

Federal Court



Cour fédérale

Date: 20251224

Docket: T-390-24

Citation: 2025 FC 2015

Ottawa, Ontario, December 24, 2025

PRESENT: The Honourable Mr. Justice Duchesne

BETWEEN:

CANADIAN NATIONAL RAILWAY  
COMPANY

Applicant

and

MINISTER OF TRANSPORT, DIRECTOR GENERAL, RAIL SAFETY AND  
TEAMSTERS CANADA RAIL CONFERENCE

Respondents

**ORDER AND REASONS**

I. **Overview**

[1] The Respondents Minister of Transport and Director General, Rail Safety, [the MT and the DGRS, respectively, and together, the MT Respondents] have brought an appeal pursuant to Rule 51 of the *Federal Courts Rules*, SOR/98-106 [the *Rules*] from an order made on February 28, 2025, by the parties' case management judge Associate Judge Micheal D. Crinson [the Order].

[2] The Associate Judge’s Order determined a motion by the Applicant, Canadian National Railway Company [CNR], pursuant to Rule 318 of the *Rules* to compel the MT Respondents to produce documents, material and information in response to its Rule 317 request as set out in its Notice of Application [the NOA]. The MT Respondents had objected to the production of some of the requested documents, material and information pursuant to Rule 318(2) of the *Rules* on the basis that the relevance of the requested materials had not been established.

[3] The MT Respondents were ordered to produce “documents, materials and information” that were before the Director General, Rail Safety and the Ministry of Transport relating to the making of the “*Duty and Rest Period Rules for Railway Operating Employees*” [the DRPR Materials] as part of the certified tribunal record disclosed and transmitted in connection with the DGRS’ January 26, 2024, decision to refuse CNR’s request for an exemption pursuant to subsection 22(4) of the *Railway Safety Act*, R.S.C., 1985, c. 32 (4<sup>th</sup> Supp) [the Decision, and the RSA].

[4] The MT Respondents argue that the Associate Judge made an overriding and palpable error of fact in finding that the DRPR Materials were or may have been before the DGRS when he made the Decision.

[5] The Associate Judge did not make the finding of fact the MT Respondents argue he made in his Order. The MT Respondents’ appeal is therefore dismissed for the reasons that follow.

## II. Background and the Order

[6] Ministerial Order 18-01 was issued on December 20, 2018, pursuant to subsection 19(1) of the RSA. The DGRS ordered railway companies, including CNR, through that Ministerial Order to revise the existing work and rest rules that governed on-duty and rest periods for persons employed in positions declared to be critical to safe railway operations [the Work/Rest Rules]. The DGRS directed more specifically that the revised Work/Rest Rules should contain “the maximum length of a duty period (in hours) that considers increases or decreases based on the time of day the duty period starts” as well as “maximum cumulative time on duty, for periods of 7 consecutive days (1 week), 28 consecutive days (4 weeks), and annually”. The Work/Rest Rules revisions were intended to reflect the latest fatigue science, including developments in research technology around fatigue and fatigue management, among other elements set out in the Ministerial Order.

[7] The Railway Association of Canada (which included CNR) and other entities and railways made submissions to the DGRS with respect to their proposals for revised Work/Rest Rules.

[8] The DGRS approved new Work/Rest Rules titled “Duty and Rest Period Rules for Railway Operating Employees”, short titled the “Duty and Rest Period Rules” [the DRPR] on November 25, 2020. Different portions of the DRPR and compliance with them was to occur in accordance with a phase-in the schedule set out in the DRPR.

[9] Subsection 22(4) of the RSA provides that a railway company may apply to the Minister for an exemption from the application of specific portions of the DRPR. The Minister has the

discretion to grant the exemption sought pursuant to subsection 22(2) of the RSA, if he is of the opinion that the exemption is in the public interest and is not likely to threaten safe railway operations.

[10] CNR applied for an exemption from the application of the requirements of DRPR sections 9.1 and 9.2 as they may apply with respect to an employee's maximum cumulative time of duty on September 25, 2023. CNR's exemption application and supplemental submissions are alleged to have included uncontradicted supporting evidence and fatigue science expert evidence to demonstrate that the requested exemption would maintain a level of safety at least equal to that brought about by the DRPR, as it provided for an additional buffer over the minimum average requirement under the DRPR and was in the public interest.

[11] The DGRS denied CNR's exemption request through the Decision. The Decision itself consists of letter and a Notice of Refusal. The Notice of Refusal of Exemption states in part:

In my opinion, granting CN an exemption from the requirements of section 9.1 and 9.2 of the DRPR is not in the public interest and is likely to threaten safe railway operations.

