Federal Court  Cour fédérale

Date: 20250131

Docket: T-2643-23

Citation: 2025 FC 203

Ottawa, Ontario, January 31, 2025

PRESENT: The Hon Mr. Justice Henry S. Brown

BETWEEN:

CANADIAN NATIONAL RAILWAY COMPANY

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

I. Nature of the matter

[1] This is an application for judicial review under s 18.1 of the *Federal Courts Act*, RSC 1985, c F-7 of a decision by a three member panel [Appeal Panel] of the Transportation Appeal Tribunal of Canada [TATC], dated November 17, 2023 [Appeal Panel Decision]. The Appeal Panel dismissed an appeal by the Canadian National Railway Company [CN or the Applicant] from a Review Determination by a single member of TATC who upheld (but lowered) a

monetary penalty the Minister of Transport imposed on CN for failing to stop a train movement where required. CN's failure to stop breached Rule 439 of the *Canadian Rail Operating Rules* [*CRORs*] and s 17.2 of the *Railway Safety Act*, RSC 1985, c 32 (4th Supp) [*RSA*].

[2] The TATC is established by the *Transportation Appeal Tribunal of Canada Act*, SC 2001, c 29 [*TATC Act*]. Its members are appointed by the Governor in Council (s 3(1)). Notably, members sitting on Review Determinations must have "expertise in the transportation sector to which the review relates" (s 12), namely the rail sector in this case. Likewise, the three appeal panel members also must have "expertise" in the rail transportation sector (s 13(4)) (except in circumstances which are not applicable in this case).

[3] No one suggests rail sector transportation expertise was absent at either level.

[4] The hearing in this matter took place immediately before I heard judicial review in a different and separate file (T-2644-23) involving the same parties but a different record. That judicial review concerned CN's failure to obtain permission to enter the limits of track work, contrary to Rule 42(b) of the *CRORs* and s. 17.2 of the *RSA*.

II. Facts, legal and evidentiary framework

[5] On July 17, 2020, Transport Canada issued a Notice of Violation to CN for violating Rule 439 of the *CRORs*, and imposed an administrative monetary penalty of $74,800. Schedule A to the Notice of Violation states:

> On or about August 18, 2019, in or near Parry Sound, Ontario, Canadian National Railway operated railway equipment on a railway otherwise than in accordance with Rule 439 of the

> Canadian Rail Operating Rules that apply to [CN], when its employees failed to stop a movement at Signal 1476 on the Bala subdivision displaying Stop, thereby violating section 17.2 of the Railway Safety Act.

[6] The Appeal Panel Decision denied the appeal and upheld the violation. Its Decision summarizes the facts which are not disputed: CN admits the *actus reus* of the offence:

> [5] The facts are not in dispute. They were admitted by CN's representative at the appeal hearing and were set out in its written submissions. The Minister's representative generally agreed with the presentation of the facts, adding, however, that three exhibits presented at the review hearing should also be noted. In particular, the Minister's representative asked that Exhibits M-9 and M-10 be added to the Statement of Facts where Exhibit M-9 was identified as detailing CN's regulatory history with alleged operating rule violations and Exhibit M-10 was identified as a TC letter to CN referencing that history. The Minister also asked that the relevant facts include Exhibit A-10, being part of CN's case at the review hearing and representing an internal CN notice to employees.
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> [6] The appeal panel accepts the facts set out in CN's written submissions as well as those additional exhibits referenced by the Minister's representative. The latter touch upon appeal grounds 2 and 3 and will be examined by the appeal panel in the course of assessing both.
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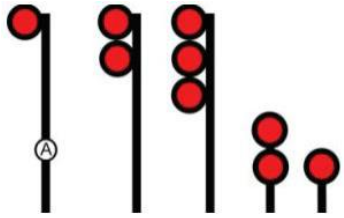
> [7] The incident occurred on or around 4:00 a.m. on August 18, 2019, when two crew members failed to stop a CN train before a stop signal located at signal 1476 at South Parry on the Bala subdivision. The incident involved two crew members: Pietro (or Peter) Cimetta, the locomotive engineer, and Kevin Morrissey, the conductor. Details of the incident are included in the Rail Daily Notification Report, the formal employee statements obtained by CN during its investigation of the incident, the evidence package provided for the formal employee statements, and CN's investigation report for the incident.
>
> [8] The Notice of Violation alleges a violation of Rule 439 of the *Canadian Rail Operating Rules (CRORs)*. Rule 439 in CN's version of the *CRORs* states:

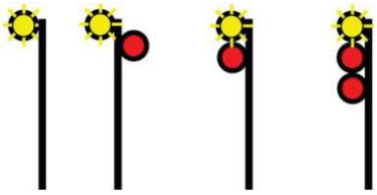


Stop - Stop.

Unless required to clear a switch, crossing, controlled location, or spotting passenger equipment on station platforms, a movement not authorized by Rule 564 must stop at least 300 feet in advance of the STOP signal.

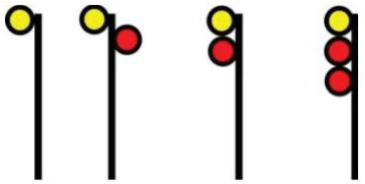
[9] Under Rule 439, a train must stop at least 300 feet in advance of a "stop" signal (the 300-foot requirement is listed as optional in the general *CRORs*), unless the movement has been authorized by Rule 564 or unless required to clear a switch, crossing, controlled equipment or spotting passenger equipment on station platforms. Rule 564 requires that a train must have authority to pass a block signal indicating "stop." CN's requirement to stop 300 feet in front of the signal was implemented after CN conducted research on the average distance that a train passes a stop signal (Appellant's Written Submissions at para. 8).

[10] There are additional signals in the *CRORs* that apply in advance of a stop signal. Rule 415 of the *CRORs* sets out the "advance clear to stop" signal, which means proceed but be prepared to stop at the second signal. Rule 415 in CN's version of the *CRORs* states:



Advance Clear to Stop - Proceed, prepared to Stop at second signal.

[11] Rule 411 of the *CRORs* sets out the "clear to stop" signal, which means proceed but be prepared to stop at the next signal. Rule 411 in CN's version of the *CRORs* states:



Clear to Stop - Proceed, preparing to stop at next signal.

[12] The crew was working the main line between Capreol and Toronto North, heading southward towards Boyne on the Bala subdivision. At Ardbeg, approximately 25 miles north of South Parry, where the incident occurred, the crew received a call from Rail Traffic Control (RTC) stating that they would not be going directly through to Boyne as there was a northbound train crossing over. RTC told the crew to stop at North Parry instead.

[13] The crew continued south to North Parry, which is three or four miles from South Parry. Although RTC had told the crew to hold back at North Parry, the advance signal to North Parry (signal 1538) displayed “advance clear to stop,” meaning the crew would need to stop in two signals. After another two miles, the crew received a “clear to stop” signal at North Parry (signal 1516), meaning they would need to stop at the next signal at South Parry (signal 1476).

