Federal Court  Cour fédérale

Date: 20240821

Docket: T-2052-23

Citation: 2024 FC 1297

Ottawa, Ontario, August 21, 2024

PRESENT: Mr. Justice Sébastien Grammond

BETWEEN:

CANADIAN NATIONAL RAILWAY COMPANY

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

[1] Once again, Canadian National Railway Company [CN] is bringing a case about missing bolts to this Court. CN is seeking judicial review of a decision of the Transportation Appeal Tribunal of Canada [the Tribunal] that imposed a penalty for breaching certain rules respecting track maintenance. It argues that the Tribunal misunderstood the law respecting the defence of due diligence, disregarded the evidence of its efforts to maintain its tracks and failed to specify precisely what it should have done to comply with the law.

[2] I am dismissing CN's application. For the reasons that follow, the Tribunal reasonably found that CN had brought insufficient evidence of the steps it took to ensure compliance on the precise subdivision where the violation took place and in the period immediately before the violation. Because CN had the burden of proving facts relevant to its defence of due diligence and failed to do so, the Tribunal did not need to specify a standard of care, and any error it may have committed in explaining the concept of due diligence did not affect the outcome.

I. Background

[3] The *Railway Safety Act*, RSC 1985, c 32 (4th supp) [the Act], requires railway companies to maintain their tracks in accordance with the *Rules Respecting Track Safety*, also known as the *Track Safety Rules* or TSR. My colleague, Justice John Norris, provided a detailed description of the legal framework relevant to this case in *Canadian National Railway Company v Canada (Attorney General)*, 2020 FC 1119 [the *Missing Bolts* case].

[4] On July 10 and 11, 2018, Transport Canada inspected the Lac La Biche subdivision of CN's railway network. The Lac La Biche subdivision is located between Edmonton and Fort McMurray, Alberta. It is a "key route" on which dangerous goods are regularly transported. The inspection revealed 26 non-compliant joints due to defective ties and 28 rail joints where a bolt was missing, contrary to specific provisions of the TSR. Transport Canada then sent a notice of violation to CN, claiming a penalty of $133,248.36.

[5] CN filed a request for review with the Tribunal. This request was heard by a one-member panel of the Tribunal [the review panel]. CN argued that it did not commit the *actus reus* of the

defective ties violation and, with respect to both violations, raised a defence of due diligence. In a decision indexed as 2022 TATCE 1, the review panel found that CN committed the violations, rejected the defence of due diligence and upheld the amount of the penalty. In particular, it found that CN had not brought evidence of the specific measures it took to ensure compliance of the Lac La Biche subdivision prior to the inspections in July 2018. Rather, the evidence pertained to CN's general policies and was given by a witness who did not work on the Lac La Biche subdivision at the relevant time. The review panel also found that the reports of the inspections conducted by CN in the months prior to the violation were unreliable, because of deficiencies in the computer system used to record inspections and because some repair activities were not captured in the system.

[6] CN then appealed to a three-member panel of the Tribunal [the appeal panel]. Before the appeal panel, CN reiterated the grounds it put forward before the review panel. Moreover, CN asserted that the review panel erred by failing to identify the appropriate standard of care in its discussion of the defence of due diligence or, in other words, to state what CN should have done to prevent a violation.

[7] In a decision indexed as 2023 TATCE 40, the appeal panel dismissed CN's appeal with respect to the violations but reduced the amount of the penalty to $104,082.36. In particular, it found that the review panel did not err in its articulation of the concept of due diligence. Moreover, it endorsed the review panel's finding that "specificity in CN's evidence is absent in the present case" and that there was "little to no evidence . . . in the pre-July 2018 period." Thus, even though CN brought general evidence regarding its track inspection programs, "there were

no specifics on the nature and extent of their effectiveness or their application at the time of the infractions."

[8] CN now seeks judicial review of the appeal panel's decision. It argues that the appeal panel should have explicitly stated what the standard of care was in this case. It also contends that the appeal panel misapprehended the law when it stated that "liability for a regulatory infraction, may arise in circumstances that fall short of outright negligence." CN also submits that this Court should decide these two issues on a standard of correctness because they involve a concept, the standard of fault for regulatory offences, that applies in a broad range of circumstances. Moreover, CN argues that the appeal panel unreasonably rejected its defence of due diligence because it disregarded the evidence of its track inspection programs.

