Federal Court  Cour fédérale

Date: 20250131

Docket: T-2644-23

Citation: 2025 FC 204

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 an appeal decision by a three member panel [Appeal Panel] of the Transportation Appeal Tribunal of Canada [TATC], dated November 16, 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 the Minister

of Transport's decision to impose a monetary penalty upon finding CN violated s 17.2 of the *Railway Safety Act,* RSC 1985, c 32 (4th Supp) [*RSA*] on two occasions by unlawfully entering without permission a protected area of the railway where track related work was or might be taking place. CN's failure to stop and obtain the foreman's permission to proceed breached Rule 42(b) of the *Canadian Rail Operating Rules* [*CRORs*] and s 17.2.

[2] Rule 42 is considered as a Life Critical Rule due to its inherent risk that each instance of non-compliance holds the potential for catastrophic fatality.

[3] In these two cases, CN's trains unlawfully entered parts of the railway, where railway track related work was or might be taking place, without the foreman's permission. Such track work areas are protected by *CROR's Planned Protection for Track Work* provisions including those under Rule 42(b). Basically, train movements in such areas where railway workers, machinery and material may or not be present (and where indeed there may or not be tracks) must not proceed beyond the red signal, or enter the protected track limits, unless and until the train crew requests and receives instructions from the foreman specified in the applicable General Bulletin Order [GBO].

[4] In the first instance considered CN's train unlawfully entered and travelled without permission 1992 feet past the stop signal into the protected work area where some 50 people were working on the tracks.

[5] 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,

Review Determination members must have "expertise in the transportation sector to which the review relates" (s 12), namely the rail sector in this case. Equally notably the three appeal panel members also must have "expertise" in the rail transportation sector. No one suggests either panel lacked railway expertise.

[6] This hearing in this matter took place immediately after I heard judicial review in a different and separate file (T-2643-23) involving the same parties but a different record. That judicial review concerned CN's failure to stop train movements contrary to Rule 439 of the *CRORs* and s. 17.2 of the *RSA*.

[7] I am not persuaded the Appeal Panel Decision is unreasonable. Therefore this application is dismissed.

II. Facts, legal and evidentiary framework

[8] On June 21, 2019, Transport Canada issued a Notice of Violation to CN for two violations of Rule 42(b) of the *Canadian Rail Operating Rules* [*CRORs*], and imposed an administrative monetary penalty of $33,000. Schedule A to the Notice of Violation states:

> On or about October 17, 2018, at Mile 95.0 of the Wainwright Subdivision, the Canadian National Railway operated railway equipment on a railway otherwise than in accordance with rule 42(b) of the Canadian Rail Operating Rules when train M31741-15, in possession of the form Y, proceeded beyond the red signal located at the identifiable location stated in the GBO without receiving instructions from the foreman named in the GBO, contrary to section 17.2 of the Railway Safety Act, thereby committing a violation under section 40.13(1) of the said Act.
>
> On or about November 4, 2018, at Mile 263.30 of the Wainwright Subdivision, the Canadian National Railway operated railway

> equipment on a railway otherwise than in accordance with rule 42(b) of the Canadian Rail Operating Rules when train L55751-04, in possession of the form Y, proceeded beyond the red signal located at the identifiable location stated in the GBO without receiving instructions from the foreman named in the GBO, contrary to section 17.2 of the Railway Safety Act, thereby committing a violation under section 40.13(1) of the said Act.

[9] The Review Determination sets out the essentials of the applicable legal and evidentiary framework:

> [5] TC alleges that CN failed to comply with Rule 42(b) of the *Canadian Rail Operating Rules (CROR)*, wherein Planned Protection for Track Work is identified as:
>
> > (b) A movement in possession of the Form Y must not proceed beyond the red signal located at the identifiable location stated in the GBO, enter the track limits stated in the GBO, or make a reverse movement within such track limits until instructions have been received from the foreman named in the GBO.
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> The diagram depicting Single Track Planned Protection is described as follows:
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> > Red signals are depicted at the locations stated in the General Bulletin Order and yellow over red flags are placed at least 2 miles in advance of the red flags. The flags are placed to the right of the track as seen by approaching movements.
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> [6] Section 17.2 of the *RSA* is the designated provision and provides that:
>
> > **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.

[7] Subsection 40.13(1) of the *RSA* provides that:

> **40.13 (1)** Every person who contravenes a provision designated under paragraph 40.1(a) commits a violation and is liable to a penalty not exceeding the maximum amount prescribed under paragraph 40.1(b).

[6] Section 17.2 of the *RSA* is the designated provision and provides that:

> **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.

[7] Subsection 40.13(1) of the *RSA* provides that:

> **40.13 (1)** Every person who contravenes a provision designated under paragraph 40.1(a) commits a violation and is liable to a penalty not exceeding the maximum amount prescribed under paragraph 40.1(b).

[8] Paragraph 40.1(b) of the *RSA* states that in the case of a corporation, the penalty for a violation of a designated provision is not to exceed $250,000. This is in line with item 6 of Schedule I, Part I of the Ra*ilway Safety Administrative Monetary Penalties Regulations*, which names section 17.2 as a designated provision, the contravention of which may be proceeded with as a violation per sections 40.13 to 40.22 of the *RSA*.

C. Did CN violate section 17.2 of the RSA?

[9] TC alleges that CN failed to comply with Rule 42(b) of the *CROR*, wherein CN, on two separate occasions, operated trains beyond the red signals specified in their respective Tabular General Order Bulletin (TGBO) inclusive of a Form Y specifically identifying the location where train movement beyond the red

signal is not to proceed until instructions from the specified foreman are received.

