

**CANADIAN RAILWAY OFFICE OF ARBITRATION  
& DISPUTE RESOLUTION**

**CASE NO. 4602**

Heard in Montreal, December 13, 2017

Concerning

**VIA RAIL CANADA INC.**

And

**TEAMSTERS CANADA RAIL CONFERENCE**

**DISPUTE:**

The disqualification and subsequent discharge of Locomotive Engineer S. Murphy.

**THE UNION'S EXPARTE STATEMENT OF ISSUE:**

Locomotive Engineer S. Murphy was hired by Via Rail effective January 11, 2016 and duly qualified July 22, 2016. At the end of September 2016 local management contacted the local union officer to advise that Mr. Murphy would be given some additional understudying of older more experienced locomotive engineers as a result of some concerns raised by some of Mr. Murphy's co-workers.

The Union submits that the Senior Officer, Mr. M. Brankley, approached the Union's Local Chairman, Mr. P. Hope and requested that both sides sit down with the employee to address concerns related to the employee's operating practices.

The Union contends that this process escalated to a recorded meeting complete with vague references to the reasons for the meeting. At the conclusion of this process Mr. Brankley advised Mr. Murphy that he had been disqualified as a locomotive engineer and as a result his services would no longer be required.

The Union maintains that at the outset Local Chairman P. Hope was assured by Via Senior Officer M. Brankley that the interview process would not result in discipline.

The Union maintains that the decision made by the Corporation was both severe and without merit. The "evidence" presented was inconclusive and in many cases unsupported and at times contradictory.

The Union maintains that Mr. Murphy co-operated fully throughout the entire process with assurances that this process was to ensure that he had every opportunity to succeed at his chosen profession.

**THE COMPANY'S EXPARTE STATEMENT OF ISSUE:**

Mr. Steven Murphy began his employment at Via Rail, as a Locomotive Engineer (LE), on January 11, 2016, subject to the completion of his qualification in accordance with VIA's standards and policy. Between February 7<sup>th</sup> and July 22, 2016, Mr. Murphy completed *On Job Training*, including his practical territory familiarization with the Corporation. Mr. Murphy's training period

was extended for fifty-six days due to issues raised by *On Job Trainers* (OJT) and Manager Paul McCallum.

After receiving his qualification as a LE, Mr. Murphy was put into service from July 23<sup>rd</sup> to September 27<sup>th</sup>, 2016. During this period, serious issues were raised by both his coworkers, and managers Michelle Ardron and Paul McCallum with respect to his ability to safely operate at VIA.

Consequently, he was returned to training status from October 1 to November 22, 2016 in order to rectify the issues raised and allow him an opportunity to improve his performance. However, during this additional training period, issues with respect to competence and safety were again raised. Based on these issues and those previously identified, the decision was made to hold a formal investigation to review, document and question Mr. Murphy's ability to operate a locomotive at VIA.

Following the investigation, the Corporation concluded that despite being given technical and practical training, Mr. Murphy had not progressed and improved sufficiently to ensure his efficient and safe ability to work as a LE at VIA. Mr. Murphy was therefore disqualified and terminated on November 30, 2016.

At all times, VIA's managers responsible for safe operation and determination of qualification of its LE's acted in good faith, without any discrimination and were motivated by VIA's responsibility to ensure that all of its LE's are competent and can operate safely. Therefore, this grievance should be dismissed.

**FOR THE UNION:**  
**(SGD.) P. Hope**  
GENERAL CHAIRMAN

**FOR THE COMPANY:**  
**(SGD.) G. Sarazin**  
SENIOR ADVISOR, EMPLOYEE RELATIONS

There appeared on behalf of the Company:

W. Hlibchuk	– Counsel, Norton Rose Fulbright, Montreal
M. Ardron	– Senior Specialist Operating Practices,
A. Puello	– Human Resources Business Partner,
P. McCallum	– Manager Train Operations, Central Region
E. Houlihan	– Director Employee Relations, Montreal
B. Bégin	– Senior Human Resources Business Partner,
C. Sterie	– Counsel, Nortron Rose Fulbright, Montreal

And on behalf of the Union:

A. Stevens	– Counsel, Caley Wray, Toronto
P. A. Hope	– General Chairman, Toronto
S. Murphy	– Grievor, Toronto

### **AWARD OF THE ARBITRATOR**

#### **Nature of the Case**

1. VIA disqualified Mr. Steven Murphy as a locomotive engineer (LE) on November 30, 2016 and ended his employment. Mr. Murphy had been with VIA for just over ten months. During much of that period, VIA provided Mr. Murphy with LE-related training.

2. The TCRC accepted it had the burden of proof in this case involving Mr. Murphy's suitability as an LE. It argued that VIA's assessment was arbitrary, unreasonable and discriminatory.

3. The arbitrator agrees with the TCRC's concerns about how the evaluation of a new LE's qualifications and suitability could impact the collective agreement's job security protections. However, the arbitrator concludes that VIA acted in good faith, especially by providing multiple training opportunities with multiple people, including experienced LEs, before concluding that Mr. Murphy would not be suitable as an LE.

### **The Analytical Framework**

4. This case, despite involving a new employee, is not a probation case. The parties advised that their collective agreement does not contain a probation provision. The parties further agreed that this was not a just cause dismissal case for which VIA would have the burden of proof.