[14] Bill Glass, who testified on behalf of CN, explained that the reason RTC asked the crew to stop at North Parry was that if they came all the way up to signal 1476, where the stop signal was, they would have been blocking two crossings and been stopped on an uphill grade, which would have made it more difficult to lift the train from the stopped position. If they had followed RTC’s direction and stopped earlier at signal 1516 at North Parry, even though it was displaying “clear to stop,” they would have been stopped on a downgrade and not blocked any public crossings.

[15] Notwithstanding that they did not stop at North Parry, the crew were both aware they were operating on a “clear to stop.” The locomotive engineer and the conductor verbally confirmed the “advance clear to stop” and the “clear to stop” signals in compliance with Rule 34 of the CRORs. The conductor reminded the locomotive engineer twice that they were operating on a “clear to stop” and needed to stop at the next signal, and the locomotive engineer acknowledged the same.

[16] Signal 1476 at South Parry is located just after a bend in the track. As the train rounded the bend coming up on the signal, the

> locomotive engineer saw the stop signal first and yelled to the conductor, asking if it was a stop signal. The conductor yelled back that they were on a "clear to stop." At that point, the locomotive engineer put the train into emergency and the crew initiated the emergency broadcast.
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> [17] CN reported the incident to the Transportation Safety Board of Canada in accordance with its obligation to do so.
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> [18] In the investigation following the incident, the locomotive engineer, Mr. Cimetta, admitted that he had it in his mind that the next controlled location was at Boyne and he had forgotten about the signal at South Parry, which was the signal the crew was supposed to stop at in accordance with the signal progression. Mr. Cimetta was a long-serving CN employee and had experience on the Bala subdivision.
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> [19] On July 17, 2020, the Minister of Transport issued CN the Notice of Violation and the assessed monetary penalty.
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> [20] CN requested a review of the Notice of Violation, and the matter was heard by a single member of the Tribunal on September 22 and 23 and October 5, 2021. During the review hearing, CN admitted the actus reus of the violation but asserted a due diligence defence.
>
> [21] On December 24, 2021, the review member rendered a determination upholding the Notice of Violation.
>
> [22] The review member concluded that CN did not exercise due diligence to prevent the violation. However, the review member reduced the monetary penalty to $33,760 on the basis that this was a first violation and not a second violation as the Minister alleged. The review member also found there were additional mitigating factors which further reduced the penalty.
>
> [Footnotes omitted]

[7] The Respondent notes the following concerning other self-reported CN Rule 439 incidents:

> **(b) Prior incidents where CN trains passed stop signals without authority**

14. Between December 2017 and July 2018, CN reported six incidents of trains passing stop signals in the Province of Ontario.

15. On July 30, 2018, TC sent CN a Notice under subsection 31(1) of the *RSA*, informing CN of a threat to safe railway operations due to these incidents. TC asked for a written explanation how CN would resolve these hazards to mitigate this threat.

16. On October 12, 2018, TC sent CN a Letter of Warning, noting several additional incidents where CN crews passed red stop signals, without proper authority. The letter emphasized that these incidents were in violation of Rule 439, and stated that if the non-compliance situation persisted, TC would take further enforcement action.

17. Together, the Notice and letters detail ten (10) incidents between August 27, 2017 and January 11 2018, with the commonality that each time, the CN train crew passed a stop signal without authority ("Prior Incidents"). These include:

1) An incident on August 27, 2017 where the CN train stopped approximately 1800 feet beyond the stop signal;

2) An incident on December 15, 2017 where TC RSIs noted that CN employees were not prepared for the stop signal;

3) An incident on December 17, 2017 where the Conductor's recollection was that he was focusing on the next signal;

4) An incident on June 27, 2018 where the CN train passed a stop signal, and its crew were contacted to avoid a potential head on collision; and

5) An incident on July 19, 2019 where a CN train proceeding through the Oakville Subdivision in territory shared with high speed VIA and GO trains applied its emergency brakes upon encountering a stop signal, resulting in the derailment of four freight cars.

18. CN reported another 6 incidents of trains passing stop signals without authority between August 2018 and September 2019.

(c) August 18, 2019: CN train again passes a stop signal without authority

19. The parties do not dispute that the incident occurred.22 At 0355 EDT on August 18, 2019, a CN train operated by Locomotive Engineer Pietro Cimetta and Conductor Kevin Morrissey was travelling east at 30 MPH on the Bala Subdivision near Parry Sound, Ontario when the crew put the train into emergency due to signal 1476 displaying STOP (the "August 18, 2019 incident"). The train car traveled two car lengths past the signal (approximately 400 feet), and a total of 580.8 feet in emergency. CN self-reported this incident to the Canadian Transportation Accident Investigation and Safety Board as it was required to do, following the appropriate established protocols. A CN investigation of the causes and corrective actions of this incident revealed that the CN crew misunderstood where they were to stop.

20. The TC RSI assessed the risk level of this incident as medium. The RSI established through the locomotive event recorder, signal activity report, and interviews with the CN operating crews that there was a violation of Rule 439.

21. In reviewing responsibility, TC recognized that CN had not been diligent with respect to oversight and supervision, specifically noting:

> 1) The last manager who rode with locomotive Engineer Pietro Cimetta was a diesel manager, not an operational supervisor, and provided no insight. The last efficiency test conducted on Mr. Cimetta was a stop test, and was not specific to riding in the cab and recognizing signals. Additionally, Mr. Cimetta had not received any operational simulator training in over four years; and
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> 2) Conductor Kevin Morrissey indicated that his last ride-along was in 2016, three years before the incident, and his last efficiency test conducted was a TGBO test in MacMillan yard the previous year, with no operational oversight related to recognition of signals.

22. This incident was the 13th violation of Rule 439 by CN in Ontario between June 24, 2017 and September 2019. Because CN did not recognize or provide a suitable corrective action to

> adequately address and prevent these violations from occurring, the RSI recommended that a Notice of Violation be laid.
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> 23. On July 17, 2020, TC issued CN a Notice of Violation and an AMP of $74,800 for the August 18, 2019 incident. The Notice of Violation indicates that CN operated railway equipment on a railway not in accordance with Rule 439, thereby violating section 17.2 of the RSA.

III. Defence of due diligence per Supreme Court of Canada

[8] The issue in this case relates to the CN's defence of due diligence. Failure to comply with the *CRORs* under the *RSA* is a strict liability offence as outlined in *R v Sault Ste Marie*, 1978 CanLII 11 (SCC), [1978] 2 SCR 1299 [*Sault Ste Marie*]. CN admits the *actus reus* of the incident but advanced a due diligence defence. *Sault Ste Marie* establishes that employers may rely on the defence of due diligence where they establish they had in place a proper system to prevent the commission of the offence including proper training of employees. Employers must also establish that they took reasonable steps to ensure their systems operate effectively.

