

Citation: *VIA Rail Canada Inc. v. Canada (Minister of Transport)*, 2018 TATCE 8 (Review)
Date: 2018-03-20
Docket: H-0022-41
MoT File No.: RDIMS 12647975

IN THE MATTER OF the review hearing requested by VIA Rail Canada Inc. with respect to a violation of section 17.2 of the *Railway Safety Act* (R.S.C., 1985, c. 32 (4th Supp.)) as alleged by the Minister of Transport.

BETWEEN:

VIA RAIL CANADA INC., Applicant

and

MINISTER OF TRANSPORT, Respondent

Before: Gary Drouin, Member
Heard in: Toronto, Ontario, September 21-22, 2017
For the Applicant: Douglas C. Hodson
For the Respondent: Eric Villemure

REVIEW DETERMINATION AND REASONS

Held: The member confirms the Minister of Transport's Notice of Violation but reduces the administrative monetary penalty by 50 per cent.

The total amount of \$19,791.54 is payable to the Receiver General for Canada and must be received by the Transportation Appeal Tribunal of Canada within 35 days of service of this determination.

I. BACKGROUND

[1] On January 30, 2017, the Minister of Transport issued a Notice of Violation, alleging that on or about September 5, 2016, at or near Bayview, Ontario, VIA Rail Canada Inc. (VIA) operated railway equipment on a railway otherwise than in accordance with Rule 439 of the *Canadian Rail Operating Rules* (CRORs) that apply to VIA Rail Canada Inc., when its employees failed to stop a movement at a STOP signal, thereby violating section 17.2 of the *Railway Safety Act* (R.S.C., 1985, c. 32 (4th Supp.)) (RSA).

II. STATUTES AND REGULATIONS

[2] Section 17.2 of the *Railway Safety Act* provides:

17.2 No railway company shall operate or maintain a railway, including any railway work or railway equipment, and no local railway company shall operate railway equipment on a railway, otherwise than in accordance with a railway operating certificate and – except to the extent that the company is exempt from their application under section 22 or 22.1 – with the regulations and the rules made under sections 19 and 20 that apply to the company.

[3] Rule 439 of the *Canadian Rail Operating Rules* provides: "Stop – Stop."

[4] Paragraph 3(1)(b) of the *Railway Safety Administrative Monetary Penalties Regulations* (SOR/2014-233) provides:

3 (1) The following instruments are designated as provisions the contravention of which may be proceeded with as a violation in accordance with sections 40.13 to 40.22 of the Act:

[...]

(b) a rule in force under section 19 or 20 of the Act;

III. EVIDENCE

A. Minister

[5] The Minister's representative, Mr. Villemure, introduced Exhibit M-1, which included a statement of facts that both parties drafted and signed.

[6] Mr. Villemure addressed all the points / interviews by Transport Canada with the train crew, also included in Exhibit M-1. This exhibit also contained a map and photos of the locations of various signals, including signal 006 at Bayview and a junction between the two subdivisions, to put into perspective the location of the events.

[7] Mr. Villemure introduced documents B (Exhibit M-1b) and C (Exhibit M-1c) drafted by Mr. Jeff Creighton. Document B refers to the notes that Mr. Creighton took from the interview with Mr. Mike Campbell, and document C refers to the notes that Mr. Creighton took from the interview with Mr. Dale Roberts.

[8] While reading out loud Exhibit M-1d, the interview of Mr. Campbell that was conducted by Inspector Hopper of Transport Canada, it appeared that the hand-written notes and the electronic typed notes were different.

[9] A recess was called by the member to allow the Minister's representative to review his exhibits and to return to the hearing with some clarifications.

[10] Mr. Villemure explained that the error occurred when the hand-written notes were transcribed into an electronic version. Mr. Villemure presented corrections. Mr. Hodson, the applicant's representative, agreed to having the revisions of the exhibit presented as evidence.

[11] Member Drouin indicated that the official exhibit would be the hand-written notes and not the electronic version.

[12] Mr. Villemure read out loud the notes of the interview of Mr. Campbell taken by Inspector Hopper. At question 11, Mr. Hodson intervened and brought to the member's attention that some information was not in the hand-written notes.

