



DECISION NO. 29-AT-R-2017

February 15, 2017

**APPLICATION by Marie Murphy and Martin Anderson (applicants)
against VIA Rail Canada Inc. (VIA) pursuant to subsection 172(1) of
the *Canada Transportation Act*, S.C., 1996, c. 10, as amended (CTA).**

Case No. 16-02732

SUMMARY

- [1] The applicants, who frequently travel with VIA, both need to use scooters as a result of disabilities. The applicants submit that for years, they have been experiencing difficulties in travelling together with their scooters stored on VIA's passenger trains, and that VIA's current policy – which provides for one scooter to be stored in the wheelchair tie-down area within the passenger compartment and the other scooter to be stored in the baggage module – is ineffective.
- [2] The Canadian Transportation Agency (Agency) considered whether the issues identified by the applicants constitute an obstacle to their mobility and, if so, whether this obstacle can be removed without causing undue hardship to VIA.
- [3] For the reasons set out below, the Agency finds that an obstacle exists and that steps can be taken to address it without causing undue hardship to VIA, at a minimum through more effective guidance of personnel, and potentially by storing two scooters in one tie-down area or ensuring that each train has more than one tie-down area.

THE LAW

- [4] The application was filed pursuant to subsection 172(1) of the CTA, which reads as follows:

The Agency may, on application, inquire into a matter in relation to which a regulation could be made under subsection 170(1), regardless of whether such a regulation has been made, in order to determine whether there is an undue obstacle to the mobility of persons with disabilities.

- [5] Also of relevance to this case are:

- the *Passenger Rail Car Accessibility and Terms and Conditions of Carriage by Rail of Persons with Disabilities* (Rail Code), which lays out a series of accessibility standards, including the provision of at least one wheelchair tie-down area per train; and,

- the *Personnel Training for the Assistance of Persons with Disabilities Regulations*, SOR/94-42 (Regulations), which requires all carriers to ensure that all employees and contractors who may be required to handle mobility aids receive an appropriate level of training on policies and procedures related to the needs of and services for persons with disabilities, the carrier's responsibilities, the skills required to provide assistance to persons with disabilities, different types of mobility aids, as well as methods for securing mobility aids in the passenger car and stowing mobility aids in the baggage area.

ISSUES

[6] This Decision considers whether:

1. the applicants are persons with disabilities for the purposes of Part V of the CTA;
2. the alleged difficulty for the applicants to travel together with their scooters properly stored on VIA's passenger trains constitutes an obstacle to their mobility and that of other persons with similar disabilities; and, if so,
3. the obstacle can be removed without causing undue hardship to VIA.

ISSUE 1: ARE THE APPLICANTS PERSONS WITH DISABILITIES FOR THE PURPOSES OF PART V OF THE CTA?

[7] The applicants have mobility limitations and require the use of scooters. VIA acknowledges that they are persons with disabilities for the purposes of Part V of the CTA. The Agency therefore finds that the first of the above three tests is met.

ISSUE 2: DOES THE ALLEGED DIFFICULTY FOR THE APPLICANTS TO TRAVEL TOGETHER WITH THEIR SCOOTERS PROPERLY STORED ON VIA'S PASSENGER TRAINS CONSTITUTE AN OBSTACLE TO THEIR MOBILITY AND THAT OF OTHER PERSONS WITH SIMILAR DISABILITIES?

[8] Transportation service providers have a duty to make their services accessible to travellers with disabilities. Where a physical structure, policy or practice results in an obstacle to a person with a disability, the service provider must remove the obstacle by either making a general modification to the structure, policy or practice or, if that is not feasible, by making specific arrangements to accommodate the disability-related needs of that person. The exception to this is a situation where removal of the obstacle would result in undue hardship for the service provider, a matter that is dealt with under Issue No. 3.

[9] Where a variety of accommodation measures may meet a person's disability-related needs, the accommodation measure does not have to be exactly what the person requests, but it must be effective in meeting the disability-related needs of the person while preserving their dignity.