[9] As the Supreme Court of Canada teaches, the defence of due diligence is available where the employer establishes it "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" (*Sault Ste Marie* at 1331). Note the word "all." The full text of the Supreme Court of Canada's judgment in this respect is:

> One comment on the defence of reasonable care in this context should be added. Since the issue is whether the defendant is guilty of an offence, the doctrine of *respondeat superior* has no application. The due diligence which must be established is that of the accused alone. 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, whose acts are therefore in law the acts of the corporation itself. For a useful discussion of this matter in the context of a statutory defence of due diligence see *Tesco Supermarkets v. Nattras* [64].
>
> (*Sault Ste Marie* at 1331)

IV. Proceedings

A. *Review Determination*

[10] The Review Determination, dated December 24, 2021, found on a balance of probabilities that the Minister of Transport demonstrated CN violated s 17.2 of the *RSA* by breaching Rule 439 of *CROR*, but reduced the assigned monetary penalty from $74,800 to $33,760.

[11] The Review Determination having considered the evidence and related submissions of the parties, found and identified a number of "concerning gaps" in CN's system to prevent commission of an offence, including:

> • Multiple gaps in training, including lack of specific training pertaining to maintenance of situational awareness, lack of a mid-certification training program for transportation staff, focus on self-study and in-class teaching, and lack of simulator training;
>
> • Gaps in identification of employees, given "entrance into the Locomotive Engineer Program is strictly based on seniority and does not consider possession of needed personal attributes on admission" and the gaps in training identified above;
>
> • Gaps in CN's monitoring process. The Member raised specific concerns about Mr. Cimetta's record of 16 previous

> situations "that led to disciplinary action, including demerits, deferred suspensions, written reprimands and an actual suspension due to his role in a yard derailment", and further states, "when noting that Mr. Cimetta, with a significant history of disciplinary actions, had 52 observations over a period of roughly two years and not one had found at-risk behaviour, it is reasonable to ask if the safety observations are effective as a monitoring tool, and if so, are they being delivered effectively by CN supervisory and training staff" and the fact that "crews were not aware they were being observed."
>
> • Gaps in ensuring compliance with Rule 439 due to "the absence of metrics in the evidentiary record"; and
>
> • Gaps in ensuring effective operation of CN's system, which the Member found was evidenced by 10 similar past incidents across Ontario from January 2017–June 2018.

[12] The Review Determination also expressed "concern in general as to the handling of the investigation for the Rule 439 violation of August 2019," finding:

> [66] Within the evidentiary record, I turn to Exhibit A-25, the Field Investigation Report of the August 2019 incident. In this report was a page entitled "Analysis (5-why's)" which specifically notes a lack of positive communication between crew members, a failure by the crew to anticipate and a failure to recognize where they were and possible fatigue issues. The conclusion of the report noted the misunderstanding as to location by the crew. It also notes the corrective actions to include using the incident in future crew briefings, continuing to perform safety audits and continuing to hold dynamic safety engagements. Fundamentally, CN viewed the corrective action as doing more of the same. It did not consider, as an example, the need to reduce train speeds in certain zones, retraining staff with respect to either communication or situational awareness, nor increasing ride-alongs on an ongoing basis. As well, CN did not pursue "possible fatigue issues." (Though in fairness, this was addressed in the disciplinary hearings of Messrs. Morrissey and Cimetta and the results of these hearings may have been known at the time of the investigation. However, the investigation report is silent in this regard.)
>
> [67] With regard to the issue of "a marked increase in incidents across the CN System," there was no evidence to suggest that the investigation into this specific incident made any attempt to find

> commonalities between it and the other similar violations. To function effectively, a system should include the search for – and addressing of – common factors and systemic issues. In fact, this would be a key ingredient of any complete system. To instead view the investigation as a discrete entity negates the idea of a systems approach to safety and to seeking to prevent commission of the offence in question.
>
> [Emphasis added]

[13] The Determination identified the test for due diligence: "the defence must demonstrate that it took all **reasonable** steps to avoid the incident" [emphasis in original], applying the jurisprudence cited by the parties: *Sault Ste Marie*; *Ontario (Ministry of Labour) v Con-Strada Construction Inc*, 2009 ONCJ 143; *R v Procrane Inc*, 1991 CanLII 7728 (SK QB), 99 Sask R 297; *Canadian National Railway Company v Canada (Attorney General)*, 2020 FC 1119 [*CNR 2020*]; *R v Deforest*, 2013 SKPC 30.

[14] Given the evidentiary gaps and other findings, the Review Determination concluded CN had not met either of the two parts of the defence of due diligence: CN's failed to take all reasonable steps to prevent the offence, and in addition, CN failed to ensure its system operated effectively. Specifically, the Determination found CN had not "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,'" per *Sault Ste Marie* at 1131.

[15] The Review Determination noted the following deficiencies in both CN's system, and in the effectiveness of the operation of CN's system:

> [73] A system contains a series of interlocking component parts, including items such as (as identified by CN) training, monitoring and discipline.

[74] CN's training program was extensive; however, a proper system to prevent the commission of the offence (or in this case, the violation) would reasonably be expected to:

- train staff as to how to maintain situational awareness and not just on the importance of doing so;

- have a recertification program that moves beyond self-study and classroom training to include ride-alongs, either by trainers or supervisory staff, to verify application of knowledge in the field; and

- have formalized training for experienced engineers who are experiencing documented difficulties and that this would include simulator training at a frequency that does not leave an employee (with a significant discipline history for performance issues) going four years between use of a simulator for performance improvement.

[76] CN's system for monitoring staff makes extensive use of discipline and safety observations. A reasonable monitoring system would identify and correct actions that can lead to accidents and negative incidents. However, the evidentiary record shows, in the case of Engineer Cimetta, that 52 safety observations (over a period of less than two years) found no at-risk behaviour despite him having been involved in 16 incidents over his career up to December 2018 that led to disciplinary measures, employee injury and three separate derailments. That not one safety observation found at-risk behaviour speaks either to: an inadequate frequency of monitoring, an inadequate form of monitoring, or monitoring being done by individuals who are not fulfilling the requirements of this important responsibility. Regardless, despite Mr. Cimetta's significant disciplinary history, the incidents continued. This is not indicative of an effective monitoring system.

[77] With respect to CN taking reasonable steps to ensure the effectiveness of the system it had in place, the evidentiary record speaks to a concerning number of Rule 439 violations. While it is clear from Exhibit A-10 that CN's system picked up on this concerning trend, and clear from Exhibits A-8 and A-9 that CN took steps to remedy the concerns, the introduction of important changes identified within these two exhibits took place after the August 18, 2019, incident. At the time of the incident, CN did not display that it was taking reasonable steps to ensure the

> effectiveness of its system. The evidentiary record instead speaks to a system that was not working in an effective manner.
>
> [78] As such, I do not find that CN 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."

[16] As noted, and which is not in dispute, the Review Determination reduced the monetary penalty from $74,800 to $33,760.

B. *Appeal Panel Decision*

[17] CN appealed to the Appeal Panel. The Appeal Panel upheld the Review Determination regarding both the finding of violation and the quantification of the monetary penalty. CN seeks judicial review to set aside the Appeal Panel Decision in respect of the violation: the quantum of the penalty is not in issue.

