yards at Garneau abolished and work moved to RDP. Timeline – 14-18 days."

[19] For the most part, these changes were implemented as planned.

[20] According to a record of inspections from May 1, 2020, to July 1, 2020 (Exhibit 10), and an employee investigation report dated June 14, 2020 (Exhibit 11), car inspections were performed by CN during the pre-closing period at Garneau. TC witness Jean Nodorakis, Regional Enforcement Unit Investigator at TC, also confirmed that inspections continued to a varying extent at Garneau, with an increase in inspections undertaken at other locations, notably at CN's Taschereau Yard and Joffre Yard as well as at Rivière-des-Prairies. There was also a change to CN's Train Service Plan in June 2020 (Exhibit 14) where Garneau Yard was, at least in part, bypassed by CN trains.

[21] Exhibit 22 lists CN employees at Garneau Yard who were impacted by these changes. It shows that as of May 2020, employee duties and locations had been changed at Garneau Yard, with some employees being laid off and others reassigned.

[22] To summarize, the removal of the Garneau Yard from the CN list of safety inspection locations had been planned by CN in the period immediately before May 1, 2020. On that date, a notice of the proposed closure was provided to TC officials in Ottawa. This notice was identified as being pursuant to paragraph 19.1(b) of the *Freight Car Safety Rules*. The internal CN documents leading up to that notice show that CN was aware of the 60-day notice period set out in the *Freight Car Safety Rules* and planned to implement the closure in a staged manner, starting as early as May 8, 2020. Changes at Garneau Yard were implemented as planned throughout May and June. Inspections continued during that period – on a reduced basis at Garneau Yard – with a consequent increase at other yards, including Rivière-des-Prairies. Garneau Yard stayed on the list throughout that period.

D. Interpretation of paragraph 19.1(b) of the *Freight Car Safety Rules*

[23] This allegation boils down to the correct interpretation of paragraph 19.1(b) of the *Freight Car Safety Rules*.

[24] The Minister's counsel said that the 60-day transition period prohibits any type of changes to inspections at the yard during the pre-closure period. They relied heavily on the Regulatory Impact Analysis Statement (RIAS) which accompanied the promulgation of the SMS regulations in 2015, including paragraph 19.1(b) of the *Freight Car Safety Rules*. There, counsel said it was very clear that the regulatory requirements for railway operating safety had increased significantly following the report of the events giving rise to the Lac-Mégantic railway accident.

[25] To this end, the Minister's counsel argued that paragraph 19.1(b) concerns a public welfare offence and has to be read according to its ordinary meaning, in light of the wording of the provision, the overall regulatory context and the overarching attention of the *RSA* to safety. As such, counsel argued that the list of inspection locations was to be maintained by CN – and not to be changed – unless 60 days' notice was first provided to TC. Counsel advocated that the

requirement does not permit incremental changes during the pre-closing period so that on day 60 the closure is "ready to go."

[26] TC offers no guidance on how this might be done and acknowledges that the rules themselves do not otherwise stipulate how the change can be put in place. Rather, according to the Minister's counsel, the only guidance is that no changes be undertaken before the 60 days are up. This period grants employees, management and TC, through risk assessment, enough time to adapt.

[27] Overall, the Minister's counsel argues that any change to railway inspections or operations that are associated with taking a location off the list cannot be undertaken by way of creeping change, so that on day 60, the situation is effectively a *fait accompli*.

[28] CN counsel disagreed, arguing that the Minister's interpretation of paragraph 19.1(b) was too expansive. Given the requirement to read the provision according to its "ordinary meaning," CN argued that the 60-day rule related to the list and "changes to the list" rather than any operating or other changes relating to locations on the list.

E. Finding on first issue

[29] Overall, I find that the rule is clear in its ambit as referring only to the requirement to file changes to the "list of safety inspection locations." The Notice of Violation refers to changes "to the list" and nothing more. Contrary to the allegation described in the notice, the evidence does not show that CN removed Garneau from the list prior to the requisite 60-day period or pre-emptively stopped inspections at that location during that period.

[30] In an internal e-mail chain (Exhibit 13), CN contemplated removal of Garneau in late April 2020, and it was acknowledged by CN managers in the CN regulatory department on April 29 that paragraph 19.1(b) applied.

[31] Pre-closing conditions were set by the responsible CN manager to the effect that:

- Garneau must remain on the train service plan (TSP) for the 60-day period;
- any trains originating at Garneau must receive a CCI;
- any train which was built at a non-CCI location must receive a CCI at Garneau if it is passing through there; and
- pick ups at Garneau must receive a CCI.

[32] There were incidental operating changes in anticipation of the delisting, and these impacted the rail traffic through Garneau and the inspections undertaken there. Yet, and in spite of these changes, the evidence shows that Garneau remained a car inspection location throughout. Certainly, the nature of some of the traffic going through Garneau changed during the period due to the rerouting of trains, but Garneau stayed on the list and inspections continued there for a significant amount of traffic.

[33] For example, Exhibit 28 shows CN outbound lineups for train 466 at Garneau from May 1 to July 1, 2020. It shows that 1,440 CCI inspections were performed there during that period.

