Federal Courts Reports
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RAILWAYS

Track safety — Judicial review of Transportation Appeal Tribunal of Canada (appeal panel) decision upholding conclusion of review member that applicant violating *Railway Safety Act*, R.S.C., 1985 (4th Supp.), c. 32, s. 17.2, upholding administrative monetary penalty — Applicant alleged to have failed to maintain railway work on two sections of track where each rail not bolted with at least two bolts as per Transport Canada's *Rules Respecting Track Safety* (Track Safety Rules), Part II, Subpart D, Section V, subsection (d) (hereinafter referred to as paragraph (d)) — Missing bolts found by inspectors travelling along tracks in assessment vehicle — Each missing bolt replaced by applicant employee as inspection proceeding — Transport Canada finding that number of missing bolts being reported "abnormally" high — Review member finding, *inter alia*, that if railway industry determined that less than stipulated number of bolts safe, industry would have included exemptions or different requirements; despite due diligence, applicant not exempted from complying with safety rules — Appeal panel agreeing with review member that Track Safety Rules clearly state physical condition of safe rail structure — Finding that Minister establishing deficiency set out in Notice of Violation on balance of probabilities — Agreeing with review member in rejecting defence of due diligence — Applicant arguing impossible for railway company to comply with appeal panel's interpretation of paragraph (d) — Stating that delict alleged not simply for bolts to be missing but, rather, for company to have failed to immediately take remedial action or appropriate precautionary measures until known deficiency rectified — Arguing only when railway company failing to do so that it would commit offence under s. 17.2 — Contending that appeal panel erred by ignoring evidence relevant to its defence of due diligence — Whether appeal panel erring in its understanding of requirements of Track Safety Rules pertaining to rail joint bolts, in rejecting applicant's defence of due diligence — Appeal panel reasonably determining that paragraph (d) meaning just what it says, i.e. railway must be joined with minimum of two bolts in each rail — Words used in paragraph (d) precise, unequivocal, entirely reasonable for appeal panel to rely on their ordinary meaning — Compliance of track joints with paragraph (d) simply one of things railway companies must inspect for, take immediate action to rectify when required — Broken, loose bolt not creating offence of absolute liability — Paragraph (d) having to be read in conjunction with s. 17.2 — Initial burden on Minister to prove *actus reus* when defendant charged with violating s. 17.2 by failing to maintain railway in compliance with Track Safety Rules denies allegation — No need for Minister to prove existence of *mens rea* — Applicant entitled in this case to raise defence that it was not negligent — Appeal panel's determination with respect to applicant's defence of due diligence unreasonable — Deficiency to which due diligence having to be directed cannot be simple fact that bolts were missing — Rather, it is that more bolts were missing than would be expected to happen through normal use of tracks between inspections — Under the Track Safety Rules, applicant required to do visual inspections of subdivisions in question at least twice weekly — No suggestion applicant failing to do so or not doing so properly — Radically different baselines for number of missing bolts suggested by parties giving rise to different standards of care — These standards having direct bearing on whether applicant established its defence of due diligence or not — Appeal panel, review member not determining whose standard was right — Absent any determination by appeal panel with respect to baseline, adverse inference it drew from fact that applicant had not provided more evidence about its maintenance, inspection practices not rationally supported — Application allowed.

CANADIAN NATIONAL RAILWAY COMPANY V. CANADA (ATTORNEY GENERAL) (T-36-20, 2020 FC 1119, Norris J., reasons for judgment dated December 4, 2020, 39 pp.)