Having regards to the current railway practice, to the views of the railway company, the views of each relevant association or organization, and to other factors I consider relevant, I, Stephen Scott, Direction General, Rail Safety, as authorized by the Minister of Transport under section 45 of the RSA, hereby deny the exemption requested.

[12] CNR filed its NOA seeking judicial review of the Decision on February 23, 2024.

### III. **The Notice of Application**

[13] CNR alleged in its NOA that the Decision should be quashed because i) the DGRS breached its procedural fairness rights, and ii) the Decision is unreasonable because a) the DGRS applied the wrong legal test to the exemption request, and b) the Decision is based on erroneous findings of fact.

[14] CNR alleges the following in its NOA as to procedural fairness:

34. The Director General breached CN's procedural fairness rights in two ways.

35. First, in denying CN's request for an exemption to sections 9.1 and 9.2 of the DRPR pursuant to subsection 22(4) of the Act, the Director General relied on documents and information which was not provided to CN for consideration, violating CN's right to procedural fairness. Specifically:

a) In his letter to CN, the Director General relied on "Transport Canada's analysis of considerations and risk factors" and in the Notice of Refusal he relied on and considered "current railway practices", the "views of each relevant association or organization" and "other factors". The Director General did not provide the particulars of the Transport Canada analysis or which practice were considered, which association or organization he consulted or what their views were, and did not identify the other "relevant factors" he took into account; and,

b) The Director General did not provide CN with copies of these information, documents, analyses, opinions and factors and failed to give CN an opportunity to make submissions on them.

36. Second, in developing the DRPR, Transport Canada repeatedly insisted that the revised rules and any exemption would be based on the latest fatigue science. Notwithstanding this insistence, the Decision does not reference or find support in relevant fatigue science. Accordingly, the Director General violated CN's reasonable expectation that its request for an exemption pursuant to subsection 22(4) of the Act would be assessed on the basis of the latest fatigue science. Pursuant to subsection 22(2) of the RSA,

[15] CNR alleges the following in its NOA as to unreasonableness:

**ii. The Decision is Unreasonable**

37. The Decision is unreasonable as it fails to provide a transparent and intelligible justification for the result in light of (a) the legal and (b) the factual constraints bearing on it, including the evidence and facts before the Director General and the submissions made by CN

**(a) Legal Constraints Ignored by Director: Director Applied Wrong Legal Test**

38. First, as to the legal constraints bearing on the Decision, the Director General applied the wrong legal test. The Director General ought to have considered the “public interest” of the exemption and whether the exemption threatens “safe railway operations” on the basis of applicable fatigue science pursuant to subsection 22(2) of the Act. The Director General did not do so. Instead, the Director General erroneously considered the principles under subsection 19(4) of the Act in having “regard to current railway practice, to the views of the railway company, the views of each relevant association or organization, and to other [unspecified] factors I consider relevant...” (as set out in the Notice of Refusal) and “Transport Canada’s analysis of considerations and risk factors” (as set out in the letter).

39. As such, the Director General failed to consider the essential components of an - exemption under the Act. Consequently, the Decision is unreasonable. It is not justified in light of the legal requirements under the Act.

40. Moreover, the Director General unreasonably relied on extraneous considerations. These factors are not listed under subsection 22(2) of the Act and the Director General did not articulate what Transport Canada’s analysis contained, which “relevant” associations or organizations provided views, what the views of the associations or organizations are, what the “other factors” are, or how any of these criteria weigh in the balance of whether CN’s requested exemption ought to be granted under subsection 22(2) of the Act. The Decision is therefore not justified in light of the legal requirements under the Act, and is not transparent and intelligible.

[16] CNR's NOA allegations as to the basis of the erroneous findings of fact that make the Decision unreasonable need not be considered for the purposes of this appeal.

IV. **The Rule 317 Request and the Rule 318(2) Objection**

[17] CNR included the following request pursuant to Rule 317 in its NOA:

**THE APPLICANT HEREBY REQUESTS** that, pursuant to Rule 317 of the Federal Courts Rules, the Minister of Transport and Director General, Rail Safety transmit to the Applicant and to the Registry certified copies of all materials that were before or considered by the Minister of Transport and Director General, Rail Safety in respect of the Decision. In particular, the Applicant requests:

1. Documents, material and information that were before the Director General, Rail Safety and the Ministry of Transport relating to the making of the *Duty and Rest Period Rules for Railway Operating Employees*;

2. Documents, material and information that were before the Director General, Rail Safety and the Minister of Transport when the Decision was rendered, including briefing notes, memoranda and research opinions provided by Transport Canada and others and considered in the determination of the Decision, and more specifically:

i) The Director General's claim at p. 1 of his letter to CN that "[CN] has not demonstrated that the exemption from the provisions of the DRPR is not likely to threaten safe railway operations.";

(ii) The Director General's claim at p. 1 of his letter to CN that "allowing an exemption that would apply across the country and to employees on variable shift schedules (i.e., day and night), would increase fatigue risk considerably."

