



**Canada Industrial Relations Board ● Conseil canadien des relations industrielles**

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## Reasons for decision

George Cairns et al.,

*complainants,*

*and*

Teamsters Canada Rail Conference,

*respondent,*

*and*

VIA Rail Canada Inc.,

*employer,*

*and*

Canadian National Railway Company,

*interested party.*

Board File: 24865-C

CIRB/CCRI Decision no. 372

December 8, 2006

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The Board was composed of Ms. Michele A. Pineau, Vice-Chairperson, sitting alone pursuant to section 14(3)(f) of the *Canada Labour Code (Part I - Industrial Relations) (the Code)*. This is a decision following a case management meeting held in Toronto on November 27, 2006 and a teleconference coordinated through the Board's office in Ottawa on November 30, 2006.

## **Counsel of Record**

Mr. Michael A. Church, for George Cairns et al.;

Mr. James L. Shields, for the Teamsters Canada Rail Conference;

Ms. Louise Béchamp, for VIA Rail Canada Inc.;

Mr. John A. Coleman, for the Canadian National Railway Company.

## **I - Background**

[1] On May 15, 2006, the undersigned rendered *George Cairns et al.*, [2003] CIRB no. 230; and 2003 CLLC 220-040, that provided for a number of remedial orders as a result of a successful duty of fair representation complaint by the complainants (the Cairns group). Applications for judicial review of the decision having been dismissed, an implementation process of this decision has been underway since February 8, 2005.

[2] Although the Teamsters Canada Rail Conference (TCRC) (formerly the Brotherhood of Locomotive Engineers or the BLE) is the defending party, the employer, VIA Rail Canada Inc. (VIA), has taken a very active role in defending and reserving its rights throughout this process, which can be explained by the fact that it will have to assume a certain part of the costs attached to the remedies ordered by the Board in this instance.

[3] The implementation process has consisted of several case management meetings and teleconferences between the Board and the parties. Disputed issues have been resolved as they arose either through compromises between the parties or by an oral decision of the Board. On this disputed issue, however, the parties have taken intransigent positions, hence the need for a written decision.

[4] Part of the implementation process includes the determination of whether former VIA conductors (the conductors) would have been eligible for training as locomotive engineers, had they been offered that opportunity. This issue arises out of the following facts. On July 1998, conductor positions at VIA were eliminated as a result of the implementation of a new Crew Consist Adjustment Agreement (CCAA). Unless they already had acquired locomotive engineer

qualifications elsewhere (such as the Canadian National Railway Company (CN)), conductors were not offered the opportunity to train for locomotive engineer positions. In order to meet its needs for locomotive engineers, VIA continued its practice of hiring locomotive engineers from CN who had so-called flow-back rights acquired through a BLE/CN/VIA Transfer Agreement. The history of this practice is explained in detail in *George Cairns et al. (230), supra*, and will not be repeated here.

[5] As part of the reasoning leading to the award of extensive remedies, the Board held that the conductors who wished to be trained as locomotive engineers after the implementation of the CCAA had been improperly denied training opportunities. However, because of the significant disruption to VIA's operations (with consequences on the travelling public) that would be created by ordering VIA to train all the conductors and to return the more junior locomotive engineers to CN, the Board ordered compensation in lieu of the missed training opportunities. To qualify for compensation, conductors must meet the requirements of an eligibility list, by measuring up to qualifying tests that would be normally administered to persons seeking to become locomotive engineers. Once on the eligibility list, conductors are to be matched up to vacancies created at VIA since July 1, 1998, until the list of vacancies is exhausted. Conductors on the eligibility list that match up to the vacancies become entitled to compensation as per the terms of the Board's remedial orders. The original order also provided that conductors remaining on the eligibility list after the vacancy list was exhausted would be trained and hired as locomotive engineers at VIA ahead of CN locomotive engineers until all conductors are trained and hired. This provision of the order has become moot because the number of vacancies created at VIA since July 1, 1998 (123), exceeds the number of conductors who are actually seeking to qualify for the eligibility list (104). In the end, all conductors who meet the eligibility requirements, including those who were already eligible for training and were not required to be tested (7), will be matched up to a vacancy and be eligible for compensation. Those who do not make the eligibility list will lose any chance at receiving compensation.