5. This award deals with a new employee's qualifications for the highly safety sensitive position of an LE. The analysis for longer service employees may differ considerably.

6. In this limited context, therefore, the arbitrator will examine whether VIA acted in good faith, without arbitrariness or discrimination, when it evaluated Mr. Murphy's suitability as an LE.

### **Facts**

7. Mr. Murphy had been a conductor for seven years and, for a short period of time, a qualified LE at CN. VIA explained that it, like any railroad, has its own training and qualification requirements for LEs. Important differences exist in the duties of LEs who operate freight trains compared with those in charge of passenger trains. Besides the trains' size differences, VIA LEs often operate passenger trains at a much higher rate of speed.

8. Mr. Murphy was part of VIA's trainee program, as were other potential LEs. VIA qualified Mr. Murphy on July 22, 2016. Despite this qualification, VIA later decided that Mr. Murphy required further training.

9. VIA's Brief sets out in significant chronological detail the challenges it had with Mr. Murphy, as well as the steps it took to assist him to become a qualified LE. As part of its qualification program, VIA paired Mr. Murphy, just as it did with other trainees, with experienced LEs (Trainers) for several months. VIA assigned Mr. Murphy almost double the number of Trainers as it did for other trainees. Mr. Paul McCallum, based on his own observations as well as on those from the Trainers, makes the decision on whether to qualify an LE.

10. VIA noted some temporary improvement which caused it to qualify Mr. Murphy in July 2016, but had significant ongoing concerns both before and after that decision. VIA placed Mr. Murphy back into trainee status from October 2, 2016 until the end of his employment on November 30, 2016.

11. During this additional training period, both VIA Managers and the Trainers raised concerns about Mr. Murphy's ability to operate safely. Multiple discussions took place with Mr. Murphy. The evidence was not contested that Mr. Murphy often seemed unwilling to take advice from both managers and experienced Trainers on how to perform as an LE.

### **Analysis and Decision**

12. The TCRC contested VIA's conclusion about Mr. Murphy's suitability and qualifications on several grounds. In its view, VIA never warned Mr. Murphy that his continued employment was in jeopardy. It further noted that other trainees had committed cardinal rule violations, but had not lost their employment. This made Mr. Murphy's termination discriminatory.

13. The TCRC also took issue with VIA relying on events which occurred before Mr. Murphy had been qualified as a VIA LE.

14. VIA argued that it needs qualified LEs, since they are tough to find. It therefore invested considerable time and resources in trying to train Mr. Murphy. In VIA's view, Mr. Murphy clearly knew about the numerous issues, and the potential consequences, but he was unable to meet the suitability and qualification requirements for being a VIA LE operating passenger trains.

15. Neither party disputed how important safety is in the railway industry for both VIA employees and the general public. The arbitrator has considered the documents attached to VIA's investigation notice on which Mr. Murphy had received an opportunity to comment (Company Brief: E-1; Tab 1 (A-K) and Union Brief: U-1; Tab 4). A transparent process is important, as is the extent to which an employer involves an employee's trade union.

16. The arbitrator had some concerns about the extent of the particulars provided to the TCRC, as described in its January 4, 2017 grievance letter. Overall, however, the arbitrator is satisfied that VIA advised Mr. Murphy of its concerns, including by setting out some of the comments and feedback that the Trainers had provided. There was no evidence from fellow bargaining unit members which disputed either VIA's process, or its decision, regarding Mr. Murphy's qualification as an LE.

17. The evidence also showed that VIA provided Mr. Murphy with positive feedback where warranted.

18. VIA determined that Mr. Murphy could not meet the qualification standards required for its LEs. The arbitrator is satisfied that VIA's decision was not made in haste, but rather occurred after a significant training investment had failed to alleviate the significant concerns which both VIA managers and the assigned Trainers had expressed throughout Mr. Murphy's short period of employment.

19. The scope of arbitral review for decisions about qualifying a new employee in a safety sensitive position like that of an LE requires a reasonableness analysis (*Brown & Beatty, 6:3100*). Arbitrators are not well placed to determine if someone is a qualified LE. Instead, an arbitrator will consider whether the employer acted in bad faith, arbitrarily or in a discriminatory fashion. Arbitrators need to be satisfied that an employer's process was not an attempt to avoid proving just cause (bad faith) or carried out for other improper motives.

20. The chronology of events demonstrates that VIA's actions cannot be characterized as being tainted by either bad faith or arbitrariness. VIA managers, as well as experienced Trainers, shared the same concerns about Mr. Murphy.

21. Discrimination did not occur when other trainees violated cardinal rules, but were not terminated. There is a difference between being qualified, but making errors, and not being qualified. The former can attract discipline; but discipline is often not an appropriate response to someone who lacks the suitability, despite significant training, to qualify for the highly safety sensitive position of an LE.

22. The fact VIA qualified Mr. Murphy as an LE, but soon regretted that decision, does not prevent the suitability and qualifications analysis from continuing for a new employee in a safety sensitive position.

23. The arbitrator also accepts that VIA had no other positions in the bargaining unit to which it could assign Mr. Murphy. There are no conductors in the bargaining unit. The obligation to consider other positions is reasonably limited to the bargaining unit in question, unless the duty to accommodate is involved.

24. For the above reasons, the arbitrator dismisses the grievance.

January 8, 2018



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**GRAHAM J. CLARKE**  
**ARBITRATOR**