[13] The member called for a short recess to allow once again the Minister's representative to review the transcriptions from the hand-written notes to the electronic-typed notes.

[14] Following the recess and clarification from the Minister's representative, the member allowed the exhibits to be admissible with changes, as both parties were in agreement.

[15] Mr. Villemure spoke to the General Bulletin Order 4228 which is related to Exhibit M-1f, paragraph 10.

[16] Mr. Villemure also addressed the Notice of Violation in Exhibit M-1, bearing the letter G.

[17] Considering that the train crew was interviewed by two RSIs (railway safety inspectors), that their notes were entered into evidence, and that both the Minister and the applicant agreed on the statement of facts, the applicant indicated there was no need to call witnesses as the applicant agreed on the facts presented to the Tribunal.

Suzanne Madaire-Poisson

[18] Ms. Madaire-Poisson, is the chief of compliance and safety for Transport Canada's Railway Safety Directorate (RSD) in Ottawa. She explained that her role is to implement the administrative monetary penalties (AMP) program.

[19] Ms. Madaire-Poisson described in detail the program, policies and procedures that guide the process leading to the issuance of an AMP and the calculation of the amount of the penalty, as well as the respective roles of the inspector, the regional manager and the director. She also explained Transport Canada's graduated approach to enforcement.

[20] Ms. Madaire-Poisson stated that there had been similar incidents in October and December of 2015, and a third in March 2016. The RSI therefore performed an administrative investigation to collect all the evidence which lead to the issuance of a Letter of Warning to VIA (Exhibit M-2) dated August 4, 2016.

[21] Ms. Madaire-Poisson confirmed that Exhibit M-3 was the response letter from VIA, dated August 11, 2016, explaining its corrective actions.

[22] Ms. Madaire-Poisson confirmed that both the inspector and TC management were satisfied with VIA's corrective measures, and a Letter of Sufficient Action Taken was drafted for signature by Ms. Diogo, Director General, Railway Safety Directorate.

[23] Ms. Madaire-Poisson explained that between the time the letter was presented to Ms. Diogo for signature and the actual time the letter should have been signed, another similar incident occurred with VIA.

[24] The director general retracted the letter (Exhibit M-4, Letter of Sufficient Action Taken (not sent) dated September 9, 2016), until further investigation by the inspector.

[25] Ms. Madaire-Poisson explained the various parts and sections of the Rail Safety Decision-Making Checklist (Exhibit M-5) and identified the Rule that was contravened, level of severity, the synopsis, documented evidence and more.

[26] Ms. Madaire-Poisson explained that several errors were made on the checklist pertaining to dates. Corrections were made during testimony. Mr. Hodson agreed with making the changes to Exhibit M-5 during testimony.

[27] Ms. Madaire-Poisson also explained the aggravating factors and mitigating factors, as well as the administrative process, which included sending the document to the regional manager for his input. She stated that Ms. Diogo decided to set aside the noncompliance of CROR 34 and focus on Rule 439, considering the recent number of noncompliances with this Rule.

[28] Ms. Madaire-Poisson explained the calculation method used to determine the amount to be charged to the Railway. She added that the maximum amount for non-compliance with Rule 439 is \$125,000, but for a first violation it was 30 per cent of this amount, for a medium basic start of \$37,500. Each aggravating factor is worth \$14,583 and six per cent is subtracted for each mitigating factor that is identified.

[29] Ms. Madaire-Poisson then explained the reason for the aggravating and mitigating factors, and confirmed that the total of the AMP came to \$39,583.08.

Cross-examination by the applicant

[30] Ms. Madaire-Poisson provided additional information pertaining to her career with Transport Canada. She confirmed other information already provided regarding regional management and exhibits presented by the Minister.

[31] Mr. Hodson quoted several extracts from Exhibits M-3 and M-4, and Ms. Madaire-Poisson provided comments about them.

[32] Ms. Madaire-Poisson explained that remedial actions were taken by VIA, not as a result of the Letter of Warning, but on their own initiative.