[9] This application was initially heard by Justice Elliott, who retired from the Court. The Chief Justice then assigned the matter to me. Both parties agreed that I would decide the application after reviewing the record and listening to the audio recording of the hearing.

II. Analysis

[10] I am dismissing the application. I find that the Tribunal reasonably rejected CN's defence of due diligence because CN failed to bring evidence of the actual implementation of its track inspection program on the Lac La Biche subdivision prior to the violations in July 2018. Without such evidence, the Tribunal was simply unable to assess whether CN acted diligently to prevent the violations. This finding was sufficient to dispose of the matter. The two other questions raised by CN are not determinative.

[11] Both parties agree that the offences created by the Act are strict liability offences and that the Tribunal had to apply the framework laid out by the Supreme Court of Canada in *R v Sault Ste. Marie*, [1978] 2 SCR 1299 [*Sault Ste. Marie*]. In that seminal case, the Court described strict liability offences as follows, at 1326:

> Offences in which there is no necessity for the prosecution to prove the existence of *mens rea*; the doing of the prohibited act *prima facie* imports the offence, leaving it open to the accused to avoid liability by proving that he took all reasonable care. This involves consideration of what a reasonable man would have done in the circumstances. The defence will be available if the accused reasonably believed in a mistaken set of facts which, if true, would render the act or omission innocent, or if he took all reasonable steps to avoid the particular event.

[12] The assertion that one "took all reasonable steps to avoid" the violation is usually called the defence of due diligence.

[13] I will deal with CN's submissions in a different order than the one in which they were put forward. I will begin with the issue that is determinative, namely, whether the Tribunal reasonably rejected CN's due diligence defence.

[14] I also reject at the outset CN's submission that the two other issues must be decided on the correctness standard, because they would involve questions having a "central importance to the legal system as a whole": *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paragraphs 58–62, [2019] 4 SCR 653 [*Vavilov*]. As will become clear, CN's submissions pertain to the sufficiency of the reasons given by the Tribunal in this particular case, not to any question of principle regarding the defence of due diligence.

A. *Whether CN Showed Due Diligence*

[15] CN submits that the Tribunal erred by disregarding evidence tending to show that it acted diligently to prevent the violations from taking place. In substance, CN says that its track inspection procedures meet or exceed the requirements of the TSR, and that this should suffice to ground a defence of due diligence. For example, it says that the Lac La Biche subdivision is visually inspected twice a week, which corresponds to the TSR's requirement of twice weekly visual inspections.

[16] This is essentially a factual issue, on which the Court will only intervene "where the decision maker has fundamentally misapprehended or failed to account for the evidence before it": *Vavilov*, at paragraph 126.

[17] It is important to describe precisely the basis for the Tribunal's decision. The Tribunal did not decide that CN's actions failed to meet the standard of due diligence. Rather, the Tribunal found that it did not have sufficient evidence of the actual work CN performed on the Lac La Biche subdivision in the period prior to the inspection that revealed the violations in July 2018. It noted that CN's only witness was not working on the Lac La Biche subdivision during the relevant period and could only provide general information as to CN's track inspection policies. Moreover, it found that the inspection reports pertaining to the relevant period were unreliable. In other words, the Tribunal did not find CN negligent; rather, CN did not meet its burden and failed to provide the evidence that would have allowed the Tribunal to decide whether it was negligent or diligent.

[18] In my view, the Tribunal's conclusions are reasonable. Contrary to CN's submissions, the Tribunal did not disregard evidence regarding CN's track inspection policies. Rather, it reasonably found that these policies were of a general nature and did not constitute sufficient evidence of the actual measures that were implemented on the Lac La Biche subdivision prior to the violation.