Positions of the parties

The applicants

- [10] The applicants provided copies of tickets for trips they have taken with VIA between Windsor, Ontario and Toronto, Ontario, in April, May and July of 2016.
- [11] The applicants submit that the number of wheelchair tie-down areas available on VIA's passenger cars is an issue of fundamental importance to all persons who travel with VIA with mobility aids, and claim that using the wheelchair tie-down area is the only risk-free way to stow their scooters. The applicants submit that the insufficient number of tie-down areas per train is a structural obstacle that has occasionally forced them to travel on separate trains.
- [12] The applicants argue that the Rail Code sets out minimum and voluntary standards for accessibility, but that such standards may not always suffice, given that reasonable accommodation depends on the impairment of the person with a disability, the impact of the obstacle, and the possible remedies.
- [13] The applicants contend that VIA's current policy of storing one scooter in the wheelchair tie-down area and the other scooter in the baggage module is problematic, as VIA's personnel are reluctant, or do not know how, to collapse the scooter and store it in the baggage module. The applicants state that they have had to stow their scooters themselves on "almost every occasion", which causes them pain, inconvenience and humiliation. The applicants add that when the scooter is stored in the baggage module, other baggage is inappropriately placed around or on top of it, increasing the risk of damaging it, and that disassembling and reassembling the scooter for storage causes wear and tear. They assert that this storage space cannot be considered "priority storage" as contemplated by the Rail Code.
- [14] The applicants indicate that they have faced an "attitudinal obstacle" where personnel are reluctant to disassemble the aid to permit storage, and that when personnel are willing to disassemble the aid, they are unfamiliar with it, and the applicants end up disassembling it themselves. According to the applicants, this is contrary to VIA's policy.
- [15] The applicants state that Mr. Anderson's scooter was damaged when stowed in the baggage area. They claim that one tire was damaged because the passageway that adjoins the VIA 1 car is extremely narrow, and that this demonstrates that the narrow entrances of the HEP cars render the stowage of the second scooter in the baggage area not feasible or safe. They contend that this situation causes them stress, anxiety and uncertainty.
- [16] The applicants argue that, as a result of the above, they are forced to choose between risking damage to their scooter and injury to themselves when dismantling it, or travelling on separate trains which results in additional expenses and the lost ability to travel together as a married couple.

VIA

- [17] VIA submits that it complies with the Rail Code, which sets out that passenger trains should have at least one wheelchair tie-down area in a passenger car with an accessible washroom, and that a passenger train with only one wheelchair tie-down area should have priority storage space for one other personal wheelchair. VIA points out, however, that the primary objective of the wheelchair tie-down area is to ensure that individuals who cannot transfer from their mobility aid to a regular train seat have equal access to travel by train, and adds that the applicants are both capable of transferring from their scooters to a regular train seat.
- [18] VIA states that it has implemented a policy regarding two people travelling together with their mobility aids on Light, Rapid, Comfortable (LRC) and Head-End Power (HEP) II rail cars with no baggage car for its corridor trains operating between Québec, Quebec and Windsor (Policy). The Policy sets out the following:
- The first passenger travels with a mobility aid that must be secured in the wheelchair tie-down area of the VIA 1 car.
 - The second passenger must be able to transfer to a regular train seat, and the second mobility aid must be stored in a baggage module of the next car.
 - The passenger with the collapsible scooter must instruct VIA's personnel on how to correctly fold the scooter.
 - Both mobility aids must meet the height, length, width and weight restrictions defined in the Policy, including that no part of the mobility aid that needs to be lifted off the ground or removed from the mobility aid will weigh more than 50 pounds.
 - Any request for two people to travel together with their mobility aids in the Québec-Windsor corridor must be made 48 hours in advance of travel and is subject to the availability of the tie-down area in the VIA 1 car.
- [19] VIA issued guidelines to its personnel regarding the storage of a second mobility aid per the Policy, which sets out that personnel are required to use, as an alternative, the bottom section of the baggage module when the mobility aid height does not exceed 26 inches. VIA's personnel are also instructed to not store other pieces of baggage in the same space to prevent any damage to the mobility aid, and instead use the baggage modules with shelving. VIA points out that, on trains with baggage cars, space availability has to be confirmed at booking time to determine if it is possible to safely store the mobility aid.
- [20] VIA states that even though the applicants have complained that their mobility aids have sometimes been stored improperly, this does not necessarily mean that the Policy is ineffective. VIA submits that the issue relates to a customer service failure, and that it is working diligently to resolve and improve the situation.