[33] Ms. Madaire-Poisson also agreed to statements quoted by Mr. Hobson pertaining to the VIA incident of March 11, 2016 indicating that VIA had taken remedial actions prior to the Letter of Warning.

[34] Ms. Madaire-Poisson confirmed that she had not followed up with VIA regarding the letter dated August 11 in which VIA had described actions taken and had affirmed that they would continue improving the management of the safety risks associated with its train operations.

[35] Ms. Madaire-Poisson confirmed that Exhibit A-1 (an e-mail dated August 11, 2016) was sent to the regional office requesting them to confirm if the proposed actions taken by VIA were satisfactory.

[36] Ms. Madaire-Poisson confirmed that a memorandum to Stephanie Lines (Director, Operations, Transport Canada) dated September 1, 2016 (Exhibit A-2) included a Letter of Sufficient Action, also dated September 1, 2016, for Ms. Diogo's signature, that was recommended by the regional office and confirming that not only were the proposed actions taken by VIA satisfactory, but that they were actually being implemented by VIA.

[37] Ms. Madaire-Poisson agreed with Mr. Hodson's statement that in the Letter of Sufficient Action Taken, no reference was made to additional action that was needed, and that the department was satisfied with the actions taken by VIA.

B. Applicant

Marc Beaulieu

[38] Mr. Beaulieu, Chief Transportation and Safety Officer and the accountable executive for safety at VIA Rail, has 39 years of experience in passenger rail at both CN and VIA.

[39] Mr. Beaulieu explained that when he became the chief transportation and safety officer, there were a high number of violations for exceeding limits of authority. He developed and introduced a new safety culture within VIA by working with the unions and its members, and by developing new tools and initiatives which lead to having a safety workshop on a quarterly basis, among several other initiatives.

[40] He continued to explain how the workshops were structured and that all employees were free to express themselves without filters, and that brainstorming was conducted to find solutions.

[41] Mr. Beaulieu confirmed he was aware of the September 5, 2016 incident and explained that he let the front-line team handle the details and make recommendations for corrective action, after which it came to his level for further investigation.

[42] Mr. Beaulieu explained the critical path crews go through prior to taking charge of the train: proper briefing and review of the TGBOs (Tabular General Bulletin Orders), the special instructions, the restrictions etc., and the train crew signing each other's TGBOs, demonstrating they have reviewed all pertinent and important information.

[43] Mr. Beaulieu confirmed he was aware of the statement of facts in Exhibit M-1. He confirmed that during the course of his investigation, he found that Mr. Roberts and Mr. Campbell had complied with not only the Rules but the VIA special instructions with respect to reviewing the TGBO. He added that the crew had identified the restrictions and appeared to have sufficient preparation to understand the upcoming restrictions.

[44] Mr. Beaulieu continued to explain that during his investigation, he looked at all possible contributing factors. He confirmed they had self-reported their error and explained that this is a big factor for VIA safety culture, as they use the information to improve safety moving forward.

[45] Mr. Beaulieu explained how situations can develop and create a mental behaviour. For example, if a freight train is clearing the control location, the train crew may create a mental model assuming they will have a clear signal by the time the freight train clears.

[46] Mr. Beaulieu added that all the information gathered is then conveyed and shared during employee training. He provided additional information on employee training; for example, VIA had moved to CN's model of training, adding 18-month training called "Midterm Cab Concentration Awareness".

[47] Mr. Beaulieu explained "Passenger Train Instructions" (Exhibit A-4, tab 6) and the fact that VIA runs only four per cent of its operations on its own tracks and the remaining operations are run on freight train infrastructure, with the exception of a small section on GO Transit. He added that this training provides the crew a clear definition of VIA's expectations for operating a passenger train, the high level of responsibility that they have, and the criticality of performing their duties as flawlessly as possible.

[48] Mr. Beaulieu agreed that in addition to the CRORs, and after completing the verification process, crew members must exchange their copy of the DOB (Daily Operating Bulletin) and/or TGBO with their work partners and initial each TGBO form. On the last page, they must sign their full name and legibly print their full name and PIN (personal identification number). He added this was to ensure that both crew members had the same TGBO.