(iii) The Director General's claim at p. 2 of his letter to CN that "Transport Canada's analysis of considerations and risk factors that there would be an increased risk of fatigue if this exemption was granted";

3. “[T]he views of each relevant association or organization and to other factors I consider relevant” as set out in the Notice of Refusal;
4. Communications to and from the Director General, Rail Safety in relation to CN’s exemption request, including with his staff at Transport Canada, and any stakeholders or third parties, as well as any notes related to these communications; and
5. Communications to and from the Minister of Transport in relation to CN’s exemption request, including with his staff at Transport Canada, and any stakeholders

[18] The MT Respondents transmitted a certified tribunal record to CNR on April 19, 2025, along with a “Rule 317 Certificate” dated April 2, 2024. The transmitted certified tribunal record appears to be responsive to the requests made at paragraphs 2 to 5 of CNR’s Rule 317 request. The MT Respondents also delivered a written objection as contemplated by Rule 318(2) of the *Rules* which reads in salient part as follows:

Please note that the Minister of Transport and Director General, Rail Safety, object to the portion of the Applicant’s request under Rule 317 seeking “[d]ocuments, material and information that were before the Director General, Rail Safety and the Minister of Transport relating to the making of the *Duty and Rest Period Rules for Railway Operating Employees*” on the basis that the relevance of such documents, material and information has not been established.

[19] CNR brought a motion pursuant to Rules 318(3) of the *Rules* to compel the MT Respondents to transmit the DRPR Materials despite their objection.

[20] The TM Respondents contested CNR’s motion. In support of their position, the MT Respondents produced the affidavit of Stephanie Plouffe affirmed on June 10, 2024, in which Ms. Plouffe deposed as follows:

2. As Director, Regulatory Affairs, my responsibilities include the management of all regulatory matters pertaining to rail safety. This involves the application of the Railway Safety Act, RSC 1985, c 32 (4th Supp) (“Act”), and associated rules and regulations, the development of proposed regulations, and collaboration with other departments and agencies involved in railway operations. In this role, I am responsible for providing recommendations to the Director General, Rail Safety (“Director General”) for review and consideration of regulatory requests made by regulated parties, including requests for exemptions from specific rules or regulations under the Act. I worked on the request submitted by the Canadian National Railway Company (“CN”) under subsection 22(4) of the Act for an exemption from the application of sections 9.1 and 9.2 of the Duty and Rest Period Rules for Railway Operating Employees (“DRPR”). I also assisted in compiling the Certified Tribunal Record (“CTR”) transmitted to the Court in relation to this application for judicial review. As such, I have direct knowledge of the matters described in this affidavit.

3. The CTR contains a complete record of the material, documents and information before the Director General at the time the Director General made his decision in respect of the request submitted by CN for an exemption from the application of sections 9.1 and 9.2 of the DRPR. This decision (the “Exemption Decision”) was communicated to CN Rail by way of a letter dated January 26, 2024 and a Notice of Refusal of Exemption.

V. **The Order Appealed From**

[21] The Associate Judge summarized most of the foregoing in his Order.

[22] The Associate Judge summarized the five grounds argued by CNR in support of the order it sought and noted that the MT Respondent’s only basis to refuse to produce the documents, materials and information sought was that CNR had not established their relevance.

[23] The Associate Judge considered *Maax Bath Inc. v. Almag Aluminum Inc.*, 2009 FCA 204, at paragraph 9 [*Maax Bath*] and its teaching that a document is relevant in the context of a Rule 318 motion if it may have affected the decision of the Tribunal, or may affect the decision that the reviewing Court will make on an application for judicial review.

[24] The Associate Judge then noted, citing *Canadian National Railway Company v. Canada (Transportation Agency)*, 2023 FCA 245 at para. 17 [CN 2023], that:

[O]n a request for documents pursuant to Rule 317 and a motion pursuant to Rule 318 an absolute determination is not required. To state the test for production as such is to set the bar too high. Rather, as the Federal Court of Appeal instructs, it is sufficient if there is an arguable case that the documents sought might well be relevant to the grounds or relief set out in the pleading”.