[34] Exhibits 29 and 30 show spot check audits that were undertaken. These reports demonstrate the same thing which is that CCI inspections were continuing systematically at Garneau even though the CN TSP and employee assignments were changing during that period in anticipation of the July 1 date.

[35] With limited exception (relating for example to the transport of dangerous goods), rail operating matters such as staff changes or relocations, TSP changes and equipment rerouting are everyday occurrences that do not involve regulatory notice, transition periods or approval.

[36] Basically, as it is presently worded, and keeping in mind the safety objectives of the *RSA*, I find that paragraph 19.1(b) was not intended to freeze all incidental or other railway operations at Garneau during the 60-day period. While the Minister's counsel argued that this was implied, I disagree. Clearer language would be required for this to be the case.

[37] In light of the above, I find that CN did not contravene paragraph 19.1(b) of the *Freight Car Safety Rules*. The evidence does not establish that CN stopped inspections at Garneau in the May to June 2020 period or that it removed Garneau from the list of CCI locations during that time. It is, therefore, not necessary to examine any possible due diligence defence or the amount of the monetary penalty imposed, including the identified aggravating factors that were the subject of considerable debate at this hearing.

F. Second issue – Did CN violate subsection 15(1) of the SMS regulations?

[38] The Tribunal must determine whether CN violated subsection 15(1) of the SMS regulations. Subsection 15(1) of the SMS regulations applies when there is a "proposed change" to railway operations. The Minister's counsel argues that the planned delisting of the Garneau Yard as one of CN's three designated CCI locations in the province of Quebec is such a change because it could affect safety and CN personnel. Accordingly, the failure of CN to conduct a risk assessment for that change is a clear contravention of the rule.

[39] The Minister's counsel argued that the requirement to conduct a risk assessment is mandatory and clear, with no exceptions or extenuating circumstances. Counsel urged that railway company discretion and self-management, which may have been the case pre-2015, is no longer an option, and that this is consistent with the amplitude of the regulatory changes brought about in 2015 where the goal is the "highest level of safety" in railway company operations in Canada.

[40] The Minister's counsel also stated that the law places the onus on the railway company to do the assessment. The onus is not on TC. In support, counsel referred to Exhibits 24 and 25, where CN advised TC that it had undertaken a risk assessment for other proposed earlier projects triggered by the requirement set out in subsection 15(1) of the SMS regulations.

[41] The Minister also refers to the record of CN traffic volumes at Garneau Yard which shows that the number of cars processed at the yard had increased from May to June 2020 (Exhibit 18 shows that 5,864 cars were processed in May and 6,585 processed in June). This, the Minister's counsel argued, contradicts CN's statement of declining volumes (Exhibit 18). Counsel then noted that even though more cars were processed there was, nevertheless, a reduction in **car inspections** at that location, with 204 in May and 183 in June).

[42] According to the Minister's counsel this reduction, combined with changes to CN's train routings, the TSP change, the change to employee postings and assignments and the results of TC inspections in early 2020 as well as in May and June 2020 all point to the need for a risk assessment to have been done, as can be seen in Exhibits 3 and 10 which list car defects found.

[43] CN disagreed, arguing that there was no breach of subsection 15(1). CN argued that the provision carries a two-step test, neither being met in the present case.

[44] First, CN's counsel argued that there must be a proposed **change to railway operations**, as stated in paragraph 15(1)(c). On this point counsel acknowledged that "operation" is not defined in the *RSA*, although the definition of "operate" does appear in section 87 of the *Canada Transportation Act* as including "any act necessary for the maintenance of the railway or the operation of a train." Counsel also cited TATC precedent cases that referenced section 87 confirming the breadth of meaning to be attributed to the term for *RSA* purposes.

[45] As a result, CN counsel agreed that a car inspection itself would be an aspect of railway operation. Yet, according to counsel, the evidence here shows there was no proposed change to car inspections. What was only being proposed by CN was a change in inspection locations and not inspections themselves, because it was intended that inspections were simply being "conducted elsewhere."

[46] CN counsel next argued that the second step required by paragraph 15(1)(c) (and the need for an evaluation) was not met because there was no anticipated impact on safety of the public or personnel or the protection of property or the environment. Here, CN counsel noted the testimonies of TC witnesses Mr. Gallant and Mr. Nodorakis, as well as that of CN witnesses who affirmed the continuing existence of inspections at Garneau during the 60-day period (Exhibit 27). This, counsel argued, is in addition to inspections continuing at Taschereau Yard (Montreal), Joffre Yard (Quebec City) and Rivières-des-Prairies. Effectively, CN counsel argued there was no change to overall inspections by simply removing Garneau from the list of CCI-designated locations.

[47] CN acknowledged that the length of rail haul may, as a consequence, change so that inspections historically at Garneau are now to take place at Taschereau which is over 100 km from Garneau. This, CN counsel stated, is not significant considering that inspection distances are not regulated and, when compared to hauls encountered elsewhere in Canada. For example, CN counsel stated that rail line hauls between Ontario and British Columbia, which involve mixed terrain and a line haul of 3000 km, take place without interim inspection points.