- [21] With respect to one incident raised by the applicants, VIA submits that there is no proof that the punctured tire on Mr. Anderson's scooter was the fault of VIA, and that the applicants contradict their conclusion regarding the cause of the punctured tire (i.e., poor storage versus narrow doorframe).

Analysis and finding

- [22] The applicants have mobility limitations and travel with scooters, but they are able to transfer to a regular train seat. Equal access to VIA's services therefore requires that they be able to travel together on its passenger cars, sitting in regular seats with both their scooters properly stored.
- [23] In theory, VIA's Policy – which provides for one scooter being stored in a wheelchair tie-down area and the other scooter being dismantled by its personnel and then securely stored in a designated priority storage space – might be adequate to meet the disability-related needs of the applicants and those of other persons with similar disabilities and, therefore, might ensure that they have equal access to VIA's services. However, the evidence indicates, on the balance of probabilities, that this has not always been the case in practice, due to issues with the application of the Policy. These issues include the reluctance of VIA's personnel to dismantle and store the second scooter and the placement of baggage on top of the stored scooter.
- [24] The fact that those issues have arisen on several occasions with different employees makes it impossible to accept VIA's assertion that the problems experienced by the applicants were nothing more than a customer service issue, and raises concerns regarding the adequacy of guidance and training of personnel with respect to the needs of travellers with disabilities and VIA's responsibilities and procedures in this regard.
- [25] The Agency therefore finds that the difficulty for the applicants to travel together with their mobility aids properly stored on VIA's passenger trains constitutes an obstacle to their mobility and that of other persons with similar disabilities.

ISSUE 3: CAN THE OBSTACLE BE REMOVED WITHOUT CAUSING UNDUE HARDSHIP TO VIA?

- [26] An obstacle will be found to be undue if it can be removed – either through a general modification of physical structures, a policy, a practice and/or the accommodation of the travellers' disability-related needs – without causing undue hardship to the service provider. If an obstacle is undue, corrective measures will be required to address it.

Positions of the parties

The applicants

- [27] The applicants request that the following specific steps be implemented:
- A minimum of two wheelchair tie-down areas in every car of every VIA passenger train or, alternatively, the ability to store two scooters in one wheelchair tie-down area;
 - VIA's personnel to properly tie down scooters and retrieve them upon arrival at destination;
 - VIA's personnel to assist with transferring out of and into personal mobility aids; and,
 - The Agency to update the standard relative to the required number of wheelchair tie-down areas per train to align more closely with the ratio of passengers with disabilities to passengers with no disabilities.
- [28] The applicants state that VIA's trains in Western Canada often have three or four wheelchair tie-down areas per train, while trains in the Windsor-Québec corridor only have one. They submit that this illustrates that additional wheelchair tie-down areas are a reasonable and financially viable accommodation measure. The applicants state that improving the accessibility of trains by adding wheelchair tie-down areas would result in an increased number of passengers with disabilities travelling with their mobility aids, such that the cost of this measure for VIA would "likely be outweighed by the benefits that would result", and would not amount to undue hardship. According to the applicants, VIA has not demonstrated that adding wheelchair tie-down areas would pose safety risks or create operational restraints.
- [29] The applicants assert that the consultant hired by VIA to test the possibility of storing two scooters in one tie-down area "confirmed that it was safe and possible" to do so. According to the applicants, VIA should disclose the results of the study, which began more than a year ago, and they ask that this accommodation measure be available to them.
- [30] The applicants argue that VIA has provided no evidence that it has trained its personnel on the implementation of the Policy, or that it has monitored the adherence of its personnel to the Policy.