[25] The Associate Judge then wrote as follows:

[13] In rejecting the requested exemption the Director General states, the exemption sought is not in the public interest and is likely to threaten safe railway operations. In arriving at that conclusion, the Director General goes on to add that regard was had “to current railway practice, to the views of the railway company, the views of each relevant association or organization, and to other factors I [the Director General] consider relevant”.

[14] The decision at issue, the reasons given for rejecting the requested exemption and the notice of application make clear that the essence of this proceeding is whether or not the decision is unreasonable or procedurally unfair. The nature of that decision is not a determination of whether the proposed exemption is the most safe practice. Rather it is a comparative exercise to determine whether the proposal is in the public interest and whether it is not likely to threaten safe railway operations.

[15] This is not a situation in which the Applicant is embarking on a fishing expedition. The intent and purpose of the DRP Rules was a factor in the decision that is the subject of this Application. The broad, open-ended and non-specific statement by the Director General to any factors thought to be relevant, has itself made the

scope of relevance broader to include what was thought by the Director General to be relevant.

[16] The Director General's refusal included as factors "current railway practice" which should be expected to include the DRP Rules, and other non-specified factors the Director General considers relevant. I agree with the Applicant that these other non-specified factors might well be argued to include documents, material and information that were before the Transport Respondents relating to the making of those DRP Rules.

[17] In light of the stated considerations and the non-specified factors the Director General considered and given that the DRP Rules are the point of comparison for evaluating an exemption, there is an arguable case that the documents sought might well be relevant to the grounds or relief set out in the notice of application and they should be disclosed. The judge hearing the merits of the application will make the final determination of relevance to the issues ultimately argued before that judge.

## VI. **The Issues on this Appeal**

[26] The MT Respondents plead that that there are three issues on this appeal.

[27] The MT Respondents have framed the second issue differently in their Notice of Motion and in their written representations. Read together, those formulations lead to the following statement of issues to be determined:

1. What is the applicable standard of review?
2. Whether the Associate Judge made an overriding and palpable factual error in his Order and Reasons in finding that the DRPR Materials either were, or may have been, before the DRGS when he made the Decision?
3. If so, should the MT Respondent's Rule 318(2) objection be upheld?

[28] The MT Respondents additionally alleged in their Notice of Motion that the Associate Judge erred in law or in principle by departing from the generally held standard that Rule 317 requires the only production of the material the administrative decision maker had before it when the Decision was made and nothing more. They further alleged that the Associate Judge erred in law and in principle in his assessment of the relevance of the DRPR Materials by concluding that there was an arguable case that they might be relevant to the grounds of relief pleaded by CNR.

[29] The MT Respondents confirmed at the hearing of this appeal that the error they were proceeding on was the alleged factual error as described above. The errors in law and in principle alleged in their Notice of Motion were not identified as distinct issues or grounds of appeal in their written representations.

## VII. The Standard of Review of an Associate Judge's Order

[30] The parties submit that the standard of review applicable on this motion is the standard applicable to a finding of fact, that is, the standard of an overriding and palpable error as explained in *Hospira Healthcare Corporation v. Kennedy Institute of Rheumatology*, 2016 FCA 215 [*Hospira*]. I agree with the parties.

[31] The Federal Court of Appeal clarified in *Hospira*, at paragraph 64, that discretionary orders of associate judges should only be interfered with when such decisions are incorrect in law or are based on a palpable and overriding error in regard to the facts. This flows from the application of the standard of review applicable to appeals set out in *Housen v Nikolaisen*, 2002

SCC 33 [*Housen*], which the Federal Court of Appeal held in *Hospira* applies to appeals from orders made by associate judges.

[32] Pursuant to *Housen*, at paragraph 8, “[o]n a pure question of law, the basic rule with respect to the review of a trial judge’s findings is that an appellate court is free to replace the opinion of the trial judge with its own. Thus, the standard of review on a question of law is that of correctness.” A palpable and overriding error, however, is an error that is both obvious and apparent, “the effect of which is to vitiate the integrity of the reasons” (*Maximova v Canada (Attorney General)*, 2017 FCA 230 at para 5). The palpable and overriding error standard of review is highly deferential (*Collins v Canada (Attorney General)*, 2023 FC 863 at para 17).