[49] Mr. Beaulieu then confirmed that both Mr. Roberts and Mr. Campbell complied with VIA special instructions for TGBO cross-verification, and both had signed and inserted their PINs.

[50] Mr. Hodson quoted the "Cab Red Zone (CRZ)" and Mr. Beaulieu agreed with its various instructions, including what the cab crew should or should not be communicating when approaching a restricted area. He added that the reason for the restriction in communication with the service manager or other train crew, with the exception of a medical emergency, is to ensure they are focusing on the upcoming STOP signal.

[51] Mr. Beaulieu confirmed that on December 12, 2015, a Notice to Operating Employees, number HQ15-22 (Exhibit A-15), was issued providing a description of what had occurred during the December 11, 2015 incident.

[52] Mr. Beaulieu explained the Notice HQ16-05, dated March 14, 2016 (Exhibit A-16, tab 27), was issued to serve as a reminder of the incident and to "keep everybody on their toes". He added that it was important to issue such a notice as quickly as possible to create a dialogue between locomotive engineers, and to not use it as a punitive measure.

[53] Mr. Beaulieu described the intent of the special instruction, effective February 25, 2016 (Exhibit A-17, tab 28), concerning cab monitoring systems that monitor from a distance to determine if the crews are compliant with the instruction. Furthermore, a technology called "Train Status Information", calculates train speed via a global positioning system within the Quebec-Windsor corridor. He added that since the implementation of this system, VIA has not had an "exceeding limits of authority" violation since September 5, 2016. He also mentioned other safety benefits of this system.

[54] Mr. Beaulieu spoke to the training that Mr. Roberts received (Exhibit A-5) and that although he had training with CP Rail, VIA provided additional training, since VIA operates passenger trains only. He also mentioned that the passing grade for CRORs training is 80 per cent, but that VIA requires 90 per cent.

[55] Mr. Beaulieu also spoke to the territory familiarization, whereby the new employee will ride the trains as a third crew member to get familiar with the territory, signals and other subtleties.

[56] Mr. Beaulieu then confirmed that Exhibit A-7 (tab 14) and Exhibit A-8 (tab 15) were used at Mr. Roberts' training in January 2016. He added that the purpose of this material was to mitigate human factor mistakes by conveying the proper techniques, and to ensure that everyone understands what could happen during a trip.

[57] Mr. Beaulieu explained the categories of human error, which include "slips, lapses, and mistakes.", and provided examples of how not only VIA but the industry addresses them to mitigate human error.

[58] He continued to explain how VIA monitors the train crew without their knowledge by parking along the main line and monitoring train crew broadcast conversations, and through speed monitoring.

[59] Mr. Beaulieu informed the Tribunal that on September 3, 2016, Mr. MacKenzie, a VIA manager out of Toronto, rode the Dundas subdivision with Mr. Roberts to evaluate his performance and ensure he was in compliance with the Rules. Mr. Beaulieu then made reference to Exhibit A-11, Mr. Roberts' onboard monitoring report, and confirmed that the result for 2016 was no non-compliance.

[60] Mr. Beaulieu addressed Mr. Roberts' Discipline Record (Exhibit A-12). He indicated that because it was considered a "cardinal violation", Mr. Roberts was awarded 45 demerits for failure to observe the signal indication; the maximum number of demerit points allowed prior to termination is 60 points. He added that every 12 months, employees will receive 20 points if they have a clean record.

[61] Mr. Beaulieu confirmed there was a TSB (Transportation Safety Board) investigation which concluded that Mr. Roberts did not follow Rule 34. He added that there was a contributing factor, such as the foreman having stated that he would "take the north track", while there was an RTC (rail traffic controller) dialogue referring to it as the "freight track", which was a wrong mental model. CN also initiated an investigation, as the incident occurred on their tracks.

[62] Mr. Beaulieu provided an explanation of the incident based on the investigation. Mr. Roberts' failure on September 5 was not related to the earlier two incidents. Mr. Roberts focused on a "slow order" that did not exist. He had his head down at a previous signal and when his crew partner called out the signal, Mr. Roberts did not repeat the signal and therefore did not observe the CRZ and Rule 34.