[19] The Tribunal's reasoning is consistent with the law governing the defence of due diligence in the regulatory context as laid out in *Sault Ste. Marie*. It stands to reason that evidence of due diligence must pertain to the period immediately prior to the offence. Likewise, the evidence must be sufficiently specific to the actual place where the offence happened. In other words, it is not enough to show the existence of a general policy if the policy was not actually implemented where and when the offence took place. CN does not challenge these requirements, which are amply supported by the case law: *Violator no 10 v Canada (Attorney General)*, 2018 FCA 150 at paragraph 62; *Ontario (Ministry of Labour) v Pioneer Construction Inc* (2005), 76 OR (3d) 603 (Ont SCJ) at paragraph 12, rev'd on other grounds, (2006), 79 OR (3d) 641 (CA); *R v Pilen Construction of Canada Ltd*, [1999] OJ No 5650 (Ont JP) at paragraph 29; *R v KB Home Insulation Ltd*, [2008] OJ No 6019 (Ont CJ) at paragraph 22; *Ontario (Ministry of Labour) v Wal-Mart Canada Corp*, 2016 ONCJ 267 at paragraphs 199–200, aff'd 2017 ONSC 6726; and the *Missing Bolts* case at paragraph 95.

[20] The issue therefore boils down to whether the Tribunal reasonably found that CN did not bring evidence that met the requirements of contemporaneity and specificity. In my view, the Tribunal did not misapprehend or fail to account for the evidence in this regard, and its decision

was reasonable. CN's witness was simply unable to testify as to CN's inspection practices on the Lac La Biche subdivision prior to July 2018. Moreover, the evidence substantiated the Tribunal's doubts regarding the reliability of the inspection reports pertaining to this period. For example, there was no evidence that the employees who performed the inspections held the requisite certification. This is especially important, as the reports disclose that at least 13 different employees performed inspections over the relevant period. CN's witness also conceded that the system for recording inspection reports was difficult to use and that some repairs were not documented. Moreover, inspections conducted by CN a few days before the violation revealed only one missing bolt, which raises doubts as to their effectiveness.

[21] For this reason, the argument that CN's track inspection policies meet the requirements of the TSR does not assist CN. The evidence simply does not show whether those policies were implemented on the Lac La Biche subdivision prior to July 2018. In this regard, the appeal panel noted, at paragraph 54 of its decision, that "a railway company may have a comprehensive safety program and culture in place, . . . but in terms of due diligence, that does not necessarily absolve the railway company from having committed a particular infraction." CN did not challenge this statement.

[22] I would add that the Tribunal's findings in this regard are not affected by CN's two other grounds of judicial review. These grounds pertain to the definition of the standard of care or, in other words, the scope of the steps CN needed to take to avoid a breach of the law. As the Tribunal did not have enough evidence of the steps CN actually took, it simply did not reach the

stage of the analysis where these steps are measured against a standard. Any mistake regarding the articulation of that standard would have had no bearing on the outcome.

[23] At the hearing, CN also argued that it launched a "bolt patrol" on the day before the inspection, and that this was evidence of an actual step taken before the violation. I must say that the fact that CN undertook this patrol after being advised of the impending inspection does not tend to prove due diligence. The Tribunal's silence regarding this aspect of the evidence does not render its decision unreasonable.

B. *Whether the Tribunal Needed to Define the Standard of Care*

[24] At the hearing, CN forcefully argued that the Tribunal erred in failing to state explicitly what the standard of care was.

[25] CN's submission must be rejected for the basic reason that the alleged omission played no role in the Tribunal's decision. In other words, it was not part of the chain of reasoning that led the Tribunal to find CN liable. If it wished to assert a defence of due diligence, CN had the burden to provide evidence of the steps it took to prevent the commission of an offence. The Tribunal held that CN did not discharge this burden and, as a result, did not know what steps CN actually took. Therefore, the analysis stopped before it became necessary to compare those steps to the standard of care. Hence, it was not necessary to define the standard of care.

[26] For the same reason, the definition of the standard of care was not a "key issue" that the Tribunal had to discuss at length: *Vavilov*, at paragraph 128. An administrative decision-maker's

duty to provide reasons that address the main issues raised by the parties does not extend to issues that become moot because of the manner in which other issues are decided.

[27] For the sake of completeness, I will nevertheless explain why the cases cited by CN do not buttress its submission.