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

[11] In support of proving the violation that occurred on October 17, 2018, the representative for the Minister introduced as evidence the following exhibits supporting the conclusion that the CN employees on CN train M31741-15 on October 17, 2018, did violate Rule 42(b) of the *CROR*:

> a. Exhibit M-1: The Rail Daily Notification Report prepared by the Transportation Safety Board (TSB) and provided daily to TC's Rail Safety division referencing the incident of October 17, 2018.
>
> b. Exhibit M-9: Notes from interview with Mr. Douglas Rowe taken by TC Rail Safety Inspector James Moran on November 15, 2018. According to the interview, Mr. Rowe was the locomotive engineer of train M31741-15 on October 17, 2018, which was alleged to be in violation of Rule 42(b) that day.
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> c. Exhibit M-10: Notes from interview with Mr. Cody Fehr taken by Inspector Moran on November 15, 2018. Mr. Fehr was the conductor of train M31741-15 on October 17, 2018, which was alleged to be in violation of Rule 42(b) that day.
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> d. Exhibit M-8: Notes from interview with Mr. Kasper Fenrich taken by Inspector Moran. Mr. Fenrich was the track foreman protecting the limits on the section of track between mileposts 95 and 105 of the Wainwright Subdivision on October 17, 2018.

[12] The respondent further introduced Exhibit M-6, an email from Mr. Greg Jaggernauth to Inspector Moran dated October 30, 2018. Mr. Jaggernauth was the Assistant Superintendent of Alberta Operations of CN Alberta Operations on the dates of the alleged violations. This email provided the details of CN's investigation of

the alleged incident involving Locomotive Engineer Rowe and Conductor Fehr operating train M31741-15.

[13] The investigation found that the violation of Rule 42(b) did occur at milepost 95 of the Wainwright Subdivision, with both Locomotive Engineer Rowe and Conductor Fehr citing distraction as the key driver to missing the signals placed to enforce Rule 42(b).

[14] In support of proving that the violation occurred on November 4, 2018, the respondent introduced as evidence the following exhibits supporting the conclusion that the CN employees on CN train L55751-04 on November 4, 2018, did violate Rule 42(b) of the *CROR*:

> a. Exhibit M-12: The Rail Daily Notification Report prepared by the TSB and provided daily to TC's Rail Safety division referencing the incident of November 4, 2018.
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> b. Exhibit M-17: Notes from interview with Mr. Steven Giesbrecht taken by Inspector Moran on December 6, 2018. Mr. Giesbrecht was the locomotive engineer of train L55751-04 on November 4, 2018, which was alleged to be in violation of Rule 42(b) that day.
>
> c. Exhibit M-19: Personal notes of Mr. Jacob Hulan from November 4, 2018, reviewed by Inspector Moran. Mr. Hulan was the conductor of train L55751-04 on November 4, 2018 which was alleged to be in violation of Rule 42(b) that day.

[15] The respondent further introduced Exhibit M-15, an email from Mr. Jaggernauth to Inspector Moran dated November 13, 2018. This email provided the details of CN's investigation of the alleged incident involving Locomotive Engineer Giesbrecht and Conductor Hulan operating train L55751-04.

[16] The investigation found that the violation of Rule 42(b) occurred at milepost 0 of the Walker Yard E2 track in the Wainwright Subdivision, with Locomotive Engineer Giesbrecht citing distraction as the key driver to ignoring the signals placed to enforce Rule 42(b).

[17] Based on the evidence presented by the respondent, the documented acknowledgement as contained in Exhibit A-11 by the applicant relative to train M31741-15 on October 17, 2018, where

> both crew members failed to observe the Rule 42 yellow over red flag and failed to react in time to stop at the Rule 42 red flag, and the submission of Exhibit A-22 relative to train L55751-04 on November 4, 2018, where both crew members failed to observe the foreman limits as specified by a Rule 42, I find that CN did violate section 17.2 of the *RSA*.

[10] In this respect I also accept the Respondent's summary:

> 14. In the railway industry, Rule 42 is considered as a Life Critical Rule due to its inherent risk that each instance of non-compliance holds the potential for catastrophic fatality. Entering a foreman's authority, without their prior authorization and agreement, means that the non-compliant rail operator is entering a portion of the track where: workers are present, work equipment may still be on the track, or portions of the railway might even have been removed.
>
> 15. The AMP was assessed because of two incidents which occurred on October 17, 2018, at Mile 95.0 of the Wainwright Subdivision, and on November 4, 2018, at Mile 263 of the same Subdivision. In both instances, CN was operating railway equipment when its trains proceeded beyond the red signal that marked the start of an identifiable planned protection area for track work without receiving instructions from the designated foreman specified in the applicable General Bulletin Order.
>
> 16. As a result, the Minister issued an AMP to the Applicant in the amount of $33,000.
>
> 17. There is no dispute between the parties that the factual elements of both violations are made out. The Applicant admits the actus reus for both violations. The key facts of the two incidents may be summarized as follows.
>
> <u>Incident #1 - October 17, 2018 Incident - Wainright Subdivision</u>
>
> 18. The first violation of Rule 42 noted in the Notice of Violation occurred when the operating crew of Train M31741-15, proceeded beyond the prescribed limit set by a foreman, without obtaining prior authorization.
>
> 19. During TC's investigation, the locomotive engineer recognized that by failing to see the yellow over red flag, he became complacent. The locomotive engineer had not registered where the

foreman's limits were located i.e., at milepost 95. The locomotive engineer thought the foreman's limit was located at milepost 98 of the Wainright Subdivision. Based on this mistaken assumption, the crew was planning to stop at the crossing at milepost 96.6.

20. Therefore, the crew members inadvertently missed the signal marking the start of their approach towards the foreman's limit, and continued to operate at a constant speed of 46 mph.

21. Upon realizing the gravity of the situation, the crew then proceeded to an emergency stop of the train by pulling the automatic brake after passing the red flag. The train was brought to a stop a milepost 95.38 on the Wainwright subdivision, 1992 feet past the signal.

22. The incident occurred on a key route where approximately 50 employees were working under the foreman's supervision in the protection area and dangerous commodities were shipped. There were 14 workers, including the foreman himself, specifically located at milepost 96 of the Wainright Subdivision at the time of the incident.

23. The incident was a serious one as it caused two (2) knuckles to break and two (2) train separations because of the excessive in-train forces that resulted from the emergency maneuver. This series of events could have led to a derailment, blocked crossings, damage to the environment or public, and could have led to disabling injury or death.

(ii) Incident #2 - November 4, 2018 – Wainright Subdivision

24. This incident occurred in North Edmonton, Alberta. CN train L55751-04, took 20 cars from a track in CN Walker Yard to depart via the signal, off CN Track E2 at CN Walker Entry/Exit East End, and entered into the foreman's protected work area without authority.

