

**IN THE MATTER OF AN ARBITRATION**

**BETWEEN**

**BOMBARDIER TRANSPORTATION CANADA INC. (BTC)**

**And**

**TEAMSTERS CANADA RAIL CONFERENCE (TCRC)**

Accommodation and Abandonment Grievances of Jean-François Valiquette

**Date:** August 11, 2020  
**Arbitrator:** Graham J. Clarke

**Appearing for BTC:**

D. McDonald: Counsel, Norton Rose Fulbright  
A. Ignace: Human Resource Manager  
C. Henripin: Human Resource Advisor

**Appearing for TCRC:**

A. Stevens: Counsel, Caley Wray, Toronto  
W. Apsey: General Chairperson, Smiths Falls, Ontario  
J-F. Valiquette: Grievor, Montreal

Heard via videoconference on July 23, 2020

# Award

## BACKGROUND

1. The parties are members of the Canadian Railway Office of Arbitration and Dispute Resolution<sup>1</sup> (CROA). They follow an expedited arbitration system that the railway industry has used successfully since 1965.
2. Exceptionally, the parties retained the arbitrator after agreeing to have the current case, and another<sup>2</sup>, heard as Ad Hoc arbitrations during a single hearing day. They referenced mainly CROA case law when pleading their case. This Award will cite from the original French documentation rather than any suggested translation.
3. This arbitration concerns two grievances, one alleging a failure to accommodate Mr. Valiquette and a second contesting his alleged abandonment of his employment.
4. The TCRC argued that BTC, despite the extensive medical information Mr. Valiquette provided, failed to investigate, or offer him, any accommodated positions. Instead, BTC simply assumed undue hardship throughout the process. Similarly, the TCRC noted that Mr. Valiquette never abandoned his position, but continuously sought to return to work.
5. During the grievance procedure, BTC did not respond to the two grievances. Its sole comment in both Joint Statements of Issue (JSI)<sup>3</sup> was “The Company disagrees and denies the Union’s request”. In the Brief it filed the day before the arbitration, BTC raised multiple alternative arguments, the main ones being that Mr. Valiquette’s medical restrictions constituted undue hardship and his failure to appear at three interviews constituted abandonment of his position.
6. For the reasons which follow, the arbitrator concludes that BTC failed to accommodate Mr. Valiquette. The arbitrator will award him compensation from April 15 to September 30, 2019. Mr. Valiquette did not abandon his position and the arbitrator reinstates him as a BTC employee without loss of seniority. However, the arbitrator

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<sup>1</sup> [croa.com](http://croa.com)

<sup>2</sup> [AH706 Bombardier v. TCRC \(Quimet\), August 4, 2020](#)

<sup>3</sup> TCRC Documents, Tab 1 and 2

awards him no compensation given his actions in October/November 2019. The parties can re-examine the issue of accommodation for Mr. Valiquette *de novo*.

## FACTS

7. Given that process is paramount in duty to accommodate cases, the arbitrator will review in considerable detail the chronology of events.

8. BTC hired Mr. Valiquette in 2013. He held the position of maintenance worker at the time his employment ended. The parties did not dispute that Mr. Valiquette had two health conditions at the time of his hiring, one of which required a relatively mild accommodation. He controlled the other via medication.

9. The current dispute seems to have its genesis in a meeting on November 19, 2018. On a couple of occasions, BTC representatives had found Mr. Valiquette sitting in a passenger coach when he ought to have been conducting inspections in another area. Mr. Valiquette explained that his medical condition necessitated the breaks.

10. BTC summarized the facts of the incident in a memo and instituted a new reporting procedure<sup>4</sup>:

Pour des raisons évidentes de sécurité ainsi que de productivité, nous vous avons alors instruit d'aviser votre superviseur aussitôt que possible lorsque survient une telle situation d'inconfort afin que nous puissions agir en conséquences et assurer autant le suivi que l'aide nécessaire ce que vous vous êtes engagé a faire. De notre coté, nous aviseront le personnel cadre de votre statu nécessitant un contrôle sanguin afin d'apporter contrôle et support. (sic)

11. On November 21, Mr. Valiquette submitted a medical note which indicated he was on « arrêt complet de travail » from November 20, 2018 to January 4, 2019<sup>5</sup>.

12. On November 29, 2018, BTC advised Mr. Valiquette that the note was incomplete and asked for further medical information regarding « la nature de ton arrêt

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<sup>4</sup> TCRC Documents, page 026.

<sup>5</sup> TCRC Documents, page 028

de travail ». It also provided him with documents to complete for its Blue Cross short-term disability (STD) program<sup>6</sup>. Mr. Valiquette provided an updated medical note<sup>7</sup> on December 3, 2018 which contained the additional explanation of “pour raison médicale”.