[18] The Appeal Panel examined each of the three grounds of appeal which focussed on CN's defence of due diligence which had been rejected by the Review Determination:

> (1) The review member erred in his assessment of what constitutes a "proper system" to prevent Rule 439 violations in the absence of any evidence regarding the same.
>
> (2) The review member erred by giving undue weight to similar fact evidence and by imposing the burden on CN to disprove the occurrence of the prior alleged incidents.
>
> (3) The review member erred in finding that CN did not exercise reasonable care to prevent the incident.

(1) Ground 1: Assessment of a "proper system" to prevent Rule 439 violations

[19] The Appeal Panel found the Review Determination correctly assessed CN's system to prevent Rule 439 violations. The Appeal Panel states:

> [47] The review member findings on what CN could or should have done to prevent the Rule 439 violation here were not undertaken in an evidentiary vacuum as argued by CN. Rather, for each finding, he first concluded that there were gaps or inadequacies in CN's safety system. It is inaccurate to say that there was no evidence to support his findings of shortcomings. He simply reviewed all of the evidence and concluded that the CN systems were not enough. Since his findings were based on some evidence, as opposed to no evidence, they are not incorrect.
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> …
>
> [49] CN's representative also addressed whether these findings were superfluous to the review member's task, that is, whether they were obiter to his having found that CN had not been duly diligent. On this point, the appeal panel finds that *R v Sault Ste Marie (City of)*, [1978] 2 SCR 1299 [*Sault Ste Marie*] does not establish, as a mandatory part of a due diligence assessment, that the decision maker set out what steps should have been taken to prevent a regulatory infraction from taking place.
>
> [50] The review member's findings here were basically his observations of what could have improved CN's safety system approach. They only followed from his first having found that the systems, based on the evidence, had "gaps" and it was those gaps which compromised CN's due diligence and its reasonableness.
>
> [51] Overall, the appeal panel finds that there was evidence upon which the review member's observations were founded. Contrary to CN's arguments, this was not a case of there being no evidence and, further to the correctness review standard, this appeal ground is dismissed.

(2) Ground 2: Weight given to similar fact evidence

[20] In this connection, both the Appeal Panel and Review Determination had before them documentary evidence of some 10 other instances in which CN train movements had failed to stop at signals contrary to Rule 439. These events were all generated by and self-reported by CN and occurred between January 2017 and June 2018. They are all noted by a Railway Safety Inspector pursuant to the *RSA*.

[21] The admissibility and relevance of these 10 instances in which CN's trains passed stop signals, the July 30, 2018 Notice sent to CN pursuant so s 31(1) of the *RSA* informing CN of the threat to safe railway operations due to these incidents, and other correspondence from Transport Canada, form a central part of this application for judicial review. They were the subject of related evidence and submissions before the Review Member, before the Appeal Panel, and again before this Court on judicial review.

[22] CN's previous failures to stop and the evidence and submissions related thereto were considered by the Appeal Panel. The Appeal Panel found the Review Determination reasonably admitted and weighed the evidence in this respect: it considered a "list of 'passed stop signals'… [which] CN refers to as 'similar fact evidence,'" which "includes reference to dates as well as CN subdivisions in Ontario and was characterized as a 'Letter of Warning' or caution issued to CN." The Appeal Panel also "noted the recent rise in safety concerns where CN trains had passed stop signals." This evidence was found admissible under s 15 of the *TATC Act* which grants the Appeal Tribunal flexibility in the admissibility of evidence.

[23] The Appeal Panel concluded:

> [56] The appeal panel finds that the list of earlier incidents was admissible. There is no point of privilege that has been raised that applies to it and the rules of evidence which guide this Tribunal point to flexibility in the admissibility of evidence. That is, subsection 15(1) of the *TATC Act* provides, in part, that the Tribunal is not bound by any legal or technical rules of evidence in conducting any matter that comes before it.
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> …
>
> [59] The review member did not reverse any onus in terms of requiring CN to refute the import of the list. His determination shows that he treated the list of "passed stop signals" as being relevant and probative, but he did not rely on it exclusively to find that CN had not been duly diligent. This is a reasonable use and outcome. Accordingly, further to a reasonableness review standard, this ground is dismissed.
>
> [Emphasis added]

(3) Ground 3: Finding that CN did not exercise all reasonable care to prevent the incident

[24] Finally, the Appeal Panel held the Review Determination reasonably found CN did not exercise all reasonable care to prevent the incident. The Appeal Panel describes the Review Member's analysis as "careful and exhaustive":

> [66] … Relative to the overall finding in the review determination that CN was not duly diligent, the appeal panel finds that the review member's assessment and finding were reasonable. After a careful and exhaustive assessment of CN's due diligence evidence, the review member found that there were gaps in a number of areas. As referenced above, among other matters, he found that there were gaps in CN's training (para. 58), monitoring including ride-alongs and observations (paras. 52, 53), situational awareness training (paras. 28, 34) discipline and corrective training (para. 56) as well as an overall lack of a "systems approach to safety … to prevent commission of the offence in question" (para. 67). These were not casual observations made by the review member. They were made following a dispassionate assessment of the available

> evidence leading to what this panel finds to be a reasonable conclusion (para. 78). That is, CN was not duly diligent here.
>
> [Emphasis added]

[25] On this issue, the Appeal Panel Decision concludes:

> [73] Basically, the available facts in this case are problematic as far as CN's due diligence is concerned. Apart from a two-year seniority requirement, there does not appear to be any screening of candidates for eligibility to become a CN locomotive engineer. As an engineer-in-training, newly hired Mr. Cimetta was identified as having significant shortcomings in terms of keeping aware or attentive during his training. Those shortcomings are consistent with faults which follow him and become apparent by virtue of a lengthy disciplinary record for operating matters when he was a conductor (from 1999 to 2015). They remain shortcomings that were experienced in the present case when on or about August 18, 2019, as a locomotive engineer, Mr. Cimetta failed to stop a CN train before a stop signal located at signal 1476 at South Parry on the CN Bala subdivision.
>
> [74] Together, these would reasonably flag the need for attentive training and monitoring, certainly for this locomotive engineer. In the period preceding this violation, being 2015 to August 18, 2019, responsible CN officials monitored Mr. Cimetta's safety conduct as a conductor and then as a locomotive engineer. Yet, his numerous infractions continued throughout this period. This points to a lack of effectiveness in the monitoring itself. It is, therefore, a reasonable finding for the review member to have concluded that CN was not duly diligent when it failed to establish that it had a proper system to prevent commission of the violation and had not taken reasonable steps to ensure the effective operation of that system.
>
> [75] Overall, the review member's findings here were coherent and logical and did not demonstrate any substantial flaw—all consistent with the requirements set out in *Vavilov*. This appeal ground is therefore dismissed.

