Federal Court  Cour fédérale

Date: 20241022

Docket: T-2262-23

Citation: 2024 FC 1667

Ottawa, Ontario, October 22, 2024

PRESENT: The Honourable Mr. Justice Ahmed

BETWEEN:

CANADIAN NATIONAL RAILWAY COMPANY

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicant, Canadian National Railway Company, seeks judicial review of a decision made by an appeal panel (the "Panel") of the Transportation Appeal Tribunal of Canada ("TATC") dated September 22, 2023, upholding two monetary penalties for contraventions of section 17.2 of the *Railway Safety Act*, RSC 1985, c 32 (4th Supp) (the "Act").

[2] The Applicant submits that the Panel committed several errors of law and rendered an unreasonable decision.

[3] For the following reasons, I find that the decision is reasonable. This application for judicial review is dismissed.

II. **Facts**

A. *Background*

[4] The Applicant is a railway corporation. 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."

[5] In December 2018 and February 2019, locomotive operators employed by the Applicant again failed to stop at designated stop signals in contravention of Rule 439. On June 4, 2019, Transport Canada issued two penalties amounting to $45,833.04 against the Applicant for these contraventions. On June 21, 2019, the Applicant requested a review of these penalties (the "Review Determination").

[6] In a decision dated March 16, 2022, a member of the TATC concluded that the Applicant had contravened section 17.2 of the Act (*Canadian National Railway Company v Canada (Minister of Transport)*, 2022 TATCE 15). Noting evidence of prior incidents with respect to Rule 439 as well as the Applicant's failure to implement measures to prevent future incidents, the member found that the Applicant "was unable to clearly demonstrate how it is addressing what appears as a systematic behaviour of repeated non-compliance with… Rule 439." The member assessed mitigating and aggravating factors, affirming the penalty of $45,833.04 but recommending that an additional $14,538 not be imposed.

[7] On April 14, 2022, the Applicant appealed the Review Determination to the Panel.

B. *Decision under Review*

[8] In a decision dated September 22, 2023, the Panel upheld the Review Determination. The appeal was based on three grounds: (1) a breach of procedural fairness due to the exclusion of the Applicant's representative from the hearing; (2) an error of law due to the rejection of the defence of due diligence; and (3) the imposition of a disproportionate penalty. Only the second and third grounds of appeal are at issue in this proceeding.

[9] On the second ground, the Panel found that the Review Determination reasonably admitted similar fact evidence of prior incidents when the Applicant was issued warnings for failure to comply with Rule 439 of the *Rules*. Citing section 15(1) of the *TATC Act*, which provides that the TATC is not bound by technical rules of evidence, the Panel found that the evidence of prior incidents was "relevant," "not privileged," and "corroborated by the

[Applicant's] own submissions." The Panel found that the Review Determination reasonably relied on evidence of previous Rule 439 violations, and indeed, that it would have been unreasonable to not consider them.

[10] On the third ground, the Panel found that the penalty imposed was reasonable. The Panel found that the Review Determination appropriately recognized the gravity of the Rule 439 breaches, including the Applicant's acknowledgement of the seriousness of contravening this rule. The Panel further found that the Review Determination reasonably balanced mitigating and aggravating factors in assessing the penalty. The Panel rejected the Applicant's argument that the penalty ought to have been reduced since there were "no prior convictions," the evidence establishing that the Applicant had twice contravened Rule 439. The Panel also rejected the Applicant's assertion that it had taken all reasonable steps to mitigate harm, noting the number of Rule 439 contraventions and the Applicant's failure to address two issues identified by a Railway Safety Inspector as general root causes for all the stop signal violations, namely, a lack of situational awareness and poor communication between crew members. The Panel acknowledged that the Review Determination excluded an additional aggravating factor and mitigating factor and found that, "if the missing mitigating factor had been applied and the aggravating factor of potential harm had not been overlooked, the value of the monetary penalty would have increased."

[11] For these reasons, the Panel dismissed the appeal and upheld the monetary penalties amounting to $45,833.04.

III. **Issues and Standards of Review**

[12] Initially, the Applicant sought judicial review of the Panel's decision on two grounds, the defence of due diligence and the reasonableness of the monetary penalties. Shortly before the hearing, the Applicant abandoned the ground of due diligence. Consequently, the sole issue in the present application is whether the Panel's affirmation of the monetary penalties is reasonable.

[13] I find the applicable standard of review is reasonableness (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 ("*Vavilov*") at paras 16–17, 23–25).

[14] Reasonableness is a deferential, but robust, standard of review (*Vavilov* at paras 12-13; 75; 85). The reviewing court must determine whether the decision under review, including both its rationale and outcome, is transparent, intelligible and justified (*Vavilov* at para 15). A decision that is reasonable as a whole 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). Whether a decision is reasonable depends on the relevant administrative setting, the record before the decision maker, and the impact of the decision on those affected by its consequences (*Vavilov* at paras 88-90, 94, 133-135).