[63] Mr. Beaulieu added that because the freight train was going by, he was expecting to see a clear signal when he came around the curb, which he did not see, and therefore his crew partner told him to "soak it" (apply full emergency braking).

Cross-examination by the Minister

[64] Mr. Beaulieu confirmed that the training referred to in Exhibit A-7, tab 14 (a cab awareness guide) is a one-day course. He added that at the present time, employees are introduced to *Cab Awareness – 4 Pillars of Impact* (Exhibit A-7) and a slide presentation on cab awareness (Exhibit A-8). He mentioned that although premature to mention, VIA has purchased a new simulator that will be part of the cab awareness training. He added that the training will be provided either by former locomotive engineers, internal personnel or qualified trainers.

[65] Mr. Beaulieu went into more detail pertaining to the scheduling of training. He mentioned that VIA went back to a full two-week in-class training in September 2015, adding a more in-depth cab awareness, and that during the midterm 18-month training, they also have a Rule and cab awareness refresher.

[66] Mr. Beaulieu confirmed that following an incident, and depending on the severity, several options are provided as far as employee awareness. It could be team briefings, bull-pen sessions, briefing talks, bulletins and more.

[67] When asked if cab awareness skills were assessed during a supervised trip, Mr. Beaulieu explained that the manager riding in the cab will be monitoring all of the locomotive crew activities. For example, did they prepare for their TGBOs properly, are they reminding themselves of speed, calling out the signals, reacting in appropriate time and handling the locomotive in a smooth way so that customers have an enjoyable trip. He added other examples of what is being assessed by the supervisor.

Re-examination by Mr. Hodson

[68] In reply to Mr. Hodson's question pertaining to action taken following the December 11 incident, Mr. Beaulieu confirmed the information already provided earlier in examination which included a safety blitz that comprised briefings with locomotive engineers.

[69] Mr. Beaulieu confirmed that VIA asked CN to take action in regard to foremen instruction conflicting with train itinerary. In addition, a special instruction to CROR 578(a) notice was developed, with the participation of CN and TCRC (Teamsters Canada Rail Conference), requiring the in-charge locomotive engineer to initiate a radio broadcast to the airwaves on the designated standby channel, stating the name of the signal displayed on the advance signal to the next controlled location, control point or interlocking.

[70] Mr. Beaulieu added that the locomotive engineers involved in the December 11, 2015 incident are no longer employed by VIA and confirmed that all of the corrective actions taken by VIA were done on their own initiative without a Letter of Warning from Transport Canada.

IV. ARGUMENTS

A. Minister

[71] Mr. Villemure spoke to the objectives of the *Railway Safety Act*, section 3, which are to promote and provide for the safety and security of the public and personnel, and the protection of property and the environment in railway operations.

[72] He then quoted the objective in paragraph (c), which is to recognize the responsibility of companies to demonstrate, by using safety management systems and other means at their disposal, that they continuously manage risks related to safety matters.

[73] Mr. Villemure stated that VIA did not continuously manage risks the way they should have. He quoted section 17.2 of the *RSA* as the provision that requires railway companies to comply or to operate within the regulations and the rules that are made under sections 19 and 20, which includes the Canadian Rail Operating Rules.

[74] Mr. Villemure referred to the *Railway Safety Administrative Monetary Penalties Regulations*, paragraph 3(1)(b), which is the enabling provision for the issuance of a monetary penalty in this case.

[75] Mr. Villemure referred to the Minister's Book of Authorities, tab 3, page 72, and Rule 439 which depicts signals with red lights requiring that the train stop when you reach this type of signal. He stated that these are the signals that were displayed on the Dundas subdivision on September 5 when VIA 76 was travelling on that track.

[76] Mr. Villemure referred to the due diligence defence in the Supreme Court of Canada decision *R. v. Sault Ste. Marie*, [1978] 2 SCR 1299. The City of Sault Ste. Marie had entered into a contractual agreement with a waste management company. The company polluted the environment, as waste was deposited in a nearby creek within the city limits, and the City was charged under pollution provisions of provincial legislation.