[33] Madam Associate Chief Justice Martine St-Louis discussed the concept of an “overriding and palpable error” in *Moosomin First Nation v Canada*, 2025 FC 518 at paras 37 to 41, as follows:

[37] As the Federal Court of Appeal indicated, palpable and overriding error is a highly deferential standard and it is a difficult standard to meet (*Lessard-Gauvin v Canada (Attorney General)*, 2020 FC 730 at para 45, aff’d in 2021 FCA 94; *Millennium Pharmaceuticals Inc v Teva Canada Limited*, 2019 FCA 273 at para 6 citing *Benhaim v St-Germain*, 2016 SCC 48, at para 38 [*Benhaim*]; *Figueroa v Canada (Public Safety and Emergency Preparedness)*, 2019 FCA 12 at para 3; *Montana v Canada (National Revenue)*, 2017 FCA 194 at para 3; *1395804 Ontario Ltd (Blacklock’s Reporter) v Canada (Attorney General)*, 2017 FCA 185 at para 3; *NOV Downhole Eurasia Limited v TLL Oilfield Consulting Ltd*, 2017 FCA 32 at para 7; *Revcon Oilfield Constructors Incorporated v Canada (National Revenue)*, 2017 FCA 22 at para 2).

[38] At paragraphs 38 and 39 of *Benhaim*, the Supreme Court of Canada referred to two appellate decisions to explain what “palpable and overriding error” actually means. One of these decisions was *Canada v South Yukon Forest Corporation*, 2012

FCA 165 [*South Yukon Forest*], in which Justice David Stratas stated, at paragraph 46, that:

[46] ... “Palpable” means an error that is obvious. “Overriding” means an error that goes to the very core of the outcome of the case. When arguing palpable and overriding error, it is not enough to pull at leaves and branches and leave the tree standing. The entire tree must fall.

[39] The Supreme Court of Canada in *Benhaim* also cites Justice Yves-Marie Morissette in *JG v Nadeau*, 2016 QCCA 167 at paragraph 77 explaining that, [TRANSLATION] “a palpable and overriding error is in the nature not of a needle in a haystack, but of a beam in the eye. And it is impossible to confuse these last two notions.”

[40] It is important to note as well that “[t]he role of an appellate court, however, is not to consider whether other inferences reasonably may have been drawn from the evidence but rather, whether the decision maker made any palpable and overriding errors in drawing the inferences that were drawn from the evidence” (*Sim & McBurney v en Vogue Sculptured Nail Systems Inc*, 2021 FC 172 at para 16 citing *Jeddore v The Queen*, 2003 FCA 323 at para 71).

[41] Lastly, per paragraph 46 of *Viiv Healthcare Company v Gilead Sciences Canada Inc*, 2021 FCA 122, an appellate court should be especially loathed to interfere where, as here, a particular judge of the Federal Court is case-managing. Even more so, given the broad power of the Court over the amount and allocation of costs provided in Rule 400(1) of the Rules, a costs award is “quintessentially discretionary” (*Alani* at para 11, citing *Nolan v Kerry (Canada) Inc*, 2009 SCC 39 at para 126).

[34] In the context of an appeal pursuant to Rule 51, “a case management judge is assumed to be very familiar with the particular circumstances and issues in a proceeding” and their “decisions are afforded deference, especially on factually-suffused questions” (*Mobile Telesystems Public Joint Stock Company v Canada (Attorney General)*, 2025 FC 181 at para 14;

*Hughes v Canada (Human Rights Commission)*, 2020 FC 986 at para 67; *Canada v Easter*, 2024 FCA 176 at para 42).

[35] Finally, appeals from an associate judge's orders are to be decided on the material that were before the associate judge at the time the order under appeal was made (*Canjura v Canada (Attorney General)*, 2021 FC 1022 at para 12; *Onischuk v Canada (Revenue Agency)*, 2021 FC 486 at para 9, citing *Shaw v Canada*, 2010 FC 577 at para 8; *Papequash v Brass*, 2018 FC 325 at para 10).

#### VIII. The Arguments

[36] The MT Respondents argue that the Associate Judge made a palpable and overriding error of fact in finding that the DRPR Materials either were or may have been before the DGRS or considered by the DGRS when he made the Decision.

[37] The MT Respondents argue that the Rule 317 Certificate signed by the DGRS and transmitted to CNR along with the certified tribunal record certified that the documents attached to his certificate were true copies of the documents considered in making the Decision. They also argue that the Plouffe Affidavit is conclusive and constitutes unimpeached evidence that the certified tribunal record contains a complete record of the material, documents and information before the DGRS at the time the Decision was made. They argue that no additional materials ought to have been ordered to be disclosed and transmitted to the CNR because all that was required to be produced had been produced.

[38] This evidence, argue the MT Respondents, conclusively establishes that it was not open to the Associate Judge to find or infer that the DRPR Materials may have been considered by the DGRS in making the Decision (*Ron W. Cameron Charitable Foundation v Canada (National Revenue)*, 2023 FCA 175 at paras 14-16; *Tsleil Waututh Nation v Canada (Attorney General)*, 2017 FCA 128 at para 132 [*Tsleil Waututh*]).