[6] By way of background and in order to give some context to the current disagreement about the conductors eligibility list, it is useful to recall that in *George Cairns et al. (230), supra*, the Board determined that there should be a selection process, but not as comprehensive as sought by VIA, because these were not entry positions and because the conductors were very senior employees who had been in the running trades for many years. Significantly, a passing mark of 60% was set for the

Bennett Mechanical Comprehension Test (the Bennett Test) on the basis that VIA had itself gradually lowered the passing mark to a little under 60% in order to attract sufficient candidates [see paragraphs 98 and 99 of the decision as well as paragraph 141(v)].

[7] Moreover, the Board agreed with the BLE that the conductor evaluation process should be in the hands of a single national committee and ordered that this committee comprise an employer representative, a locomotive engineer representative designated by the BLE and a now trained locomotive engineer from the Cairns group [see paragraphs 100 and 141(viii)]. The Board gave the committee the latitude of administering and marking the Bennett Test, with its assessment being final [see paragraphs 101 and 141(viii)]. Because of VIA's procedure of linking the Bennett Test with an oral interview, the Board held that there should be both the mechanical test and an oral interview [see paragraph 141(vii)]. The Board did not set a passing mark for the interview, but heard that a similar dual test administered at CN Rail had a high success rate.

[8] The Bennett Test was administered in the spring of 2006; 95% of those who took the test were successful. Interviews were conducted in the fall of 2006; only 39% were successful. The implication of the low rate of success on the interview is that only 39 out of 104 of those from the Cairns group who seek to make the eligibility list become eligible for compensation under the Board's remedial orders.

[9] Briefly put, the Cairns group alleges that the disproportionate number of failures points to the fact that the interview questions and the administration of the test were unjust and that VIA has attempted, through the interview process, to unduly limit the number of former conductors eligible for compensation. The Cairns group also argues that since the former conductors seeking to be placed on the eligibility list will never be called upon to be trained as locomotive engineers, the interview process was unduly harsh and merely used as another means of eliminating them. It asks that the interview either be revisited or its results disregarded.

[10] VIA's response is that the interviews were the "employer's process" as recognized by the Board and that the Cairns group representative and the TCRC representative were to have no say in either the setting of the interview questions or correction grid. VIA has submitted that if the Board tinkers

with the process, the interview process must be completely redone.

[11] The TCRC has remained neutral in this debate.

## **II - Analysis and Decision**

[12] At the time it rendered *George Cairns et al. (230)*, *supra*, the Board set out certain parameters to guide the parties through the process of providing redress to former VIA conductors. It was anticipated that these guidelines, upheld by the Federal Court of Appeal, would enable the parties to achieve closure on their own. Unfortunately this has not been case, as the Board has had to meet and intervene with the parties at each step in order to resolve issues as they came up. Despite numerous disagreements, the implementation process is quite advanced, to the point where the compensation process would be about to get underway were the disputed interview results not now a major obstacle to completing this process.

[13] Accordingly, it is appropriate for the Board to focus on the underlying principles of the selection process. The Board's decision to institute a single national committee was meant to ensure a high degree of fairness and uniformity in providing former conductors with the opportunity to get on the eligibility list. Since the Bennett Test is a multiple question and answer test with predetermined scores, its results are standardized. Although administered locally, there was little room for error on the part of the national committee who corrected the test. The passing mark was consistent with VIA's own standard.

[14] The interviews, however, are more subjective in how the candidates are rated. The process is based on a VIA "Interview Guide" for locomotive engineers that sets out questions, the desired answers and gives the number of points for each correct answer. It is up to the interviewers to determine whether candidates' answers are responsive to the desired answer. Certain questions require the interviewers to rate the relevance of a candidate's experience rather than his/her knowledge.

[15] For the purpose of this decision, the Board compared the Interview Guide that was filed as Exhibit 77 that was administered by VIA in 1998 (the 1998 Guide) with the similar Guide (the 2006 Guide) that was used during the fall interviews that are the subject of this dispute. The reason for conducting this comparison is VIA's position that the interview process administered in 2006, except for minor changes, is no different than the one it has previously used. The Board's observations concerning the two guides are as follows.