V. Issues

[26] CN raises the following issues:

1. The Appeal Panel erred in upholding the Review Determination's factual findings regarding the actions CN should have taken to prevent the Incident by:

    a. improperly applying the correctness standard; and

    b. accepting the Review Determination's findings despite the lack of any supporting evidence on the evidentiary record;

2. The Appeal Panel erred in its review of the Review Determination's use of similar fact evidence of the Unrelated Activities by:

    a. identifying and applying the wrong standard of review to the question of the relevance of the Unrelated Activities; and

    b. concluding the Unrelated Activities were relevant to CN's due diligence defence; and

3. The Appeal Panel erred in its review of the Review Determination's articulation and application of the test for due diligence.

[27] Respectfully, the issue is whether the Appeal Panel Decision is reasonable.

VI. Standard of review

[28] CN in its written submissions argued certain issues were subject to the correctness standard, but properly abandoned these argument in oral submissions. The parties now agree, and I concur, that the standard of review is reasonableness.

[29] With regard to reasonableness, in *Canada Post Corp v Canadian Union of Postal Workers*, 2019 SCC 67, issued contemporaneously with the Supreme Court of Canada's decision in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paragraph 10 [*Vavilov*], the majority per Justice Rowe explains what is required for a reasonable decision, and what is required of a court reviewing on the reasonableness standard:

> [31] A reasonable decision is "one that is based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision maker" (*Vavilov*, at para. 85). Accordingly, when conducting reasonableness review "[a] reviewing court must begin its inquiry into the reasonableness of a decision by examining the reasons provided with 'respectful attention' and seeking to understand the reasoning process followed by the decision maker to arrive at [the] conclusion" (*Vavilov*, at para. 84, quoting *Dunsmuir*, at para. 48). The reasons should be read holistically and contextually in order to understand "the basis on which a decision was made" (*Vavilov*, at para. 97, citing *Newfoundland Nurses*).
>
> [32] A reviewing court should consider whether the decision as a whole is reasonable: "what is reasonable in a given situation will always depend on the constraints imposed by the legal and factual context of the particular decision under review" (*Vavilov*, at para. 90). The reviewing court must ask "whether the decision bears the hallmarks of reasonableness – justification, transparency and intelligibility – and whether it is justified in relation to the relevant factual and legal constraints that bear on the decision" (*Vavilov*, at para. 99, citing *Dunsmuir*, at paras. 47 and 74, and *Catalyst Paper Corp. v. North Cowichan (District)*, 2012 SCC 2, [2012] 1 S.C.R. 5, at para. 13).
>
> [33] Under reasonableness review, "[t]he burden is on the party challenging the decision to show that it is unreasonable" (*Vavilov*, at para. 100). The challenging party must satisfy the court "that any shortcomings or flaws relied on ... are sufficiently central or significant to render the decision unreasonable" (*Vavilov*, at para. 100).
>
> [Emphasis added]

[30] In the words of the Supreme Court of Canada in *Vavilov*, a reviewing court must be satisfied the decision-maker's reasoning "adds up":

> [104] Similarly, the internal rationality of a decision may be called into question if the reasons exhibit clear logical fallacies, such as circular reasoning, false dilemmas, unfounded generalizations or an absurd premise. This is not an invitation to hold administrative decision makers to the formalistic constraints and standards of academic logicians. However, a reviewing court must ultimately be satisfied that the decision maker's reasoning "adds up".
>
> [105] In addition to the need for internally coherent reasoning, a decision, to be reasonable, must be justified in relation to the constellation of law and facts that are relevant to the decision: *Dunsmuir*, at para. 47; *Catalyst*, at para. 13; *Nor-Man Regional Health Authority*, at para. 6. Elements of the legal and factual contexts of a decision operate as constraints on the decision maker in the exercise of its delegated powers.
>
> [106] It is unnecessary to catalogue all of the legal or factual considerations that could constrain an administrative decision maker in a particular case. However, in the sections that follow, we discuss a number of elements that will generally be relevant in evaluating whether a given decision is reasonable, namely: the governing statutory scheme; other relevant statutory or common law; the principles of statutory interpretation; the evidence before the decision maker and facts of which the decision maker may take notice; the submissions of the parties; the past practices and decisions of the administrative body; and the potential impact of the decision on the individual to whom it applies. These elements are not a checklist for conducting reasonableness review, and they may vary in significance depending on the context. They are offered merely to highlight some elements of the surrounding context that can cause a reviewing court to lose confidence in the outcome reached.
>
> [Emphasis added]

[31] Notably, *Vavilov* makes it abundantly clear the role of this Court is not to reweigh and reassess the evidence unless there are "exceptional circumstances." The Supreme Court of Canada instructs:

> [125] It is trite law that the decision maker may assess and evaluate the evidence before it and that, absent exceptional circumstances, a reviewing court will not interfere with its factual findings. The reviewing court must refrain from "reweighing and reassessing the evidence considered by the decision maker": *CHRC*, at para. 55; see also *Khosa*, at para. 64; *Dr. Q*, at paras. 41-42. Indeed, many of the same reasons that support an appellate court's deferring to a lower court's factual findings, including the need for judicial efficiency, the importance of preserving certainty and public confidence, and the relatively advantageous position of the first instance decision maker, apply equally in the context of judicial review: see *Housen*, at paras. 15-18; *Dr. Q*, at para. 38; *Dunsmuir*, at para. 53.
>
> [Emphasis added]

[32] The Federal Court of Appeal also held in *Doyle v Canada (Attorney General)*, 2021 FCA 237 [*Doyle*] that the role of this Court is not to reweigh and reassess the evidence unless there is a fundamental error:

> [3] In doing that, the Federal Court was quite right. Under this legislative scheme, the administrative decision-maker, here the Director, alone considers the evidence, decides on issues of admissibility and weight, assesses whether inferences should be drawn, and makes a decision. In conducting reasonableness review of the Director's decision, the reviewing court, here the Federal Court, can interfere only where the Director has committed fundamental errors in fact-finding that undermine the acceptability of the decision. Reweighing and second-guessing the evidence is no part of its role. Sticking to its role, the Federal Court did not find any fundamental errors.
>
> [4] On appeal, in essence, the appellant invites us in his written and oral submissions to reweigh and second-guess the evidence. We decline the invitation.

[33] Moreover, *Vavilov* requires the reviewing court to assess whether the decision subject to judicial review meaningfully grapples with the key issues:

> [127] The principles of justification and transparency require that an administrative decision maker's reasons meaningfully account

> for the central issues and concerns raised by the parties. The principle that the individual or individuals affected by a decision should have the opportunity to present their case fully and fairly underlies the duty of procedural fairness and is rooted in the right to be heard: Baker, at para. 28. The concept of responsive reasons is inherently bound up with this principle, because reasons are the primary mechanism by which decision makers demonstrate that they have actually listened to the parties.
>
> [128] Reviewing courts cannot expect administrative decision makers to "respond to every argument or line of possible analysis" (*Newfoundland Nurses*, at para. 25), or to "make an explicit finding on each constituent element, however subordinate, leading to its final conclusion" (para 16). To impose such expectations would have a paralyzing effect on the proper functioning of administrative bodies and would needlessly compromise important values such as efficiency and access to justice. However, a decision maker's failure to meaningfully grapple with key issues or central arguments raised by the parties may call into question whether the decision maker was actually alert and sensitive to the matter before it. In addition to assuring parties that their concerns have been heard, the process of drafting reasons with care and attention can alert the decision maker to inadvertent gaps and other flaws in its reasoning: *Baker*, at para. 39.