[15] For a decision to be unreasonable, the applicant must establish the decision contains flaws that are sufficiently central or significant (*Vavilov* at para 100). Not all errors or concerns about a decision will warrant intervention. A reviewing court must refrain from reweighing evidence before the decision maker, and it should not interfere with factual findings absent

exceptional circumstances (*Vavilov* at para 125). Flaws or shortcomings must be more than superficial or peripheral to the merits of the decision, or a "minor misstep" (*Vavilov* at para 100).

IV. **Analysis**

[16] The Applicant submits that it was unreasonable for the Panel to use evidence of prior incidents to increase the monetary penalties. The Applicant submits that, when non-compliance is treated as "violations" under section 40 of the Act rather than as "offences" under section 41, they operate as strict liability offences. Consequently, monetary penalties may only be imposed when a finding of fault is made against the Applicant. Since the prior incidents were not treated as violations and no such finding of fault was made, the Applicant submits that they must be excluded from the Panel's assessment of historical non-compliance, an aggravating factor which increased the monetary penalty at issue. The Applicant submits that including prior incidents in this analysis effectively transforms the prior incidents into absolute liability offences, since the Applicant would effectively be punished without a finding of fault being made. The Applicant further asserts that the Panel conflated the standard of review for the relevance of the Applicant's prior incidents with the standard of review for the weight assigned to these incidents, thus erring by applying the wrong standard and rendering a decision that was unreasonable.

[17] The Respondent submits that the Panel reasonably referred to evidence of the Applicant's prior incidents in affirming the monetary penalty. The Respondent submits that the prior incidents did not, as the Applicant contends, need to be "prior convictions," in order to be relevant to the penalty imposed, especially given the Applicant's own admission of previous contraventions of Rule 439. According to the Respondent, the Applicant's contention that only

previous incidents treated as violations pursuant to section 40 of the Act may be referenced in assessing non-compliance history is baseless, as Transport Canada's graduated enforcement regime belies the notion that contraventions are a strict liability offence. The Respondent further submits that the Panel's assessment of this evidence was a question of weight and was grounded in the context of the Panel's home statute. Consequently, the rule against similar fact evidence does not apply, and the Applicant's submissions amount to a request for the Court to reweigh the evidence.

[18] I agree with the Respondent.

[19] As a preliminary note, I find the Applicant's submissions about prior incidents being treated as absolute liability offences to be unintelligible. As counsel for the Respondent rightly noted, the Applicant concedes that monetary penalties are calculated on a graduated basis, taking into account several aggravating and mitigating factors. The graduated enforcement scheme indicates that contraventions do not operate as absolute liability or even as strict liability offences, but rather as part of a non-punitive, compliance-focused framework of administrative monetary penalties.

[20] However, the Applicant is correct that, strictly speaking, the Panel applied the wrong standard of review with respect to the Review Determination's treatment of the prior incident evidence. As my colleague Justice Norris found, "the parties and the [Panel] all appear to have conceived of the role of the appeal panel in terms more commonly associated with judicial review (i.e. as applying standards of correctness or reasonableness depending on the issue) rather

than the usual appellate standard of review (i.e. as applying standards of correctness or palpable and overriding error depending on the issue)" (*Canadian National Railway Company v Canada (Attorney General)*, 2020 FC 1119 ("*CNRC*") at para 68). Both the Act and the *TACT Act* are silent on which standard of review applies on an appeal of a Review Determination (*CNRC* at paras 64-65). Thus, the Panel ought to have reviewed the decision on the appropriate appellate standard of review—that of palpable and overriding error. This is "a difficult standard to meet" and highly deferential (*Millenium Pharmaceuticals Inc v Teva Canada Limited*, 2019 FCA 273 at para 6).

[21] Nonetheless, I do not find that this error renders the Panel's decision as a whole unreasonable. With respect to the weight assigned to evidence of prior incidents, the fundamental issue before the TATC is essentially a question of "when the [Panel] does or does not owe deference to the review member's determinations" (*CNRC* at para 68). The Panel did not, in my view, render an unreasonable decision by relying upon a standard of review that shows deference to the weighing of the evidence in the Review Determination, even if, strictly speaking, it was not the standard of review that ought to have been applied.

[22] Furthermore, I find that the Panel did not err by considering evidence of the prior incidents in its decision. The Applicant submits that this evidence constituted similar fact evidence and the Panel therefore ought to have applied the principles for similar fact evidence from *R v Handy*, 2002 SCC 56 ("*Handy*"), *R v Cargill Limited – Cargill Limitee*, 2000 ABPC 97 ("*Cargill*"), and *Sierra Fox Inc v Minister of Transport*, 2005 CanLII 94043 (CA TAT) ("*Sierra Fox*"). As stated in *Sierra Fox*, "[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" (at 6). The Applicant submits that the Panel, without regard to these principles and the facts at hand, merely accepted that the evidence of prior incidents was relevant to the impugned incidents.

[23] Although it is true that the Panel did not discuss *Handy* in its analysis, the Panel addressed the Applicant's submissions on similar fact evidence through their discussion of *Cargill*. The Panel distinguished *Cargill* from the present case, finding that there was "a single previous incident that ha[d] a similar outcome but different cause" in *Cargill* whereas, in this matter, there were 12 previous instances of the Applicant committing stop signal violations. In my view, the Panel's assessment demonstrates that they did assess the relevancy of these 12 previous contraventions, rather than simply accepting them as relevant as the Applicant contends.