25. The crew approached the signal and the foreman's limit. While it was in the process of receiving clearance from the rail traffic controller for Coronado Subdivision, the train was brought to a stop. Once clearance was obtained from the rail traffic controller, the train passed the red flag entering the foreman's limits without requesting and receiving the authority to operate in the protection area. The train was then brought to a full stop approximately three car lengths into the foreman's limits.

[Footnotes omitted, emphasis added]

III. Defence of due diligence per the Supreme Court of Canada

[11] Failure to comply with the *CRORs* 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 these two incidents but maintains a due diligence defence, which requires CN to establish that it "took all reasonable steps to avoid the particular event" (*Sault Ste Marie* at 1326). Note the word "all." As more fully set out and discussed below this entailed CN showing both a proper system and its effective operation.

IV. Proceedings

A. *Review Determination*

[12] The Review Determination dated December 24, 2021, found on a balance of probabilities CN violated s 17.2 of the *RSA* and affirmed the monetary penalty.

[13] The Review Determination made the following findings:

> • Evidence of prior incidents was relevant and admissible. CN self-reported the incidents and did not contest their occurrence, so they were accepted to have occurred. This evidence was considered for CN's due diligence defence.
>
> • The Applicant undertook initiatives subsequent the incidents under review, namely the Critical Focus Zone [CFZ] pilot training program introduced in 2020. The Review Member assigned this evidence "less weight in considering whether the applicant exercised the required due diligence at the time of the incidents in question."
>
> • The testimony of CN witness Mr. Grewal established "there was limited action taken by CN Operations Management in validating train crew performance outside of incident

> investigation". Further, "there was no mechanism in place at the time of the incidents addressed in this review to effectively monitor potential distractions and loss of situational awareness resulting from operating requirements in the locomotive environment" and "both incidents involved in this review had loss of situational awareness as well as distraction as root causes of the violations."

[14] With regard to CN's due diligence defence, the Review Determination applied the test from *Sault Ste Marie* namely whether 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." This requires both the establishment of a proper system to prevent such violations, and the effective operation of the system.

[15] The Review Determination found CN did not establish its due diligence regarding either its system or the effective operation of its system:

> [45] The applicant has been very clear that the focus of CN's initiatives has been two-pronged: increased training program attention to be paid to the consequences of violating signals specifying limits of authority as well as increased vigilance through on-the-job testing by CN management on train crew actions.
>
> [46] The applicant presented evidence in its initial train crew training programs that CN recognized the need to focus more attention on the work environment in the locomotive cab when a train is encroaching on territory where restrictive signalling is in place and for which the crew must ensure a high degree of vigilance.
>
> [47] There was no specific testimony provided by CN on the measures taken to increase vigilance and no performance indicators that demonstrated train crew behavioural changes resulting from such increased vigilance.
>
> [48] The discussion about a system begs the question as to the contents of such a system and the practices that ought to be present

in order for the aggregate to be considered efficient and effective. CN has been quite vocal in its declaration that both its training program and its monitoring practices constitute their system. It is my belief that monitoring by testing and ride-alongs form only a small part of the monitoring. For CN to wait for in-cab video monitoring to further enhance monitoring appears to be insufficient to absolve CN of any effort needed to enhance in-cab train crews' situational awareness.

[49] As part of a system operating as a means to prevent the occurrence of a violation such as those involved in this review, CN's training and train crew observances do form a part of this system but I believe that they are far from being comprehensive. Evidence provided by Mr. Grewal confirmed that the crews in the incidents in this review were distracted from their responsibilities to vigilantly operate the train by performing non-critical work activities, resulting in loss of situational awareness and the violation of Rule 42.

[50] A system should also contain a series of reviews on the workload being asked of train crews while in operation of a train to ensure that such work requirements do not detract from the vigilance required of train crews, resulting in loss of situational awareness and rule violations.

[51] The Critical Focus Zone (CFZ) training package introduced by CN in 2020, currently in a pilot stage before fully implementing this element of training in the near future, is clearly an indication that CN has understood the shortcomings of its current training program and, more importantly, the lack of an effective system to ensure compliance with such training as it pertains to Rule 42 operating practices.

[52] Of particular note is CN's focus in the CFZ training that advises crew members to refrain from regular work tasks that could be considered distracting and for crew members to focus on observing track signals. I consider such directives to be critical to the success of a system that supports a due diligence defence.

[53] In considering this CFZ training, I am giving this evidence very little weight as part of the due diligence defence since it is not relevant to the prevention of the 2018 incidents in question.

[54] When questioned during the review on initiatives contemplated or undertaken by CN to address the need to minimize crew distraction due to work content, it was observed that this review was to be considered at a future date, potentially with the

> introduction of video cab monitoring technology in the very near future.
>
> [55] In the series of communications between CN and TC in 2017 and 2018, both parties did engage in a dialogue about the issues surrounding self-reported CN incidents associated with movements exceeding authorized limits, with CN outlining a number of initiatives it had taken to mitigate such occurrences.
>
> [56] I conclude that CN's remedies for distraction and loss of situational awareness are primarily focused on training, both initial and recurring, as well as disciplinary action resulting from violations such as those that are the focus of this review. I am of the opinion that the disciplinary action employed by CN for Rule 42 violations by longer-serving crew staff is inadequate given the life-threatening nature of the violation. I suggest a more severe penalty, such as suspension from train operating duties for a period of one year to be considered for Rule 42 violations. Such a penalty would definitely send the right message to the workforce that Rule 42 violations truly are life-critical violations and are not tolerated.
>
> [57] I believe CN was inadequate in ensuring that they had a comprehensive "system" view on ensuring the effectiveness of its train crews and, as such, I do not find that CN exercised all reasonable care "by establishing a system to prevent commission of the offence" and "by taking reasonable steps to ensure the effective operation of the system."
>
> [58] I find the due diligence defence to be lacking and is therefore denied.
>
> [Emphasis added]

B. *Appeal Panel Decision*

[16] The Appeal Panel upheld the Review Determination, having considered each of CN's four grounds for appeal re its defence of due diligence:

> The review member erred in law by rejecting the defence of due diligence. In particular, the review member:
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> > (a) improperly considered and relied upon irrelevant evidence of other unproven and unrelated allegations;

> (b) erred by making findings of fact in the absence of evidence;
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> (c) failed to identify the appropriate standard of care; and
>
> (d) erred by concluding that the appellant did not exercise reasonable care to prevent the violations in all of the circumstances.