VII. Relevant legislation

[34] Section 17.2 of the *RSA* prohibits railway companies from operating or maintaining a railway in contravention of the *CRORs*:

Compliance with certificate, regulations and rules	**Conformité avec les certificats, règlements et règles**
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	**17.2** Il est interdit à toute compagnie de chemin de fer d'exploiter ou d'entretenir un chemin de fer, notamment les installations et le matériel ferroviaires, et à toute compagnie de chemin de fer locale d'exploiter du matériel ferroviaire sur un chemin de

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.	fer, en contravention avec un certificat d'exploitation de chemin de fer, les règlements et les règles établies sous le régime des articles 19 ou 20 qui lui sont applicables, sauf si elle bénéficie de l'exemption prévue aux articles 22 ou 22.1.

[35] Sections 12-14 of the *TATC Act* concern the composition and qualifications of review determination members and appeal panels of the TATC:

Hearings on review	**Requêtes en révision : audition**
12 A review shall be heard by a member, sitting alone, who has expertise in the transportation sector to which the review relates. However, a review that concerns a matter of a medical nature shall be heard by a member with medical expertise, whether or not that member has expertise in the transportation sector to which the review relates.	**12** Les requêtes en révision sont entendues par un conseiller agissant seul et possédant des compétences reliées au secteur des transports en cause. Toutefois, dans le cas où la requête soulève des questions d'ordre médical, le conseiller doit posséder des compétences dans ce domaine, qu'il ait ou non des compétences reliées au secteur des transports en cause.
Hearings on appeal	**Appels : audition**
13 (1) Subject to subsection (2), an appeal to the Tribunal shall be heard by an appeal panel consisting of three members.	**13 (1)** Sous réserve du paragraphe (2), les appels interjetés devant le Tribunal sont entendus par un comité de trois conseillers.
Size of panel	**Effectif du comité**
(2) The Chairperson may, if he or she considers it appropriate, direct that an	**(2)** Le président peut, s'il l'estime indiqué, soumettre l'appel à un comité de plus de

appeal be heard by an appeal panel consisting of more than three members or, with the consent of the parties to the appeal, of one member.

trois conseillers ou, si les parties à l'appel y consentent, à un seul conseiller.

Composition of panel

(3) A member who conducts a review may not sit on an appeal panel that is established to hear an appeal from his or her determination.

Composition du comité

(3) Le conseiller dont la décision est contestée ne peut siéger en appel, que ce soit seul ou comme membre d'un comité.

Qualifications of members

(4) With the exception of the Chairperson and Vice-Chairperson, who may sit on any appeal panel, an appeal shall be heard by an appeal panel consisting of members who have expertise in the transportation sector to which the appeal relates.

Compétences des conseillers

(4) Les conseillers qui sont saisis d'un appel doivent, sauf s'il s'agit du président et du vice-président, qui peuvent siéger à tout comité, posséder des compétences reliées au secteur des transports en cause.

Medical matters

(5) Despite subsection (4), in an appeal that concerns a matter of a medical nature, at least one member of the appeal panel shall have medical expertise, whether or not that member has expertise in the transportation sector to which the appeal relates.

Questions d'ordre médical

(5) Toutefois, dans le cas où l'appel soulève des questions d'ordre médical, au moins un des conseillers doit posséder des compétences dans ce domaine, qu'il ait ou non des compétences reliées au secteur des transports en cause.

Decision of panel

(6) A decision of a majority of the members of an appeal panel is a decision of the panel.

Décision

(6) Les décisions du comité se prennent à la majorité de ses membres.

Nature of appeal	**Nature de l'appel**
14 An appeal shall be on the merits based on the record of the proceedings before the member from whose determination the appeal is taken, but the appeal panel shall allow oral argument and, if it considers it necessary for the purposes of the appeal, shall hear evidence not previously available.	**14** L'appel porte au fond sur le dossier d'instance du conseiller dont la décision est contestée. Toutefois, le comité est tenu d'autoriser les observations orales et il peut, s'il l'estime indiqué pour l'appel, prendre en considération tout élément de preuve non disponible lors de l'instance.
[Emphasis added]	[Je souligne]

[36] Section 15(1) of the *TATC Act* provides that the TATC is not bound by "any" legal or technical rules of evidence in conducting a hearing. Section 15(1) applies to both the Review Determination and the Appeal Panel:

Nature of hearings	**Audiences**
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.	**15 (1)** Sous réserve du paragraphe (2), le Tribunal n'est pas lié par les règles juridiques ou techniques applicables en matière de preuve lors des audiences. Dans la mesure où les circonstances, l'équité et la justice naturelle le permettent, il lui appartient d'agir rapidement et sans formalisme.

VIII. Analysis

[37] CN submits the Appeal Panel Decision unreasonably upheld factual findings made in the absence of evidence and relied on evidence of "irrelevant and unproven allegations." The

Respondent submits the Decision is transparent, intelligible, and justified based on the evidentiary record and therefore reasonable per *Vavilov*. As set out below, I agree with the Respondent and will therefore dismiss this application.

A. *Upholding factual findings*

[38] CN submits the Appeal Panel erred in its application of the correctness standard to the Review Determination findings about what constitutes a proper rail safety system. It argues that although the Appeal Panel Decision claimed it reviewed on correctness, it conducted a reasonableness review, submitting that the Appeal Panel's application of the correctness standard was unreasonable in connection with what constitutes a proper rail safety system. CN submits these findings were based on speculation without supporting evidence, which is unreasonable: *Hitchings v PSS Professional Salon Services Inc* 2007 SKCA 149 at paragraph 68. I am unable to accept these submissions framed in this manner because, and with respect, this and other law relied upon for this argument pre-dates and has been superseded by the Supreme Court of Canada's judgment in *Vavilov*.

[39] I understand CN argues there is 'no evidence' for certain evidentiary findings made by the Review Determination, which it says therefore should have been set aside by the Appeal Panel. I also agree 'no evidence' arguments require a determination that there is in law no evidence, which goes to the constraining record in the case under consideration. However, it seems to me that after *Vavilov*, judicial review of 'no evidence' submissions must take place on the reasonableness standard and entails respectful deference and other *Vavilov* considerations.

[40] I need not deal further with this issue because even if I agree with CN, its case is answered by the Respondent who properly submits the Appeal Panel reasonably determined that since the Review Determination's "findings were based on some evidence, as opposed to no evidence, they are not incorrect" (Decision at para 40).