[77] Mr. Villemure quoted from page 1331 of the *Sault Ste. Marie* decision:

Where an employer is charged in respect of an act committed by an employee acting in the course of employment, the question will be whether the act took place without the accused's direction or approval, thus negating wilful involvement of the accused, and whether the accused exercised all reasonable care by establishing a proper system to prevent commission of the offence and by taking reasonable steps to ensure the effective operation of the system.

[78] Mr. Villemure submitted that VIA failed. They had a system but they did not ensure that this system operated effectively.

[79] Mr. Villemure introduced another case, *R. v. Weyerhaeuser*, [2000] BCPC 0227, and provided the history and decision of this case, which referred to the *Sault Ste. Marie* case in proving a due diligence defence:

The preventive systems in place, the efforts made to address the problem, the promptness of their response. What are the industry standards? Are they matters beyond the control of the accused? Was there any foreseeability that this could happen?

[80] Mr. Villemure continued to say that these are all elements that need to be considered to determine whether or not one was due diligent. In the case of *Weyerhaeuser*, it was determined that the firm had been diligent. He continued to say that they made efforts to address problems, they were prompt in doing so, and that they met the industry standards.

[81] Mr. Villemure indicated that VIA did not have a preventive system in place that was effective, and that these incidents, and the type of incidents, were and are foreseeable.

[82] Mr. Villemure indicated that the Minister met the burden to prove that the events of September 5 did happen as per the signed statement of facts and as per the statements of VIA's witness on September 21, 2017.

[83] Mr. Villemure brought to the attention of the Tribunal that if we apply the *Sault Ste. Marie* decision, the burden is not on the Minister to demonstrate if VIA took reasonable steps, but rather for VIA to demonstrate it.

[84] Mr. Villemure stated that VIA, through testimony, has a system in place. They train their people, they monitor their performance and they have instructions in place. He then questioned if the system was working and if it was effective.

[85] Mr. Villemure questioned the effectiveness of VIA's notices that were issued on the following day of incidents to alert train crew to be vigilant and remind them of cab awareness. He concluded that he did not believe they were sufficient when looking at the factual scheme that lead to the issuance of a monetary penalty.

[86] Mr. Villemure once again brought the Tribunal's attention to the VIA 605 incident of December 11, 2015, when the crew failed to remind one another of the signal requirements. Though not related to this hearing, he referred to it as an example of an incident where the crew did not communicate well together. He then spoke about VIA 40, close to the city of Cobourg, traversing the crossover in excess of the permissible speed.

[87] Mr. Villemure spoke to the training VIA offers their train crews. Cab awareness is simply crew concept, based on testimony by Mr. Beaulieu. He added that crews are only trained every three years to be re-certified through classroom training and cab awareness is only eight hours, less breaks and lunch time, for a total of a six and a half-hour training day.

[88] Mr. Villemure added that he thought Mr. Beaulieu would have presented as evidence the nuts and bolts of their training, how they monitor the training and have more than retired train locomotive engineers to provide the training, such as experts in human factors.

[89] Mr. Villemure brought to the attention of the Tribunal several paragraphs of VIA's training manual and added that VIA's corporate entity is only aware of a small portion of the problems, and that they only have "the tip of the iceberg", as referenced on page 10 of VIA's cab awareness guide.

[90] Mr. Villemure added that all three related occurrences have the same root causes: crews did not communicate properly. They did not work as a team. He submitted that there was no mention of Mr. Campbell; all blame was on Mr. Roberts.

[91] Mr. Villemure provided the Tribunal with examples of how procedures work in air transportation and how pilots and co-pilots work as a team when approaching a landing.

[92] In Mr. Villemure's conclusion, he brought to the attention of the Tribunal Ms. Madaire-Poisson's calculations of the aggravating factors, Mr. Beaulieu's testimony concerning a cardinal violation, and that VIA did cooperate with Transport Canada. He added, however, that VIA did not meet its defence of due diligence.