[17] Grounds 1(a), (b), and (d) were assessed and rejected on the application of a reasonableness standard to the record. Ground 1(c) was assessed on a correctness standard. In these respects the Appeal Panel followed *Canada (AG) v Friesen*, 2017 FC 567, which CN relies upon.

(1) Grounds 1(a) and (b): Consideration of unproven allegations and findings of fact

[18] The Appeal Panel held the Review Determination in assessing the two incidents in question, reasonably relied on relevant evidence of 12 previous incidents CN had prepared and self-reported involving Rule 42(b). Its findings are summarized in the Appeal Panel Decision (at para 89):

> • The allegations, which primarily but not exclusively refer to the November 17, 2017, Letter of Notice, are not unproven. Testimony before the member clearly documented that these were self-reported violations made by CN to the TSB. Secondly, the response provided by CN on December 5, 2017, corroborates the existence of the 12 violations identified in Inspector Moran's Letter of Notice.
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> • The incidents identified in Exhibit M-21 were not unrelated—all involved trains being in locations they were not authorized to be, creating a threat to safe railway operations (as noted in Exhibit M-21). For CN to argue that these incidents were unrelated is to, in fact, argue against both its response to TC (which addressed all 12 incidents in a largely homogenous fashion,

> speaking to their similarity) and to dismiss its own recertification training to conductors (Exhibit A-7, CN Transportation Recertification PowerPoint), where incidents such as passing a stop signal without authorization, entering limits without authority, OCS3 violations – limits of authority, and even the Via Rail accident at Aldershot, Ontario, where a train proceeded through a crossover at a speed of 67 mph when track speed was authorized at 15 mph, were combined together into one training section focused on the need to not be complacent, not lose focus, not rush, and to plan well.
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> • In this appeal, CN argued that the November 17, 2017, Letter of Notice and other correspondence related to that letter and other events brought to CN's attention were "simply … correspondence" (Appeal Hearing Transcript at p. 25). This is a mischaracterization of the seriousness of a notice. A notice is a statutory instrument, with powers delegated directly through section 31(1) of the *RSA* to the individual inspector. In point of fact, the *RSA* states:
>
> > **31 (1)** If a railway safety inspector is of the opinion that a person's conduct or any thing for which a person is responsible **constitutes a threat to the safety** or security of railway operations or the safety of persons or property, the inspector shall inform, by Notice sent to the person and to any company whose railway operations are affected by the threat, the person and the company of that opinion and of the reasons for it. [emphasis added in original]
>
> [Emphasis added]

(2) Ground 1(c): Identification of standard of care

[19] The Appeal Panel Decision held the Review Member "did not err by failing to identify the appropriate standard of care" and that the Member's findings were correct.

[20] The Appeal Panel reviewed considerable jurisprudence cited by both parties in assessing the appropriate standard for a due diligence defence, which must start with *Sault Ste Marie* and included *Fullowka v Pinkerton's of Canada Ltd*, 2010 SCC 5 at paragraph 80; *R v Imperial Oil*,

2000 BCCA 553 at paragraph 23; *R v CC Eric James Management Ltd,* 2000 BCPC 178 at paragraph 6; *R v Petro-Canada,* 2003 CanLII 52128 (ON CA); and *Canadian National Railway Company v Canada (AG),* 2020 FC 1119 at paragraph 95.

[21] The Appeal Panel rejected CN's submissions and concluded the Review Determination was not "required to articulate what [CN] should have done to prevent the violation," agreeing with the Respondent that this "would amount to a reverse onus." Rather, it held the onus was on CN to prove it took all reasonable steps to prevent the incidents (*Sault Ste Marie* at 1331, 1325).

[22] In this respect the Appeal Panel Decision summarizes specific measures CN should have taken, identified in the Review Determination (at para 76):

> • The member expresses concern that, in response to a notice identifying threats to safe railway operations, CN responded in a very general manner (Review Determination at para. 21). Also, within the same paragraph, the member notes that no evidence was presented that the crews involved in the incidents actually received the training identified in the letter from Mr. Linder to Mr. Moran dated January 9, 2018 (Exhibit M-24), responding to the December 18, 2017, Letter of Insufficient Action (Exhibit M-23).
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> • In paragraph 31 of the review determination, the member positively noted the introduction by CN of Critical Focus Zones as an act to prevent such incidents, but noted these were "introduced subsequent to the events in this review."
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> • In paragraph 34, the review member noted that through the testimony of CN witness Mr. Grewal, "limited action" had been taken "by CN Operations Management in validating train crew performance outside of incident investigation."
>
> • In paragraph 47, the review member specifically identified that there was "no specific testimony provided by CN on the measures taken to increase vigilance and no performance indicators that demonstrated train crew behavioural changes resulting from such increased vigilance."

> • In paragraph 50, the review member expressed concern with the "workload being asked of train crews while in operation of a train to ensure that such work requirements do not detract from the vigilance required of train crews." To which, the panel notes, CN takes some umbrage by stating, "CN is ultimately the train expert. It knows how to operate its trains…" (Appellant's Written Submissions at para. 104). The panel notes the juxtaposition within CN's argument that it is up to the member to specifically identify what steps needed to be taken to avoid the violation, while concurrently declaring that "CN is ultimately the train expert" when the member identifies a specific and reasonable concern. The fact that the evidentiary record was silent on this issue speaks more to the lack of workload monitoring by CN than it does to anything unreasonable on the part of the member. The panel would note that CN failed, in its attempt to establish due diligence, to table as evidence of something as rudimentary as work descriptions for the positions of conductor and locomotive engineer, items that may have provided some support for its arguments.

[23] The Appeal Panel Decision further notes "it was reasonable for the review member to consider the presence of similar incidents and their probative value" in this connection, particularly because "the incidents, as previously noted, share geographic, timeframe and nature-of-incident commonalities" and " the evidence before the member (Exhibit M-21) clearly identified 12 incidents of track authority violations within a period of under four months."