[39] The MT Respondents argue that their Rule 318(2) objection to the disclosure and transmission of DRPR Materials should have been upheld because:

- a) Rule 317 is confined to material before the decision maker and/or material relevant to issues raised in the NOA;
- b) there is no basis to set aside the objection because all relevant materials have been transmitted; and,
- c) CNR's request amounts to a fishing expedition.

[40] In support of their argument, the MT Respondents rely on well-known jurisprudence that establishes the purpose of a Rule 317 request as well as how relevance is determined on a Rule 317 request (*China Mobile Communications Group Co., Ltd. v. Canada (Attorney General)*, 2023 FCA 202, at paras 37 to 43 [*China Mobile*] and the jurisprudence cited therein). They further argue that Rule 317 may not be used to obtain records related to decisions other than the decision under review in the proceeding (*Tsleil Waututh*, at para 113). The MT Respondents also argue that although grounds of review are to be read holistically and practically, there must be a nexus between the grounds of review and the documents sought (*Canadian National Railway Company v. Canada (Transportation Agency)*, 2019 FCA 257 at paras 14 - 22 [CN 2019]).

[41] The MT Respondents argue that CNR had to meet a two-part test to succeed in obtaining disclosure of material that was not before the DGRS when he made the Decision (*Canada (Public Sector Integrity Commissioner) v Canada (Attorney General)*, 2014 FCA 270 at para 4 [*Canada PSIC*]; *Right to Life Association of Toronto and Area v. Canada (Employment, Workforce and Labour)*, 2019 CanLII 9189 (FC), at paras 14 and 15 [*Right to Life Association*], and that it failed to do so.

[42] Lastly, the MT Respondents argue on the basis of *Maax Bath* at paras 10-11, *Access to Information Agency Inc v Canada (Attorney General)*, 2007 FCA 224 at paras 20-21, and *Right to Life Association* at paras 57-60, that CNR's Rule 317 request for the DRPR Materials is an insufficiently specific fishing expedition and ought not to have been granted.

[43] CNR takes a different view of the matter, although it agrees that the issue on this appeal is the issue framed by the MT Respondents: whether the Associate Judge made an overriding and palpable error of fact in finding that the DRPR Materials may have been before the DGRS when he made the Decision.

[44] CNR argues that the Federal courts have reiterated that Rule 317 is not limited to materials that were physically "before" the decision-maker at the time of their decision. Rather, the Rule encompasses documents "relevant" to the application, which may include materials that were not physically before the decision-maker that nevertheless form part of the underlying factual basis for the decision under review, including materials from related proceedings. CNR argues that a document is relevant if it may have affected the DGRS's Decision or may affect the

decision the Court will make on the application for judicial review, and, that any doubt or uncertainty as to the necessity of the documents should be resolved in favor of inclusion (*Maax Bath*, at para 9; CN 2019, at para 14).

[45] CNR argues that Rule 317 may encompass factual information that was known to the DGRS as a result of previous or related proceedings, such as the process that led to the DRPR, but was not contained in a document that was physically before the decision-maker at the time of the decision to be reviewed (*Office and Professional Employees International Union v. Cougar Helicopters Inc.*, 2019 FCA 231 [*Cougar Helicopters*] at paras 9-10, citing *Bell Canada v. 7262691 Canada Ltd. (Gusto TV)*, 2016 FCA 123 [*Bell Canada*], para 15).

[46] Further, CNR argues that it operates in an ongoing regulatory context with the MT Respondents in which multiple issues interrelate and evolve over time because of the intersection of current and past issues between the same parties. In such cases, it argues, it is common for decision makers to see the same parties on issues that relate to or intersect with past issues. Thus, administrative decision makers will focus not only on the evidence placed before them in the specific matter before them, but may also “go further and draw upon broader industrial, economic, regulatory or technological insights they have gathered from past proceedings and regulatory experience” (*Bell Canada* at para 14). It follows, in CNR’s argument, that past proceedings and regulatory experience can form part of the information the administrative decision maker drew upon in making the Decision and that this information may form part of the evidentiary record before the reviewing court in this proceeding (*Bell Canada*, at para 15).

Therefore, the record is necessarily broader than the content of the certified tribunal record transmitted thus far notwithstanding the Rule 318 certificate and the Plouffe Affidavit.