B. Applicant

[93] Mr. Hodson brought to the attention of the Tribunal that the hearing was not about the December 11, 2015 incident, nor about the March 2016 incident, but about the September 5, 2016 incident. He added that he has a strong objection to the Minister bringing up arguments about the two earlier incidents and that it is unfair for VIA to deal with these incidents in addition to the September 5 incident.

[94] Mr. Hodson stated that he had no issues with Ms. Madaire-Poisson having the two previous incidents on her checklist when the decision was made to issue a Notice of Violation; however they are different cases, and the September 5 incident is a new case.

[95] Mr. Hodson referred to the present incident itself, whereby VIA train 76 exceeded the stop sign by 20 feet at one mile an hour. They almost stopped. He continued to say that in no

way does he argue that the crew did not breach the Rule, nevertheless, the crew did fully cooperate with the RSI.

[96] Mr. Hodson quoted part of the Minister's case in *Sault Ste. Marie*, page 1325:

In this doctrine it is not up to the prosecution to prove negligence. Instead, it is open to the defendant to prove that all due care has been taken. This burden falls upon the defendant as he is the only one who will generally have the means of proof. This would not seem unfair as the alternative is absolute liability which denies an accused any defence whatsoever. While the prosecution must prove beyond a reasonable doubt that the defendant committed the prohibited act, the defendant must only establish on the balance of probabilities that he has a defence of reasonable care.

He emphasized *reasonableness*, in the sense that reasonable care, and the duty to take reasonable steps, does not require VIA to take all conceivable steps, nor to meet a standard of perfection.

[97] Mr. Hodson referred to *R. v. Deforest*, 2013 SKPC 30, a Saskatchewan Provincial Court decision, paragraph 15, where it states:

Due diligence does not require that an individual guarantee that an offence will not occur; rather, the individual is required to demonstrate that she took "all reasonable steps".

He submitted there is a sense that when the September 5 incident happened, it must be because VIA did not take all reasonable steps. He added that this, however, is not the case.

[98] Mr. Hodson also introduced a decision from the Alberta Provincial Court, *R. v. Servisair Inc.*, 2012 ABPC 63, paragraph 257, which states:

On the whole of the evidence before me I am satisfied that the defendant company has satisfied the Court on a balance of probabilities that it took all reasonable steps to ensure the safety and health of its employee, Mr. Murgappa Naiker, and to ensure he wore his fall protection equipment.

Perfection is not the expectation of the Court with regard to the test of due diligence and on balance the defendant company took all reasonable steps to prevent the accident and exercised due care and diligence to avoid the contraventions before the Court.

[99] Mr. Hodson brought forward another decision to illustrate the important aspect of due diligence that arises where the breach of the regulation is solely within the control of the employee, *R. v. Z-H Paper Products Ltd.*, 1979, CarswellOnt 1357, Ontario Divisional Court, paragraph 18, which states in part:

... in establishing and carrying on an industrial business, an employer quite properly should be accountable for the acts of his servants ... Assuming that the employer has taken all reasonable precautions, how can he prevent a breach of a regulation solely within the control of the employee, where the employee does the prohibited act intentionally, or through his own negligence or inadvertence. Surely in those circumstances as has been said, "the law is engaged, not in punishing thoughtlessness or inefficiency, and thereby promoting the welfare of the community, but in pouncing on the most convenient victim...

[100] Mr. Hodson continued by quoting another case, *R. v. Procrane Inc.*, 1991, CarswellSask 229, paragraphs 13 and 17, which state:

Where an employer is charged with a strict liability offence the inquiry is not whether the employee has taken reasonable steps to avoid the offence but whether the employer has taken reasonable steps to avoid the offence.

[...]

In my opinion, Procrane took all reasonable care to prevent a breach of the regulation. There was nothing more it could have or should have reasonably done to prevent human error on the part of its employee.

[101] Mr. Hodson then asked what more VIA Rail could have done to prevent the failure to stop at a STOP signal.

[102] Mr. Hodson provided an overview of the events of September 5 such as reviewing the TGBO, calling out the signals and believing the slow order was still in effect. Yet Mr. Roberts failed to comply with his training and his rules. He added that we are all human and sometimes despite efforts and concentration, employees will not follow their training on rules.