[41] I am not persuaded the Appeal Panel's rejection of CN's 'no evidence' arguments is unreasonable given it reviewed and reached its conclusion based on "some evidence" which is all that is required. In my view the finding of "some evidence" supports the Appeal Panel's finding of reasonableness, and note it is well established mere disagreement with factual determinations do not establish a case for judicial review. I should add that this evidentiary finding is well within the remit of both the Review Determination and the Appeal Panel and is a complete answer to the CN's argument on this point. The Appeal Panel's conclusion on the evidence is also one that lies within its statutory expertise. And, as already noted, reassessing and reweighing the record forms no part of the role of this Court per *Vavilov* and *Doyle*. I decline CN's invitation to second-guess the Appeal Panel in this respect.

[42] I would add, as I found in T-2644-24, these panels are reasonably entitled to base their conclusions not only on what a railway company does but also on what the railway fails to do. Such findings are entitled to deference and respectful attention, as per *Vavilov* at paras 84, 93 and *Canada Post* at para 31. These are evidentiary findings within the Appeal Panel's remit. They constitute a complete and reasonable answer the CN's submissions on this point. I should add these Appeal Panel conclusion on the evidence are also in my view within its "expertise." And, as already noted, reassessing and reweighing the record (which and with respect CN asks this

Court to do) forms no part of the role of this Court, per *Vavilov* and *Doyle*. I decline CN's invitation to second-guess the Appeal Panel in this respect.

B. *Relevance of prior incidents*

[43] CN submits the Appeal Panel unreasonably (no longer incorrectly) upheld the Review Determination's finding that CN's self-reported evidence of at least 10 prior failures to stop was relevant. CN refers to these as "Unrelated Activities" but consider them 'prior incidents.'

[44] The Respondent notes, as did the Appeal Panel, that neither level of the *TATC* is bound by the rules of evidence (*TATC Act*, s 15(1)) except in relation to privilege which is not applicable in this case. I agree the flexibility provided by the Appeal Panel's legislation is a reasonable consideration, and am not persuaded it was unreasonable for either the Review Determination or the Appeal Panel to admit and rely on the evidence of prior incidents. The Respondent submits CN's arguments constitute a disagreement about relevance, use and weight, and again I agree. It is not this Court's role to reassess and reweigh the evidence on judicial review without fundamental error or exceptional circumstances which are not present: see *Vavilov* and *Doyle* quoted above.

[45] Notably, the evidence of prior incidents was before both the Review Determination and the Appeal Panel, where both parties had the opportunity to and made related submissions. I find no merit in CN's submission that it had no opportunity to raise a due diligence defence in relation to the prior incidents - particularly when each was fully known to CN and indeed all these reports were both prepared and self-reported by CN itself.

[46] Further in this respect, CN submits while neither the Review Determination nor Appeal Panel are bound by technical rules of evidence, the Appeal Panel could not consider irrelevant evidence: *Sierra Fox Inc v Minister of Transport*, TATC File No. O-2997-41 at paragraph 6.

[47] While I may agree, this argument proceeds on a false premise because of the Tribunal findings that this evidence was indeed relevant. In particular, I am not prepared to set aside the conclusions of the Appeal Panel which considered this evidence relevant in all the circumstances of this case. To do so would again infringe the Appeal Panel's (and Review Determination's) fact assessing and weighing role. The Appeal Panel concluded:

> [59] The review member did not reverse any onus in terms of requiring CN to refute the import of the list. His determination shows that he treated the list of "passed stop signals" as being relevant and probative, but he did not rely on it exclusively to find that CN had not been duly diligent. This is a reasonable use and outcome. Accordingly, further to a reasonableness review standard, this ground is dismissed.

[48] CN also submits "[t]he rule against similar fact evidence prohibits mere character evidence from being used as circumstantial proof of conduct," citing *R v Handy*, 2002 SCC 56 [*Handy*]. However, in the case at hand, the Review Determination specifically considered the application of *Handy* to the facts of case (at para 60 to 64):

> [60] With respect to the introduction of these incidents, the applicant referred to the Supreme Court of Canada case of *R. v. Handy*, 2002 SCC 56, in its closing argument. CN argued that simply because these alleged violations had occurred in the past, that is not to say that CN's defence of due diligence cannot be successful with respect to the incidents in question. CN cautioned that these alleged violations should not be relevant to whether it took all reasonable steps to prevent the violation in question, and that appropriate weight should be applied to this evidence.

> [61] I would note the following: CN did not contest the occurrence of these incidents. They did not introduce, as an example, any correspondence back to TC to note the incidents did not occur or to clarify the nature of the incidents, nor did they call witnesses to provide testimony as to the occurrence or lack of occurrence of these 10 other incidents. Additionally, through the introduction of Exhibit A-10 (Educational Notice – Rule 439 / Stop Signal Violation, dated April 4, 2019), CN itself referenced its concern over "a marked increase in incidents across the CN System … in violation of CROR Rule 439."
>
> [62] As such, there is nothing in the evidentiary record to cast doubt on the accuracy of TC's identification of these incidents. It would be imprudent to cast this as "discreditable," particularly when CN itself introduced material referencing these incidents into the evidentiary record.
>
> [63] Finally, as noted by the applicant, the admissibility of similar fact evidence "generally depends on whether its probative value outweighs its potential prejudice." I find, given we are examining whether CN had in place an effective system to prevent precisely the type of infraction that did occur on August 18, 2019, that the probative value certainly outweighs any prejudicial effect.
>
> [64] In support of this, I note that the Minister submitted the Supreme Court case of *R. v. Sault Ste.* Marie, [1978] 2 SCR 1299 (*Sault Ste. Marie*), where the defendant is a corporation and defends itself by maintaining it "exercised all reasonable care by establishing a proper system to prevent commission of the offence" and must show that it took "reasonable steps to ensure the effective operation of the system." Finally, I again note that CN itself introduced documentation into the evidentiary record regarding its concern over an increase in Rule 439 violations.

C. *Due diligence defence*

[49] CN submits that the standard for a due diligence defence is "reasonableness," not perfection (*Sault Ste Marie* at 1331; *CNR 2020* at para 9; *Lévis (City) v Tétreault; Lévis (City) v 2629-4470 Québec Inc*, 2006 SCC 12 at para 15; *R v Syncrude Canada Ltd*, 2010 ABPC 229 at para 99). I agree perfection is not required however in my view the Appeal Panel set out and

reasonably applied law from the Supreme Court of Canada which requires that for the defence of due diligence to succeed, the employer must show it "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" (*Sault Ste Marie* at 1331, emphasis added). This is made clear by the Appeal Panel upholding the Review Determination which reasonably set out a similar distinction at paragraph 71, citing jurisprudence of this Court:

> [71] The Minister introduced *Canadian National Railway Company v. Canada (Attorney General)*, 2020 FC 1119, to argue that "[i]t will not suffice for a defendant simply to show that it acted reasonably in general. Rather, the defendant must establish that it took all reasonable steps to avoid the particular deficiency that is alleged…". I concur; the defence must demonstrate that it took all reasonable steps to avoid the incident.