(3) Ground 1(d): Conclusion that CN did not exercise reasonable care to prevent violations

[24] Following the Appeal Panel's conclusions regarding grounds 1(a) and (b), it held the Review Determination "was reasonable and … did not err by concluding that the appellant did not exercise reasonable care to prevent the violations in all of the circumstances."

[25] The Appeal Panel concludes:

> [93] It strikes the panel that, having received the Letter of Notice dated November 17, 2017, from Inspector Moran identifying 12 similar violations—all self-reported by CN staff—that CN should have been aware at the time that their system was not operating in an effective manner. We would have anticipated CN, upon receipt of this Letter of Notice, to have taken immediate and deliberate steps to address system deficiencies. Instead, as noted by the member, CN responded in a very general manner. The member also mentioned Inspector Moran's comments in the December 18, 2017, Letter of Insufficient Action and his finding that "corrective action implemented is insufficient" (Review Determination at para. 20(c)). The member further noted, as found by the inspector, that a number of the new initiatives cited by CN as a response to the Notice "had been implemented well before the incidents in question" (Review Determination at para. 20(c)).
>
> [94] The panel would further comment on the testimony provided by Mr. Hoyt to the member that despite Rule 42 being a "Life Critical Rule" and—along with other similar rules of track authority—having been clearly identified as a threat to safety, Mr. Hoyt testified that "our method of teaching Rule 42 hasn't changed dramatically at all" (Review Hearing Transcript, June 30, 2021, at p. 113). That CN was experiencing a high number of authority violations in the Alberta region and yet didn't take significant steps to change or improve its method of training on this rule speaks to concerns with a due diligence defence.
>
> [95] The review member identified this concern in paragraph 30 of his review determination noting, "Mr. Hoyt did not provide evidence to confirm that recertification training provided to the train crews involved in the incidents in question in this hearing did include emphasis on Rule 42 and **the need to enhance the protection of Track Work operations**" (emphasis added).
>
> [96] The panel would also identify the member's concern with respect to a lack of testimony provided by CN on the measures taken to increase vigilance, as well as a lack of performance indicators that demonstrated train crew behavioural changes resulting from such increased vigilance. As previously noted, the member was correct that no such indicators were provided. Also, as previously noted, the panel was surprised with the absence of evidence of such measures, given the requirements of the Railway Safety Management System Regulations, 2015.

> [97] With respect to the evidentiary record itself, the member specifically noted that CN's response was "very general in nature." The panel would further note that, while there was a great deal of evidence as to the training undertaken by CN with respect to its student conductors (and in recertification of existing staff), the vast bulk of this was in place prior to the Letter of Notice issued by Inspector Moran on November 17, 2017. With the issuance of this Letter of Notice, identifying a threat to safe railway operations and 12 track authority violations in under four months, CN should have been immediately aware their system was not functioning as intended.
>
> [98] Given the requirements to establish targets and evaluate remedial action, and that CN identified Rule 42 as being "Life Critical," we share the member's observation and identify our concern over the absence of such performance indicators.
>
> [99] The panel dismisses ground 1(d) and holds that the review member was reasonable and that he did not err by concluding that the appellant did not exercise reasonable care to prevent the violations in all of the circumstances.
>
> [Emphasis in original]

V. Issues

[26] CN raises the following:

1. The Appeal Panel erred in its review of the Review Member'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;
2. The Appeal Panel erred in its review of the Review Member's factual findings made in the absence of evidence by:
    a. identifying and applying the wrong standard of review to the question of whether evidence

existed to support the Review Member's findings of fact; and

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

3. The Appeal Panel erred in law in its review of the Review Member's articulation and application of the defence of due diligence by failing to identify the appropriate standard of care; and

4. The Appeal Panel erred in its review of the Review Member's articulation and application of the due diligence defence.

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

VI. Standard of review

[28] CN in its written submissions alleged some issues in this matter are subject to the correctness standard of review. However in oral submissions CN (properly in my view) abandoned such arguments. 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 *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] *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 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] The leading authority on the defence of due diligence is and remains the Supreme Court of Canada's judgment in *Sault Ste Marie*. The Supreme Court of Canada instructs that for strict liability offences such as the present, a due diligence is available where the accused 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:

> 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 <u>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</u>. 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].
>
> [Emphasis added]

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 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.	**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 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] Rule 42(b) under the *CRORs* states:

> (b) A movement in possession of the Form Y must not proceed beyond the red signal located at the identifiable location stated in the GBO [General Bulletin Order], enter the track limits stated in the GBO, or make a reverse movement within such track limits

until instructions have been received from the foreman named in the GBO.

[36] Sections 12-14 of the *TATC Act* provide the composition and expertise 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 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.	**(2)** Le président peut, s'il l'estime indiqué, soumettre l'appel à un comité de plus de trois conseillers ou, si les parties à l'appel y consentent, à un seul conseiller.
Composition of panel	**Composition du comité**

(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.

(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

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

Nature de l'appel

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

and, if it considers it necessary for the purposes of the appeal, shall hear evidence not previously available.	considération tout élément de preuve non disponible lors de l'instance.
[Emphasis added]	[Je souligne]

[37] Section 15(1) of the *TATC Act* also 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

[38] CN submits the Appeal Panel Decision is unreasonable because it relies on allegedly inadmissible and irrelevant evidence of 12 prior Rule 42(b) incidents involving CN trains, because it upholds the Review Member's factual findings allegedly made in the absence of evidence, because it allegedly fails to identify the standard of care, and because it claims the Appeal Panel unreasonably assessed CN's defence of due diligence.

[39] The Respondent submits and I agree the Decision is justified, intelligible, and transparent, and is thus reasonable per *Vavilov*.

[40] The parties' submissions are substantially the same as in consolidated file T-2643-23. And for substantially the same reasons, the application for judicial review in this case will also be dismissed.

A. *Relevance of prior incidents*

[41] CN submits the Appeal Panel unreasonably (no longer incorrectly) upheld the Review Determination of the admissibility and relevance of CN's self-reported evidence of 12 prior Rule 42(b) incidents (where CN trains unlawfully without permission entered protected track work areas).