[47] CNR argues that the Rule 318 certificate transmitted with the certified tribunal record is not conclusive because it is premised on the DGRS's own view of what is relevant to the application instead of on what may actually be relevant to the application. CNR further argues and that the Plouffe Affidavit does not preclude other material, such as the DRPR Materials, from being disclosed pursuant to a Rule 317 request to the extent they may have formed part of the underlying factual basis for the Decision.

[48] CNR argues that the preferred approach to determining the relevance of documents sought through a Rule 317 request in the context of an ongoing regulatory project consisting of multiple decisions such as theirs with the MT Respondents is set out in out in CN 2023, at paragraphs 16 and 17. Accordingly, CNR argues that where there is an arguable case that the DRPR Materials requested might well be relevant to the grounds or relief set out in the NOA, then they should be disclosed and that final determinations of their relevance should be left to the judge or panel hearing the application on its merits. CNR argues that it pleaded at paragraphs 35, 38 and 40 of its NOA that the DGRS considered "other factors that I [the DGRS] consider relevant" in making the Decision and that this provides a basis in its allegations to support an arguable case that the DRPR Materials fall within the "other factors" considered relevant by the DGRS and ought to be disclosed.

[49] CNR maintains that the Associate Judge did not make any error in his Order, much less an overriding and palpable one.

IX. **Analysis**

a) *The Associate Judge did not make a finding of fact*

[50] The first issue to be resolved is whether the Associate Judge made a factual error in finding that the DRPR Materials either were or may have been before the DRGS when he made the Decision.

[51] The difficulty with the MT Respondents' argument is that a reasonable reading of the Associate Judge's Order leads one to conclude that the Associate Judge did not make any factual finding as argued by the MT Respondents.

[52] Paragraphs 15 to 17 of the Associate Judge's Order reflect his reasoning that the DGRS's consideration of "current railway practice" in connection with CNR's exemption request should be expected to include the DRPR. In addition, because the DGRS considered "other factors I [the DGRS] consider relevant", the Associate Judge found that it "might well be argued to include [the DRPR Materials] that were before the MT Respondents relating to the making of the DRPR" because the DRPR is the normative comparator from which the exemption is sought.

[53] Following this reasoning, the Associate Judge determined at paragraph 17 of his Order that:

“[...] given that the DRP Rules are the point of comparison for evaluating an exemption, there is an arguable case that the [DRPR Materials] sought might well be relevant to the ground or relief set out in the notice of application and should be disclosed.”

[54] The Associate Judge did not make a factual finding regarding what materials may or may not have been before the DGRS at the time of the Decision. It follows that the MT Respondents’ appeal on the basis that the Associate Judge made an error of fact must be rejected because there was no finding of fact made by the Associate Judge that the DRPR Materials either were or may have been before the DGRS at the time of the Decision.

***b) The Associate Judge did not err in ordering disclosure and production notwithstanding the MT Respondents’ Rule 318(2) objection***

[55] The Associate Judge did not make any error by implicitly determining that the MT Respondents’ Rule 318(2) objection should not be upheld.

[56] The Associate Judge’s Order and Reasons are brief but set out his consideration of the issue on the motion that was before him: whether the MT Respondents’ objection to disclosing the DRPR Materials should be maintained with the effect that the DRPR Materials sought by CNR ought not to be disclosed because they were not relevant to the grounds or relief set out in the notice of application.

[57] The Federal Court of Appeal has considered what is at play when a Rule 318(2) objection to a Rule 317 request is to be determined. In *Lukács v Canada (Transportation Agency)*, 2016 FCA 103 at paras 11 and 12, Stratas JA specified that the Court is not reviewing the

administrative decision maker's decision to object when a motion for a disclosure and production order is brought despite a Rule 318(2) objection. Rather, the Court is tasked with deciding the content of the evidentiary record in the proceeding, must apply its own standards and not defer to the administrative decision maker's view. In carrying out its task, the Court may craft a remedy that furthers and reconciles three objectives: (1) a meaningful review of the administrative decision at issue, (2) procedural fairness, and (3) the protection of any legitimate interests such as solicitor-client privilege or any other privilege or confidentiality interest while permitting as much openness and transparency as possible (*Lukács* at para 15).

[58] Following the Federal Court of Appeal's direction set out at paragraph 16 of CN 2023, the Court must pay careful attention to the context in which the decision under review was made when determining what documents, materials and information may be relevant to the grounds and relief sought set out in an application and therefore required to be disclosed and transmitted pursuant to Rule 317. When the decision under review was made in the context of an ongoing regulatory project consisting of multiple decisions, as is arguably the case in this proceeding, then the relevant documents, materials and information may rest in a specific file as it relates to the decision and also in related files.