[24] The Panel's treatment of this evidence is certainly not perfect. However, perfection is not the standard on reasonableness review (*Vavilov* at para 91). Instead, reviewing courts must determine whether a decision is demonstrably responsive to a party's submissions (*Vavilov* at paras 127-128). The Panel meets this standard as they addressed, albeit in an imperfect manner, the Applicant's submissions regarding the relevance of the prior incidents in their decision to uphold the monetary penalties imposed.

[25] Similarly, I find no issue with the Panel's treatment of *Sierra Fox*. The Panel distinguished the present case from *Sierra Fox*, finding that *Sierra Fox* involved uncorroborated

evidence whilst the prior incidents in this case were corroborated by the evidence of both parties. The Panel reasonably concluded that the occurrence of "the previous incidents…is, in no way, disputable. Further the evidence clearly spoke to the effectiveness of the system in place…to prevent the incident and, as such, is relevant." Pursuant to section 15(1) of the *TATC Act*, the Panel was not bound by any legal or technical rules of evidence, a provision the Panel referred to several times in their decision. I find that the Panel's reliance on this provision with respect to the Applicant's repeated breaches of Rule 439 demonstrates justification in light of the decision's legal and factual constraints. This is an essential feature of a reasonable decision (*Vavilov* at para 99).

[26] In contrast, the Applicant inappropriately minimizes the significance of the prior incident evidence. According to the Applicant, "[s]ome of the Prior Incidents do not bear any similarity to the Incidents other than the fact that a train passed a stop signal." This is an unsettling characterization of the evidence. The Panel firmly stated that Rule 439 is a "cardinal rule." Non-compliance "can cause harm, danger, death and hazard to the environment." It is thus highly significant that the Panel noted evidence of 12 stop signal violations by the Applicant, resulting in a "marked increase" in Rule 439 violations "across [the Applicant's] system."

[27] Furthermore, I cannot agree with the Applicant that the Panel could not take into account the "unproven offences" (*i.e.*, the prior incidents) when imposing the monetary penalties. The Respondent rightly notes that these penalties are administrative, rather than criminal, sanctions (*Guindon v Canada*, 2015 SCC 41 at para 75). The Applicant's submission that offences which are alleged but unproven should not be considered when fashioning a penalty is based on

jurisprudence from a different context, namely, the appeal of a sentencing judge's decision made pursuant to a provincial regulatory scheme (*R v Canada Pacific Forest Products Ltd*, 1992 CanLII 389 (BC SC)). The monetary penalties in this matter were awarded by a decision-maker under their home regulations, specifically section 3.1(b) of the *Railway Safety Administrative Monetary Penalty Regulations*, SOR/2014-233. Neither the Review Determination nor the Panel's decision treated the prior incidents as instances when the Applicant "committed offences" or contravened the Act in the same manner as they have in this case. Instead, they considered the prior incidents as simply that: prior incidents. Thus, the Applicant's submission that the "unproven offences" were treated as criminal sanctions has no bearing on the Panel's decision to refer to the prior incidents in upholding the monetary penalties.

[28] In any event, the Panel makes few references to the prior incidents, mentioning the incidents only in determining whether the Applicant took reasonable steps to mitigate harm. This is a factor that is well within the ambit of the Panel to consider. I therefore find no reason to interfere with the treatment of this evidence in the Panel's decision.

[29] Given that the Panel's assessment of the monetary penalties does not rely particularly heavily on the evidence of prior incidents, the Applicant's submissions about the prior incidents amount to a request for this Court to either overturn the Review Determination or decide the issue of the monetary penalties for itself. Neither request can succeed. This is the judicial review of the Panel's decision, not of the Review Determination, and the Court must focus on what the Panel decided, not on what the Court itself would have decided in its place (*Vavilov* at paras 15, 83, 125).

[30] For these reasons, the Applicant has failed to establish that the Panel's decision is unreasonable (*Vavilov* at para 100). This application for judicial review is dismissed.

V. **Costs**

[31] The parties agree to costs in the amount of $4,000. I find this figure to be reasonable. As this application for judicial review is dismissed, costs in the amount of $4,000 are awarded to the Respondent.

VI. **Conclusion**

[32] This application for judicial review is dismissed. The Applicant has failed to establish the decision is unreasonable (*Vavilov* at para 100). Costs are awarded to the Respondent in the amount of $4,000.

JUDGMENT in T-2262-23

THIS COURT'S JUDGMENT is that:

1. This application for judicial review is dismissed.

2. Costs are awarded to the Respondent in the amount of $4,000.

"Shirzad A."
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-2262-23
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APPEARANCES:

Kristen MacDonald	FOR THE APPLICANT
Cynthia Lau Zoe Stevens	FOR THE RESPONDENT

SOLICITORS OF RECORD:

MLT Aikins LLP Barristers and Solicitors Saskatoon, Saskatchewan	FOR THE APPLICANT
Attorney General of Canada Winnipeg, Manitoba	FOR THE RESPONDENT