[48] As an example of CN's attention to safety, and by way of offsetting any potential risks of not having an inspection at Garneau, CN counsel referred to the evidence of Mr. Dale Iverson, a specialist at CN responsible for implementing and maintaining rail wayside detectors. Mr. Iverson stated that wayside detectors have been installed by CN throughout their system. This equipment, he said, is able to pick up en route various car defects including bearing problems, dragging equipment, wheel wear and hot wheels. These detectors, he said, are spaced by CN every 30 km. He acknowledged that inspections are not a perfect substitute for physical car inspections by certified inspectors, but they are nonetheless an important part of CN's overall

SMS programs. He implied that this was part of CN's internal protection system that supported the conclusion that the delisting of Garneau would not have any safety implication.

G. Finding on second issue

[49] I find that the March 23, 2020, Rail Safety Equipment Notice (Exhibit 5) and the history of car inspection problems in northern Quebec which gave rise to that Notice of Violation all point to this area as being a sensitive one for railway safety. On the one hand, the extra 100 km haul without inspection is not necessarily significant when compared to other CN traffic and other locations over different geographies. On the other hand, the traffic is largely composed of gondola cars filled with bulk materials loaded at site by shipper equipment. CN admitted that customer loading can be a problem and can lead to equipment defects on cars due to lack of customer care. The extra car travel in this case cannot be ignored in the overall context and, to Mr. Iverson's point, wayside detectors can discover only some of the defects in passing rail cars.

[50] Nevertheless, there was no evidence showing that the extra distance in this case will be or is directly related to an increased risk to rail safety, personnel, the public or the environment. While TC felt that the extra 100 km warranted a finding of increased risk, there was nothing more to substantiate it by way, for example, of relational studies.

[51] Overall, CN's plan throughout was that after delisting Garneau, CCI inspections would still be performed at existing car inspection locations or new non-designated locations (for example, Rivière-des-Prairies). The evidence is consistent with this.

[52] It shows that there has been no appreciable change in safety matters or events including car defects found. While discovered defects do continue (Exhibits 9, 10, 28, 29 and 30), their incidence is not significantly changed from 2019 and early 2020.

[53] There is no available evidence showing that new train routings will impact safety or that the limited number of employees affected by suspension or reassignment will increase risk. Since the onus falls on TC to show this on a balance of probabilities, this part of the contravention fails.

[54] Said another way, I am not convinced based on the evidence in this hearing that there is a safety issue that "could" arise from delisting Garneau when certified inspections continue only 100 km distant and, notwithstanding the delisting, inspections continue at that location anyway.

[55] At the close of the hearing, the Minister's counsel also argued that where a designated inspection location is eliminated, as here, the impact is unknown; only a risk assessment could show whether safety may be impacted. Counsel implied that paragraph 15(1)(c) requires that a risk assessment be done in all cases.

[56] The difficulty I have with this reasoning is that according to the paragraph, as presently worded, an assessment is required only when safety may be affected and, even then, the decision to do one, or not, is left in the first instance to the railway company. Thus, Ms. Lynda MacLeod, Senior Manager, Regulatory Affairs at CN, advised TC officials in May/June 2020 that in CN's view, a risk assessment was not done because one is not required under paragraph 15(1)(c).

[57] There is no requirement that an assessment be undertaken in all cases. This distinguishes paragraph 15(1)(c) of the SMS regulations from paragraph 19.1(b) of the *Freight Car Safety Rules*. The latter requires the filing of list changes **in all circumstances**, not just those where the railway company thinks safety may be impacted. Another example of mandatory action for the railway company appears in paragraph 15(1)(b) of the SMS regulations where a risk assessment is always required when the railway company proposes to begin transporting dangerous goods or changes to goods that it already transports.

[58] I understand what the Minister's counsel referred to as the "Swiss Cheese" approach to regulatory oversight, where layers of protection are embedded so that safety risks are minimized. I do not believe that this model is compromised when the regulation itself gives the decision to the railway companies in the first instance to conduct an assessment.

[59] In light of my findings, above, and based on the evidence at this hearing, the allegation has not been proven by TC, on the balance of probabilities. It is, therefore, not necessary to examine the question of CN's due diligence or the quantum of the administrative monetary penalty or the factors used by the Minister in arriving at the amount levied.

IV. DETERMINATION

[60] The Minister of Transport has not proven, on a balance of probabilities, that the applicant violated section 17.2 of the *Railway Safety Act* and paragraph 19.1(b) of the *Railway Freight Car Inspection & Safety Rules*. The monetary penalty is dismissed.

[61] The Minister of Transport has not proven, on a balance of probabilities, that the applicant violated subsection 15(1) of the *Railway Safety Management System Regulations, 2015*. The monetary penalty is dismissed.

October 5, 2022

(Original signed)

George 'Ron' Ashley

Member

Appearances

For the Minister:	Micheline Sabourin
For the Applicant:	Vikki-Ann Flansberry