[59] Past proceedings and regulatory experience between the parties can form part of the data an administrative decision maker draws upon in making a reviewable decision. Parts of that data, as identified by the parties as matters that the administrative decision-maker drew upon in making its decision can form part of the evidentiary record before the reviewing court (*Bell Canada* at para 15).

[60] In this case, the DGRS's Decision and the Notice of Refusal reflect that the DGRS considered unspecified "other factors" that contextually relate to the DRPR, thereby broadening what may constitute relevant information, materials and documents for the purposes of judicial review. The Associate Judge reviewed and considered the allegations made in the NOA and considered that CNR had referred to these unknown "other factors" in its grounds as information the CGRS considered and weighed in making the Decision. The Associate Judge considered that the broad scope of "other factors" makes it arguable that the DGRS drew upon information or data from the DRPR Materials for the purposes of the Decision. The Associate Judge did not make any overriding or palpable error in this regard.

[61] The Associate Judge was correct in his interpretation and application of the law and of the jurisprudence in light of the materials before him when he held that the DRPR Materials could well be argued to have been among the "other factors" considered by the DGRS and thereby became subject to disclosure and transmission pursuant to Rule 317. The Associate Judge applied *Lukács*, *Bell Canada*, and *CN 2023* in furthering the objective of a meaningful review of the Decision.

[62] The Rule 317 Certificate and the Plouffe Affidavit are limited in their probative value because they focus on the material, documents and information that were before the DGRS at the time of the Decision. They neither refer to nor exclude any information from the ongoing regulatory project regarding days of rest that the DGRS may have drawn upon and considered in his Decision. To this extent at least, they are not conclusive and do not dispose of CNR's Rule

317 request. The Associate Judge did not make an overriding or palpable error in his consideration of the Rule 317 Certificate or of the Plouffe Affidavit.

[63] The jurisprudence relied upon by the MT Respondents on this motion is consistent with the Associate Judge's Order. The principles set out in *Tsleil Waututh*, CN 2019, *China Mobile* and *Canada PSIC* were respected by the Associate Judge. The Associate Judge also applied more specific instructions from the Federal Court of Appeal regarding Rule 317 requests in the context of an ongoing regulatory project consisting of multiple decisions, as is arguably the case in this proceeding, as set out in *Bell Canada* and CN 2023 in discharging his task of determining the effect of the MT Respondents' Rule 318(2) objection as described in *Lukács*. As the jurisprudence makes clear, a certified tribunal record is not limited to the documents, materials and information that were physically before the decision maker at the time of the decision under review and in this case was broader because of the allegations contained in the NOA regarding what the DGRS may have drawn upon to make the Decision. I cannot find that the Associate Judge made an error in applying *Bell Canada* and CN 2023.

[64] The MT Respondents' argument that the Rule 317 request for the DRPR Materials was insufficiently specific and was properly objected to must be rejected in the circumstances. The MT Respondents' argument that CNR is seeking to judicially review the Decision and the November 25, 2020, DGRS decision approving the new DRPR must also be rejected. Nothing in the record before the Court on this motion suggests that either of these arguments had been raised before the Associate Judge. New arguments such as these cannot be considered for the first time on appeal (*Quan v Cusson*, 2009 SCC 62 at paras 36 to 38).

X. **Conclusion**

[65] The MT Respondents have not established that the Associate Judge made any overriding of palpable error of fact in his Order. The MT Respondents' appeal is therefore dismissed.

[66] Pursuant to the parties' agreement as to costs, CNR shall be awarded its costs of this appeal in the amount of \$ 4,000, all-inclusive.

**ORDER in T-390-24**

**THIS COURT ORDERS that:**

1. The Minister of Transport and the Director General, Rail Safety's appeal from Associate Judge Crinson's Order made on February 28, 2025, is dismissed.
2. The Minister of Transport and the Director General, Rail Safety, shall pay the Canadian National Railway Company its costs of this appeal and motion which are hereby fixed at \$ 4,000, all-inclusive.

\_\_\_\_\_  
"Benoit M. Duchesne"

Judge

**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** T-390-24

**STYLE OF CAUSE:** CANADIAN NATIONAL RAILWAY COMPANY v.  
MINISTER OF TRANSPORT, DIRECTOR GENERAL,  
RAIL SAFETY AND TEAMSTERS CANADA RAIL  
CONFERENCE

**PLACE OF HEARING:** TORONTO, ONTARIO

**DATE OF HEARING:** DECEMBER 3, 2025

**ORDER AND REASONS:** DUCHESNE, J.

**DATED:** DECEMBER 24, 2025

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