[42] The Respondent notes, as did the Appeal Panel, that neither level of the *TATC* is bound by "any" rule of evidence (*TATC Act*, s 15(1)) except in relation to privilege which is not applicable here. I agree the flexibility provided by the Appeal Panel's legislation is a reasonable consideration, and am not persuaded it was unreasonable for the Appeal Panel to uphold the admissibility and relevance of these prior incidents.

[43] It seems to me CN's arguments both re the admissibility and relevance of these many prior incidents come down to its disagreement about relevance, use and weight of evidence in the circumstances. However, as noted, it is not this Court's role to reassess and reweigh the relevance of this evidence on judicial review except in cases of fundamental error or exceptional

circumstance which are not present here (see *Vavilov* at para 125 and *Doyle* at para 3, quoted above).

[44] Notably also, the evidence of theses prior incidents was before both the Review Determination and the Appeal Panel, where both parties had the opportunity to make related submissions. I find no merit in CN's argument it had no opportunity to raise a due diligence defence in relation to the prior incidents because each prior incident report was known to CN and both written and self-reported by CN. If CN had something to say about all or any of them it was certainly free and had every opportunity to do so.

[45] CN also submits while the Tribunal is not 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 6. There is no merit in this submission. First of all it discounts the clear design choice of Parliament to allow TACT members to determine relevance and admissibility of evidence as just notted. Nor am I persuaded to set aside the conclusions of the Appeal Panel as to do that would infringe the Appeal Panel's and the Review Determination's fact assessing and weighing role per *Vavilov* and *Doyle* already cited.

[46] I also rely on the Appeal Panel's reasonable conclusions in this respect:

> [32] For the following reasons, the panel is not persuaded by CN's position:
>
> > • The previous incidents, along with the two before us, involved a defined geographic area, with rule violations that fall under the heading of main track authority violations.

> • The incidents are corroborated through correspondence with CN.
>
> • CN's own response to TC's Notice cites a largely homogenous approach to addressing the incidents identified.

[33] The panel can differentiate the matter at hand from that in Cargill and see it as providing limited guidance.

[34] CN relies on *Sierra Fox* and draws the panel's attention to the principle that "[b]eing relieved of the legal and technical rules of evidence does not mean that no rules apply. It has been recognized that the basic criterion for the admissibility of evidence in an administrative setting is relevance" (Appellant's Written Submissions at para. 91, citing *Sierra Fox* at p. 6).

[35] In *Sierra Fox*, the panel held that the member erred in law in accepting uncorroborated hearsay evidence as the sole proof of an alleged violation.

[36] The grounds for appeal in *Sierra Fox* read in part:

> 1. The Tribunal erred in admitting as evidence and relying on Daily Air Traffic Records prepared by Nav Canada for the following reasons:
>
> i. The copies of the Daily Air Traffic Records admitted as Exhibits M-1 and M-2, **were not certified true copies and were not the same as the Daily Air Traffic Records disclosed to the document holder prior to the hearing**. The evidence at the hearing established that Exhibit M-1 and M-2 were not certified true copies of original, or certified true copies of copies;
>
> ii. The Tribunal erred in finding as fact that the alterations and notes made on the Daily Air Traffic Records submitted as Exhibit M-1 and M-2 did not obscure any information, although a post-it note on one of the copies covered information relating to the aircraft in issue at the hearing;
>
> iii. There were **serious issues with respect to the accuracy and authenticity** of the Daily Air Traffic Records such that procedural fairness and natural justice required that the author of the documents be required to attend the hearing to authenticate the

> documents and submit to cross-examination, or be identified to the document holder prior to the hearing. … [emphasis added; p. 3]

[37] This panel is not persuaded by CN's position and notes several distinctions between this matter and *Sierra Fox.*

[38] In *Sierra Fox*, the evidence accepted by the member was uncorroborated and disputed by the appellant. In the matter before us, we find evidence that has been corroborated by correspondence from CN itself and was self-reported to the Transportation Safety Board of Canada (TSB). This is not a matter of disputed violations, of altered records, of obscured information or of something requiring certified true copies. This is a simple matter of the Minister submitting clear evidence—originating both from itself and CN—as to the existence of the previous violations.

[39] The panel does not agree with CN's argument that the record of other similar incidents was introduced solely to show a "general disposition" of CN to commit such violations and, as such, is inadmissible. This panel takes guidance from Sopinka, Lederman & Bryant: *The Law of Evidence in Canada*, which also states:

> Relevance is concerned with the relationship between the proffered evidence and the issues in the case that the proponent of the evidence is advancing. … Thus, the proffered evidence must render it more likely that the disputed fact exists or, if proving a negative, more likely that the disputed fact does not exist. [para. 11.224]

[40] To this, the panel would note that the disputed fact is that of CN having a reasonable system in place to prevent the violations in question, and that the presence of similar violations (trains being where they should not be without authority), in a defined time period, in a defined geographic area, and with a common approach by CN in addressing these other incidents, speak directly to the disputed fact in question—that of an effective system to prevent the Rule 42 violations.

[41] The Minister argues, as previously noted, that the *TATC Act* expressly permits hearsay evidence and that the review member conducted a thorough review of the evidentiary record, specifically identifying and commenting on the evidence submitted by the Minister regarding other similar incidents.

[42] The panel would note that the *TATC Act* is very explicit:

> **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.
>
> **(2)** The Tribunal shall not receive or accept as evidence anything that would be inadmissible in a court by reason of any privilege under the law of evidence.

[43] The panel finds that the evidence in question was not privileged and, as such, was admissible. The question, then, is one of relevance and weight.

[44] The review member was quite explicit in his comments regarding the relevance of the previous incidents, noting:

> • While they were "not specific to Rule 42(b) violations," the incidents identified in the November 17, 2017, Letter of Notice (Exhibit M-21) from James Moran, Railway Safety Inspector at TC, to Stefan Linder, Senior Manager Regulatory Affairs at CN, were self-reported by CN to the TSB and were "reported as violations on authority limits" (Review Determination at para. 20(a)).
>
> • In a letter dated December 5, 2017 (Exhibit M-22), Mr. Linder responded to Mr. Moran's Letter of Notice, identifying concern over these incidents and outlined "**corrective action has been implemented to prevent recurrence of these types of incidents**" (emphasis added; Review Determination at para. 20(b)(iv)). The panel would observe that Mr. Linder did not differentiate the incidents identified in any significant manner—he responded with a relatively general approach to all incidents (as also observed by the member), indicating to this panel that CN saw a commonality among the incidents.
>
> • These other incidents were all "Alberta incidents" (Review Determination at para. 20(b)(iii)) and, as such, were in a clearly defined geographic area—to which this panel would further specify the incidents largely occurred within and around the smaller area defined as the Greater Edmonton Terminal Area.