[103] Mr. Hodson turned to the due diligence defence and acknowledged that VIA bears the burden of due diligence, and submitted that he has clearly established that VIA had taken reasonable steps.

[104] He added that clear rules were implemented to protect against this occurrence. VIA effectively communicated these rules to its employees (Roberts and Campbell) and provided effective training. VIA took follow-up steps and supervision to ensure compliance with the rules, and there were effective consequences for employee breaches, designed to ensure compliance, and he spoke to each one.

[105] Mr. Hodson continued by revisiting the training program, the procedures, and how employees are trained and evaluated, and also spoke to the training material and its effectiveness.

[106] Mr. Hodson stated the rules that directly applied to Mr. Roberts and Mr. Campbell. They were obligated to review the TGBO and observe the signals. VIA took reasonable steps to ensure that Mr. Roberts read and understood the importance of the TGBO. As well, the Cab Red Zone is very important, as it provides additional instruction and rules.

[107] Mr. Hodson addressed the training that is provided by VIA and believes Mr. Villemure improperly characterized the 80-page training document. He added that during the training, VIA did have experts, people who ran trains, people in the cab, and that the train crew is evaluated.

[108] Mr. Hodson brought to the attention of the Tribunal that awareness was not only addressed on two pages of the training program but was present throughout the training package.

[109] Mr. Hodson referred to "categories of human error" and drew the Tribunal's attention to factors related to the rail industry. He also addressed communications and human behaviour.

[110] Mr. Hodson concluded by referencing Mr. Beaulieu's testimony and making direct relations with the actions of the crews in general and in this particular incident.

V. ANALYSIS

[111] Considering that VIA acknowledged through testimony and by signing the agreed statement of facts between both parties that the offence took place, whereby Rule 439 of the CRORs was breached when its employees failed to stop a movement at a STOP signal and as such was a breach of a cardinal rule in the industry on September 5, 2016, and considering that VIA imposed severe penalties to the train crew (Mr. Roberts) pertaining to this incident, the violation has therefore been proven.

[112] I will now consider whether the applicant exercised all due diligence to avoid committing the violation. The Supreme Court in *R. v. Sault Ste. Marie* states that:

Where an employer is charged in respect of an act committed by an employee acting in the course of employment, the question will be whether the act took place without the accused's direction or approval, thus negating wilful involvement of the accused, and whether the accused exercised all reasonable care by establishing a proper system to prevent commission of the offence and by taking reasonable steps to ensure the effective operation of the system., The availability of the defence to a corporation will depend on whether such due diligence was taken by those who are the directing mind and will of the corporation,...

[113] Although the applicant has demonstrated through evidence that it has a training program and crew monitoring systems (in-cab and at road side), that it conducts regular briefings and takes immediate action when an offence is cited by informing other crews, these actions and measures have not been proven to constitute a proper system to prevent the commission of the violation.

[114] The evidence showed that the railway safety inspectors, through interviews, confirmed that the incident did occur and the train crew admitted to the errors in behaviour. The RSIs did perform effective and efficient interviews of the train crew, and documented and consulted with the Railway Safety Directorate to ensure proper remedial actions were taken to ensure safe railway operations.

[115] However, the Tribunal finds that not all reasonable care was exercised to prevent the violation. As the evidence showed, the Minister approved the applicant's training program submitted to the Railway Safety Directorate through the SMS (Safety Management System) program, and the applicant took immediate remedial actions and corrective measures. The Minister cannot solely put the blame on the applicant when he approves a training program and subsequently claims that it was inefficient after a violation occurred.

[116] Although the Minister did prove that the incident occurred, there are sufficient mitigating factors. I therefore reduce the monetary penalty to \$19,791.54.

VI. DETERMINATION

[117] The member confirms the Minister of Transport's Notice of Violation but reduces the administrative monetary penalty by 50 per cent.

[118] The total amount of \$19,791.54 is payable to the Receiver General for Canada and must be received by the Transportation Appeal Tribunal of Canada within 35 days of service of this determination.

March 20, 2018

(original signed)

Gary Drouin
Member