VIA

- [31] VIA states that the fact that some of the trains used in Western Canada are equipped with more than one wheelchair tie-down area does not create a precedent to follow on other trains. VIA claims that it would be unreasonable to require a refit of its old train cars to add wheelchair tie-down areas when the acquisition of new train cars is "under extensive analysis", and that the structural changes required to meet the applicants' demands would cause undue hardship to VIA in terms of costs and operation.

- [32] VIA acknowledges that in June 2015, it initiated a study to examine the possibility of storing two mobility aids in one wheelchair tie-down area in its LRC cars, as opposed to storing one of the mobility aids in the baggage module. VIA points out that this study and related report are incomplete. VIA asserts that it needs to complete an internal Risk & Hazard Assessment Study, consult with its union representatives (Health and Safety Committee) and liaise with Transport Canada on this project.
- [33] Therefore, VIA contends that it is premature to conclude that storing two mobility aids in one wheelchair tie-down area is a feasible option as the study relative to the storage of two mobility aids in one wheelchair tie-down area has not yet been completed. VIA asserts that if it were required to operate without thorough examination of the impact that this option might have on passengers and on the company itself, a finding of undue hardship based on safety concerns and costs would be justified.

Analysis and finding

- [34] Undue hardship is evaluated through the adverse consequences of providing accommodation, considering factors such as safety, operational, economic and financial, physical and structural constraints. In this case, VIA refers to undue hardship in terms of costs and operation, but does not explain the extent of these constraints and their impact on the company.
- [35] VIA has provided no explanation for the delay in completing the study relative to the possibility of storing two scooters in one tie-down area, and no timelines for the next steps. The Agency therefore has no basis on which to determine whether such a change would result in undue hardship for VIA.
- [36] In addition, VIA has not provided any explanation as to why its personnel cannot be trained and managed in a manner that ensures consistent and proper application of regulations, codes, policies and procedures regarding the storage of one scooter in the tie-down area and the other scooter in the baggage module.
- [37] The Agency therefore finds that the obstacle can be removed without causing undue hardship to VIA, at a minimum through more effective guidance of personnel, and potentially by storing two scooters in one tie-down area or ensuring that each train has more than one tie-down area.

ORDER

- [38] The Agency orders VIA to take the following steps by May 15, 2017:
- Provide clear guidance to all employees who may be required to provide service to persons with disabilities on the content and application of relevant regulations, codes, policies and procedures, consistent with the Regulations, and ensure that the related requirements are properly applied by its personnel.

- Provide a copy of the final report from the study on the possibility of storing two scooters in one wheelchair tie-down area and a summary of the results of all required consultations to the Agency and the applicants.
- Either revise the Policy to provide for the storage of two scooters in one tie-down area or the assurance that each train has at least two tie-down areas or, alternatively, submit evidence to the Agency that neither of these revisions can be implemented without causing undue hardship.

[39] In the event that VIA chooses to revise its Policy, the Agency orders VIA to file a copy of the revised policy, in addition to reflecting it on its website, for the Agency's review and approval, by March 15, 2017. In addition, the Agency orders VIA to provide, within 60 days of the revisions, updated training to all employees who may be required to provide service to persons with disabilities on the changes to the Policy and how those changes should be implemented at the operational level.

[40] If VIA chooses to make a claim of undue hardship with respect to reviewing its Policy, it must do so by March 15, 2017. The applicants will then have until March 29, 2017 to file an answer to VIA's submission, and VIA will then have until April 5, 2017 to file a reply to the applicants' answer. Once these pleadings are completed, the Agency will determine whether undue hardship has been demonstrated. If it has not, the Agency will order VIA to proceed with one of the policy changes and implement the associated training for its employees. If it has, the Agency will either order different policy changes and associated training, or determine that no further action is required.

[41] Separately, the Agency will consider the applicants' request for an update to the minimum standard related to the number of wheelchair tie-down areas per train, as set out in the Rail Code, in the context of its current Regulatory Modernization Initiative.

(signed)

Scott Streiner
Member

(signed)

Stephen Campbell
Member

(signed)

William G. McMurray
Member