> • The review member concluded that these earlier incidents were acknowledged by CN to have occurred and reports were submitted to the TSB—as required under the *RSA*. CN referenced these incidents in correspondence to TC and did not contest that they occurred. As such, the member found them "worthy of consideration of a due diligence defence by the applicant" (Review Determination at para. 26).
>
> [45] The panel finds the member's admission and use of the evidence in question to have been reasonable. The burden rests on the appellant to show they have a system in place that could reasonably be expected to prevent the violations. The evidence in question clearly speaks to this system.
>
> [46] The panel dismisses ground 1(a) and finds that the member did not improperly consider and rely upon irrelevant evidence of other unproven and unrelated allegations.
>
> [Emphasis in original]

[47] CN also submits that "for similar fact evidence to be admitted, the party leading the evidence must show that it is relevant to an issue to be decided, and that the probative value outweighs the potential prejudice of admitting the evidence," citing *R v Handy*, 2002 SCC 56 [*Handy*]. CN further submits:

> 53. If the Appeal Panel intended to rely on the Unrelated Activities to rebut CN's due diligence defence, it needed to determine whether the Unrelated Activities were relevant in accordance with the *Handy* test. The Appeal Panel failed to do so. Without the necessary "similarity" of facts, the Unrelated Activities should have been excluded on the grounds that they were ***not relevant***.
>
> [Emphasis in original]

[48] The Appeal Panel Decision specifically and in my view reasonably considers the application of *Handy* to this case (at paras 11-14), with which I agree:

> [11] In support of its position, CN relied on several decisions, including *R v Handy*, 2002 SCC 56, and *R v Cargill Limited - Cargill Limitee*, 2000 ABPC 97 [Cargill], and the proposition that the member's error lies in the law regarding character evidence and the rule against similar fact evidence, which prohibits character evidence from being used as circumstantial proof of conduct. In summary, it is CN's position that similar fact evidence is presumptively inadmissible and that the onus is on the party leading the evidence to show that its probative value outweighs its potential prejudice.
>
> [12] The Minister argued the standard to be one of reasonableness and took the position that the TATC is not bound by any legal or technical rules of evidence and that hearsay or similar evidence is admissible before the TATC.
>
> [13] The panel agrees with the Minister's position and holds that the standard of review applicable to ground 1(a) is one of reasonableness. Although the admissibility of evidence is a matter of law, section 15(1) of the *Transportation Appeal Tribunal of Canada Act* (*TATC Act*) provides that the Tribunal is not bound by any legal or technical rules of evidence in conducting any technical matter that come before it. The panel finds that the member did not rely on inadmissible evidence. As such, the question is that of weight the review member gave to the evidence in question, which is a finding of fact.
>
> [14] The panel agrees with the Minister's position and holds that the standard of review applicable to ground 1(a) is one of reasonableness.

[49] In my view, especially given its "expertise" in railway sector matters, the determination of admissibility and relevance of evidence is for the Appeal Panel (and before that, the Review Determination) to weigh and assess. In my respectful view the Appeal Panel reasonably considered and rejected CN's submissions. I am not persuaded its findings in either respect warrant judicial intervention.

B. *Upholding factual findings*

[50] CN submits the Appeal Panel Decision was unreasonable in upholding the Review Determination's findings of fact allegedly made in the absence of evidence in three respects, namely (per para 65 of CN's memorandum):

> (a) CN did not provide evidence to confirm that the recertification course involved emphasis on Rule 42;
>
> (b) CN did not produce specific testimony on the measures taken to increase vigilance; and
>
> (c) CN is waiting for in-cab video monitoring before enhancing crew monitoring regarding situational awareness.

[51] CN also submits the Appeal Panel erred by selecting the reasonableness standard for assessing whether the Review Member made findings of fact in the absence of evidence. (I note that in file T-2643-23, the Appeal Panel reviewed this same question on a correctness standard, but on judicial review I found that Appeal Panel's decision was reasonable, as indeed I do in the present case).

[52] In the case at bar, the Appeal Panel's reasons are as follows:

> [15] CN argues that this is an error of law and should be reviewed under the standard of correctness and takes the position that the error does not concern the weight or sufficiency of evidence. Rather, it is about the existence of evidence.
>
> [16] CN relies on *Toronto Standard Condominium Corporation No 2256 v Paluszkiewicz*, 2018 ONSC 2329, at paragraph 64 where the court held that "[t]he finding of a fact on no evidence is an error of law."
>
> [17] CN further relies on *Regina (City of) v Kivela*, 2006 SKCA 38, at paragraph 49. In that case, the court held that:
>
> > The traditional view, in these circumstances, is that the tribunal's factual determinations are subject to review only if and to the extent that such findings

> constitute errors of law, as when there was no evidence before the tribunal that, viewed reasonably, was capable of supporting the tribunal's finding.
>
> [18] The Minister argues this to be a matter of mixed fact and law and, as such, it is reviewable on a standard of reasonableness. The Minister submits that a review member must assess, evaluate and weigh the evidence to determine if a due diligence defence is made out and that the burden is on the party challenging the decision to show that it is unreasonable.
>
> [19] The Minister relies on Vavilov in support of its position specifically:
>
> > • "Any alleged flaws or shortcomings must be more than merely superficial or peripheral to the merits of the decision" (para. 100); and
> >
> > • "… a decision will be unreasonable if the reasons for it, read holistically, fail to reveal a rational chain of analysis or if they reveal that the decision was based on an irrational chain of analysis" (para. 103).
>
> [20] The panel concurs with the Minister that this ground is to be reviewed on a standard of reasonableness. This matter is one of mixed fact and law—fact with respect to the review member's use of the facts within the evidentiary record, and law with respect to whether the member made findings unsupported by a holistic review of the evidentiary record.