[50] Both parties agree as do I that a number of factors may be relevant in assessing an employer's effort to establish due diligence defence. Among these, jurisprudence recognizes (1) foreseeability of accidents, (2) degree of control over the outcome, and (3) history of prior incidents (*Industrial Chrome*; *R v 33rd Street N E Bingo Association*, 2001 ABPC 188 at paras 26-27 & 30; see also *R v Taylor's Pharmacy (Edmonton) Ltd et al*, 1997 CanLII 24719, (1997) 241 AR 131 (PC), *R v Sobeys*, 2000 CanLII 1961, 181 NSR (2d) 263 (NS SC); *R v Lopes*, [1996] OJ No 96, 18 CELR (NS) 299 (ON PD) at paras 13-15; *R v Dillabough*, 2008 YKTC 46).

[51] Given this, I see no unreasonableness in the Appeal Panel's assessments of these matters in this case. Again this is simply a disagreement with the result.

[52] CN further submits "the Appeal Tribunal's conclusion that the Review Member's proposed measures could have improved CN's safety systems approach was not based on any

evidence"; rather, the evidence demonstrated CN "had a 'proper system' to prevent the Incident and took steps to ensure the efficient operation of that system."

[53] I disagree. It was within the Appeal Panel's remit to review and assess the Review Determination's conclusions on the evidence on this point. In my respectful view, the Appeal Panel reasonably agreed that CN had not established its defence of due diligence. In this the Appeal Panel reasonably upheld the conclusions of the Review Determination which, I also agree, were "careful and exhaustive," Moreover, as the Respondent submits, this question "engages the Appeal Panel's specialized expertise in the railway sector, and involves the interpretation of its home statute," citing the *TATC Act*, s 14-15(1) and *RSA*, s 3(b)-(c), 40.16).

[54] It is also the case and well-established that evidence to support a defence of due diligence must be specific to the violation in issue, not generalized (*R v Raham*, 2010 ONCA 206 at para 48; *R v Bennett*, 2013 CanLII 10271 (NLPC) at paras 13, 16; *Toronto (City) v Barrasso*, 2006 ONCJ 463 at para 105). Notably, the Appeal Panel upheld the Review Determination which in this connection reasonably directed itself on this issue at paragraph 71.

[55] In addition, to succeed on a due diligence defence an employer must also establish it took "reasonable steps to ensure the effective operation of the system" (*Sault Ste Marie* at 1331; *Ontario (Ministry of Labour) v Wal-Mart Canada Corp*, 2016 ONCJ 267 at para 199, aff'd 2017 ONSC 6726; *R v B Gottardo Site Servicing Limited*, 2010 ONCJ 239 at 11-12; *R v Gorham Holdings Ltd*, 1983 CanLII 2199 (SKKB) at paras 3, 5; *R v Pilen Construction of Canada Ltd*, [1999] OJ No 5650 at para 29; *R v KB Home Insulation Ltd* [2008] OJ 6019 at para 22; *R v Gulf of Georgia Towing Co Ltd*, [1979] BCJ No 2064 at paras 10, 12-13, 15).

[56] The Appeal Panel was fully aware of the requirement of effective system operation which it seems to me underlies its findings respecting employee training and monitoring:

> [74] Together, these would reasonably flag the need for attentive training and monitoring, certainly for this locomotive engineer. In the period preceding this violation, being 2015 to August 18, 2019, responsible CN officials monitored Mr. Cimetta's safety conduct as a conductor and then as a locomotive engineer. Yet, his numerous infractions continued throughout this period. This points to a lack of effectiveness in the monitoring itself. It is, therefore, a reasonable finding for the review member to have concluded that CN was not duly diligent when it failed to establish that it had a proper system to prevent commission of the violation and had not taken reasonable steps to ensure the effective operation of that system.

D. *Recent jurisprudence*

[57] At the request of the Respondent for directions, the parties were asked to make brief written submissions on two recent judgments of this Court issued after the parties filed their memoranda.

[58] First, in *Canadian National Railway Company v Attorney General of Canada*, 2024 FC 1297 [per Grammond J, which I will refer to as *Lac La Biche*], dated August 21, 2024, CN "breach[ed] certain rules respecting track maintenance" (at para 1). The Court held "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" (at para 2). This case involved missing bolts.

[59] Second, *Canadian National Railway Company v Attorney General of Canada*, 2024 FC 1667 [per Ahmed J, which I will refer to as *Ruel*], dated October 22, 2024, found an Appeal

Panel decision reasonable that involved 12 breaches of the same stop rule as in the case at bar, namely *CRORs* Rule 439:

> [4] … In 2017 and 2018, the Applicant committed several breaches of Rule 439 of the *Canadian Rail Operating Rules* ("Rules"), thereby contravening section 17.2 of the Act. These breaches include 12 stop signal violations. In one incident, the emergency braking system was deployed, causing four freight cars to be derailed. In another incident, employees who were "noncompliant to [the Applicant's]…policies regarding drug [*sic*] and alcohol" were operating a train while "impaired."

[60] While a Notice of Appeal to the Federal Court of Appeal was filed on November 21, 2024, these findings remain as stated until the appeal is determined. I note the Court in *Ruel* concludes "the Applicant inappropriately minimizes the significance of the prior incident evidence" (at para 26). As noted above, the evidence in support, together with the relevance of the prior incidents and their assessment and weight, were matters reasonably decided by the Appeal Panel in the case at hand.

[61] The Respondent generally relies on *Lac La Biche* for its analysis of due diligence and for *Ruel* for its analysis of prior incident evidence. The Respondent also submits Rule 439 is a "cardinal rule" because "[n]on-compliance can cause harm, danger, death and hazard to the environment" (*Ruel* at para 26). I suggest the proper description of Rule 439 is Life Critical Rule, which I note is used in other judicial review (T-2644), seemingly as set out in *Canadian Railway Office of Arbitration & Dispute Resolution* per http://croa.com/PDFAWARDS/CR4833.pdf at paragraph 20 where CN "argued that understanding signals is critical, and that Rule 439 was one of the most important signals in a highly safety-sensitive industry and is considered a "cardinal rule" in this industry and a Life Critical Rule at the Company."

IX. Conclusion

[62] In my view and given the above, this application judicial review must be dismissed.

X. Costs

[63] The parties agree that costs in the amount of $4000.00 all inclusive should be awarded to the successful party pursuant to Rule 400 of the *Federal Courts Rules,* SOR/98-106, which I find reasonable. Therefore CN will be ordered to pay the Respondent $4,000.00 all inclusive as their costs.

JUDGMENT in T-2643-23

THIS COURT'S JUDGMENT is that:

1. This application for judicial review is dismissed.

2. The Applicant shall pay the Respondent its all inclusive costs in the amount of $4,000.00.

"Henry S. Brown"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-2643-23
STYLE OF CAUSE:	CANADIAN NATIONAL RAILWAY COMPANY v ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	OTTAWA, ONTARIO
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DATED:	JANUARY 31, 2025

APPEARANCES:

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