[28] CN first relies on the Supreme Court's statement, in *Fullowka v Pinkerton's of Canada Ltd*, 2010 SCC 5 at paragraph 80, [2010] 1 SCR 132 [*Fullowka*], that "the trial judge erred by failing to articulate the standard of care" to which the defendant was held. It may well be that, when giving reasons for a finding of negligence, a trier of fact will usually need to explain what the defendant should have done. However, this principle cannot be transposed to the present case, because the Tribunal never found that CN was negligent. Rather, the Tribunal found that CN, who had the burden of proof on this issue, failed to prove the facts that would be relevant to a defence of due diligence. This underscores the difference between a civil tort claim and a prosecution for a regulatory offence (or proceedings relating to an administrative monetary penalty). In a civil tort claim, the plaintiff bears the burden of proving that the defendant acted negligently. In contrast, in a regulatory prosecution, the defendant bears the burden of proving that it acted with due diligence (that is, not negligently). In the latter context, the defendant's failure to provide sufficient evidence (or any evidence) may result in a conviction without any positive finding of negligence and, consequently, without the need to articulate the standard of care.

[29] CN also relies on Justice Norris's decision in the *Missing Bolts* case, in particular the statement at paragraph 95 that:

> When the defence of due diligence is raised, the trier must determine what steps a reasonably prudent person (or company) would take to avoid the deficiency in question and whether the defendant had taken those steps.

[30] This statement is to the same effect as the Supreme Court's statement in *Fullowka* that was reproduced above. The present situation, however, is different. A finding of negligence is based on a comparison between what the defendant did and what a reasonable person would have done. To reach a positive finding of negligence, a decision-maker must establish both sides of the comparison. But if the evidence of one side is missing, no comparison can be drawn and the party who bears the burden of proof fails.

[31] In addition, Justice Norris's statement must be read in the particular context of the case before him. It appears that both parties relied heavily on the idea that there was a certain "normal" number of bolts that could be missing over a given length of track without being indicative of a lack of due diligence, but diverged starkly as to what that number was. The Tribunal did not indicate what that "normal" number was and Justice Norris found that this omission rendered the decision unreasonable. In this case, however, both parties' witnesses agreed that the number of missing bolts revealed by the inspection was above what one would normally expect. Hence, the Tribunal did not need to decide what the "normal number" was.

[32] Moreover, it is unclear that a trier of fact must always describe explicitly the standard of care before finding that a defendant did not show due diligence nor act with reasonable care. In *R*

v Gold Range Investments Ltd, [1995] NWTR 264 (CA) at paragraph 10, the Northwest Territories Court of Appeal held that the trial judge did not err "in failing to set out the specifics of a standard of conduct against which to measure the adequacy of the Appellant's system of compliance and its execution."

C. *Whether the Tribunal Misstated the Test for Due Diligence*

[33] CN's third ground of judicial review is that the appeal panel's statement that "liability for a regulatory infraction, may arise in circumstances that fall short of outright negligence" is wrong. As negligence is usually considered the opposite of due diligence, the idea that the defence of due diligence would fail in the absence of negligence sounds conceptually suspect.

[34] It is unclear what the appeal panel meant by the impugned statement. The concept of "outright negligence" is not a legal term of art. The appeal panel perhaps used it as a synonym of gross negligence, to refer to the kind of violations mentioned in the preceding paragraph of its reasons, which "should not occur at all," such as the failure to set a hand brake.

[35] It is not necessary, however, to speculate about what the appeal panel exactly meant. Assuming that the appeal panel was mistaken as to the precise requirements of the defence of due diligence, this has no bearing on the outcome of the case, as CN's defence failed for a lack of contemporaneous and specific evidence, not because the steps CN took failed to measure up to any particular standard of diligence. In other words, the appeal panel's statement did not form part of the chain of reasoning that led it to its conclusion. Therefore, even if the statement is in error, it does not render the decision unreasonable.

III. Disposition

[36] For the foregoing reasons, CN's application for judicial review is dismissed.

[37] The parties agreed that the losing party would pay $4000 in costs to the prevailing party. I agree that this amount is reasonable in the circumstances. Accordingly, I will award costs against CN in the amount of $4000.

JUDGMENT in T-2052-23

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed.

2. The applicant is condemned to pay to the respondent the amount of $4000 in costs, inclusive of disbursements and taxes.

"Sébastien Grammond"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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