[53] CN submits that "[t]he issue was not the weight or sufficiency of evidence considered by the Review Member, or the Review Member's interpretation of facts, but whether the evidence existed at all. While the Tribunal is not bound by the strict rules of evidence, it cannot make findings of fact in the complete absence of evidence – an error of law," citing *Young v Johnson* (1961), 27 DLR (2d) (Man CA) at 407 and *Hitchings v PSS Professional Salon Services Inc* 2007 SKCA 149 at paragraph 68.

[54] I am unable to accept these submissions because, and with respect, the law relied upon pre-dates and has been superseded by the Supreme Court of Canada's judgment in *Vavilov* which mandates presumptive reasonableness review. As noted, the parties agreed as do I that reasonableness review is the required standard on this judicial review including this aspect of the case.

[55] I see no unreasonableness in the Appeal Panel's determinations to dismiss the appeal in these respects. It is not disputed that items (a) and (b) noted above are evidentiary matters in respect of which CN's due diligence submissions failed to satisfy these expert decision-makers. It is certainly the case that CN filed no evidence on these two matters, which the Review Panel determined, among other things, CN could have done to support its due diligence defence.

[56] As to (c) above, this was a characterization of the evidence that was reasonably open to the decision-maker. I should add it was neither central nor determinative, and I am not persuaded it warrants judicial intervention.

[57] In my view, the Appeal Panel's was reasonably entitled to and did consider not only what was placed on the record, but also deficiencies in the record identified in the Review Determination. That is part and parcel of an Appeal Panel's decision-making.

[58] In summary as I indicated in T-2643-23, these panels are reasonably entitled to base their conclusions not only on what a railway company does but also, as in this case, on what the railway company failed to do. Such findings are entitled to deference and respectful attention, as

per *Vavilov* at paragraphs 84, 93 and *Canada Post* at paragraph 31. These are evidentiary finding within the Appeal Panel's remit. They constitute a complete and reasonable answer the CN's submissions on this point. I add these Appeal Panel conclusion on the evidence are also 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.

C. *Standard of care*

[59] CN submits on the standard of care that the Appeal Panel erred in law when it held that the Review Member was not required to articulate or identify the standard of care for the purpose of the due diligence defence. CN argues there can be no determination of whether an accused has breached the standard of care without identifying the standard to which the accused is to be held. CN says this is a fundamental component of the due diligence test. In this respect CN points to *R v Gonder*, 1981 CanLII 3207 (YK TC), 62 CCC (2d) 326, applied in *R v Greater Sudbury (City)*, 2023 SCC 28 at paragraphs 55-56 for the proposition that "some consideration must be given to what the accused could have done to meet the standard of care" (Applicant's Memorandum at para 72).

[60] There is no merit in this submission because, in my respectful opinion, the standard of care in this case is that established by the Supreme Court of Canada in *Sault Ste Marie*; namely 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." This is expressly acknowledged by the Appeal Panel which states:

> [68] We note that in *Fullowka*, the discussion centred around concerns the trial judge imposed what amounts to an absolute liability, not one of reasonable care. In the matter at hand, the review member clearly articulated this to be a matter of reasonable care stating at paragraph 57 of the review determination, "I believe CN was inadequate in ensuring that they had a comprehensive 'system' view on ensuring the effectiveness of its train crews" and at paragraph 40:
>
> > … CN needed to prove, on a balance of probabilities, that it meets the two-part test 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 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**. [emphasis in original]
>
> [Emphasis added]

[61] The Appeal Panel further in my view reasonably considered and rejected CN's argument, concluding:

> [81] Clearly, it is the responsibility of the defendant to prove that it took all reasonable steps. It is not up to the Minister, nor the member, to do so on the defendant's behalf.
>
> [82] That CN feels it was up to the member to identify what would have prevented the violations is to place an onus on the review member that is absolute and is a standard not in keeping to the guidance of *Sault Ste Marie*. It is not up to the review member to identify, in detail, the nature of each and every step, precaution, procedure, training or other component of a systemic approach as defined under *Sault Ste Marie*. The panel takes notice that *Sault Ste Marie* clearly identifies it to be the responsibility of "the defendant to prove that all due care has been taken" (p. 1325). The panel further notes, as argued by the Minister that "[t]he due diligence which must be established is that of the accused alone" (Respondent's Written Submissions at para. 23, citing *Sault Ste Marie* at p. 1331).

> [83] The panel finds that the review member did not err by failing to identify the appropriate standard of care and that the review member's findings were correct.

D. *Due diligence*

[62] CN submits 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). No one disagrees that perfection is not the standard. With respect, the Supreme Court of Canada demands that for the defence 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). I am not persuaded the Appeal Panel applied a standard of perfection either expressly (as just discussed) nor in any form of disguise. There is no merit in this line of argument.

[63] CN further submits it was unreasonable for the Appeal Panel Decision to affirm the Review Determination because it "was based significantly on the irrelevant Unrelated Activities and on findings of fact made in the complete absence of evidence." As noted already, it was for the Review Determination and then on appeal, for the Appeal Panel to weigh and assess the evidence including deficiencies and content of CN's system and efforts respecting its operating effectiveness.

[64] Notably and 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; see also *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). While CN extended an invitation in this respect also, with respect I decline to second-guess the Appeal Panel's weighing and assessing of what it considered relevant factors , again per *Vavilov* and *Doyle*.

[65] It was within the Appeal Panel's remit to review and assess the Review Determination's conclusions on the evidence on these aspects of the CN's effort to establish a defence of due diligence. In my respectful view, the Appeal Panel reasonably agreed with the Review Determination conclusion CN had not established its defence of due diligence. Moreover, as the Respondent submits, these conclusion also "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.

IX. Conclusion

[66] Given the above, this application will be dismissed.

X. Costs

[67] The Applicant and Respondent 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 agreement I find reasonable. Therefore the Applicant will be ordered to pay the Respondent $4,000.00 all inclusive as its costs.

JUDGMENT in T-2644-23

THIS COURT'S JUDGMENT is that:

1. This application for judicial review is dismissed.

2. The Applicant shall pay the Respondents its all inclusive costs in the amount of $4000.00.

"Henry S. Brown"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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