[16] The introduction to both guides is similar, if not identical. The 1998 Guide has an added paragraph that suggests the composition of the interview panel and how the interview should be conducted in terms of rotating the questions and simulations.

[17] One aspect of the correction method used that is common to both is that each answer must be complete. There are no partial points for incomplete answers; an incomplete answer scores "0." The total number of points for each section is computed and a candidate must pass each section according to a minimum of points to pass the interview. Both guides have five identical sections with an identical minimum score rating:

- A - Decision Making Skills/Work With Minimal Supervision: 59/75;
- B - Deal with Stressful Situations: 33/40;
- C - Team and Orientation: 34/50;
- D - Ability to Respond in Emergency Situations: 31/40;
- E - Communication Skills: 22/25.

[18] Some questions are similar, while others are markedly different. Except for section E, each section in the 2006 Guide has more questions than in the 1998 Guide. The 2006 Guide has generally more sub-issues to be rated for each question. Because there are more questions, each question within a section in the 2006 Guide has a lower score than in the 1998 Guide.

[19] As the undersigned is not a docimologist, the relevance of these differences is not obvious. They certainly beg the question as to whether these apparently small differences may have influenced the success rate of the 2006 interviews. I am also mindful of the evidence heard during the remedial

hearing that a similar interview at CN generally produces a high rate of success and VIA's acknowledgment that its 1998 Guide is fashioned on a similar CN Guide. The success rate of persons to whom VIA's 1998 Guide was administered is unknown.

[20] On the basis of these observations, the Board concludes that its decision as to the validity of the interview process and its consequences should be subdivided so as to deal separately with two separate groups.

[21] Group 1 comprises (i) former VIA conductors who have passed the interview, are ready to be ranked in seniority order and form part of the eligibility list; (ii) former VIA conductors who were already eligible for training and were not required to be tested; and (iii) former VIA conductors who are considered medically restricted. Those who are part of Group 1 are clearly eligible for compensation. For the reasons explained earlier, all conductors who meet the eligibility requirements will be matched up to a vacancy and be eligible for compensation; consequently, there is no reason to delay the claims of those who are part of Group 1 because of the dispute surrounding those who did not pass the interview. The Board will commence the evaluation of their claims according to the schedule established during the case management meeting held on November 27, 2006, that is:

- (a) Compensation claims are to be completed by conductors and filed with counsel for the Cairns group no later than December 22, 2006;
- (b) Counsel for the Cairns group is to identify and advise the other parties of the test cases to be submitted to the Board for determination no later than January 31, 2007 and is to remit copies of the claims to the TCRC and VIA on that date;
- (c) Responses of the TCRC and VIA to the test cases claims are to be submitted no later than February 28, 2007;
- (d) Reply from the Cairns group is to be submitted no later than March 15, 2007;
- (e) Hearings will be held in Toronto during the week of March 26, 2007.

[22] Group 2 comprises all VIA conductors who passed the Bennett Test but failed the fall 2006 interviews. For this group, the Board hereby sets down a hearing to deal with this specific issue. To ensure an orderly process and the collection of relevant information, the Board has determined that the following evidence is relevant and will limit the hearing to these questions:

1. An explanation of the differences between the 1998 Guide and the 2006 Guide on the following points: the content of the questions and their relevance to the selection process; the number of questions and subquestions and its potential impact on an interviewee's chances of success; the content and relevance of the answers; the scoring method benchmarks.
2. Scoring results of the persons tested by VIA using the 1998 Guide.
3. Evidence of the three national committee participants concerning the conduct of the 2006 interviews and the process for scoring.
4. Evidence about how VIA applied the principles and content of CN's Interview Guide to devise its own Interview Guide in 1998.
5. Evidence concerning the scoring results of interviews at CN, to the extent available.

[23] Since the 2006 Interview Guide that is the subject of this dispute was devised entirely by VIA as an "employer process," parties should expect that the Board will apply the *contra proferentem* rule. As a result, VIA shall proceed first in making its case to justify why the interview results should stand.

Michele A. Pineau  
Vice-Chairperson