13. Blue Cross wrote to Mr. Valiquette on December 13, 2018 asking him to complete its enclosed forms for STD benefits<sup>8</sup>. On December 14, 2018, BTC’s Human Resources department wrote to Mr. Valiquette and asked him to have his doctor complete certain forms, one of which was titled “Évaluation\_Aptitude au travail\_postes liés ou non liés à la sécurité.pdf”<sup>9</sup>.

14. BTC followed up with Mr. Valiquette on January 7 and 11, 2019 asking for the medical documents<sup>10</sup>. On January 14, 2019 Mr. Valiquette provided BTC with another medical note<sup>11</sup>, dated January 10, 2019, which extended his absence to February 20, 2019. Another medical note dated February 20, 2019 extended that absence again to April 9, 2019<sup>12</sup>.

15. On January 14, Blue Cross sent Mr. Valiquette a second letter reminding him it needed his documents. Blue Cross imposed a deadline of March 13 after which it would close his file<sup>13</sup>. At the end of February, Mr. Valiquette provided Blue Cross with the documentation<sup>14</sup>. On April 3, 2019, Blue Cross wrote to Mr. Valiquette about additional documentation it required from him or else it would close his file<sup>15</sup>.

16. On April 11, 2019, BTC wrote Mr. Valiquette asking him for a completed aptitude form regarding his restrictions (Form) which it had sent him earlier<sup>16</sup>:

Je comprends que ton médecin indique que tu peux reprendre à partir de la semaine du 15 avril 2 jours par semaine, puis 3 jours par semaine et la semaine suivante jusqu’au prochain rv. Elle indique également **cf document complété**

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<sup>6</sup> TCRC Documents, page 030

<sup>7</sup> TCRC Documents, pages 032-033

<sup>8</sup> BTC Documents, page 76 of 428

<sup>9</sup> BTC Documents, page 78 of 428

<sup>10</sup> BTC Documents, page 80 of 428

<sup>11</sup> TCRC Documents, page 035 and BTC Documents, page 82 of 28

<sup>12</sup> TCRC Documents, page 037

<sup>13</sup> BTC Documents, page 85 of 428

<sup>14</sup> BTC Brief, paragraph 30

<sup>15</sup> BTC Documents, page 90 of 428

<sup>16</sup> TCRC Documents, page 039

**semaine du 8 avril pour restrictions**. Peux-tu me dire quand nous allons recevoir ce document?

Tel que mentionné, pour pouvoir revenir au travail régulier il nous faut notre formulaire aptitude au travail que nous t'avons déjà envoyé complété par ton médecin, sinon tu ne peux pas revenir au travail.

(Emphasis in original)

17. Mr. Valiquette supplied the requested documents on April 12 and asked if he would be returning to work on April 15<sup>17</sup>. BTC's Form contained the following question along with a box for items to be answered yes or no:

S'il est apte à des tâches régulières ou modifiées, votre patient est-il capable d'accomplir des tâches exigeant :

18. Mr. Valiquette's doctor answered « oui » to: Discernement, Jugement, Mémoire, État d'esprit, Fonctions psychomotrices, and Communication écrite, verbale et par signaux. His doctor ticked off « non » for Vigilance and Concentration.

19. After reviewing the medical document, BTC's Human Resources refused to allow Mr. Valiquette to return to work and asked that his doctor complete the same Form again during his next medical visit scheduled for May 28, 2020<sup>18</sup>:

Après analyse du document que tu m'as envoyé, tu ne peux pas revenir au travail puisque ton médecin a émis des restrictions qui empêchent un retour au travail. Par conséquent, ton médecin devra remplir à nouveau le même formulaire (Aptitude au travail) lors de ta visite du 28 mai prochain afin de voir si tu peux revenir au travail.

20. On April 26, Blue Cross asked Mr. Valiquette to undergo an independent medical exam (IME)<sup>19</sup>.

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<sup>17</sup> TCRC Documents, page 045-046

<sup>18</sup> TCRC Documents, page 049

<sup>19</sup> BTC Documents, page 104 of 428

21. On May 28, Mr. Valiquette asked BTC when he could return to work after providing another medical note from his doctor containing a graduated return to full time work schedule<sup>20</sup>:

Vu pas encore retourné au travail, quand le retour sera prévu, prévoir 2 jours par semaine, puis 3 jours par semaine la semaine suivante, puis 4 jours/sem x 1 sem puis temps complet ensuite.

22. BTC's Human Resources asked that Mr. Valiquette provide another completed Form<sup>21</sup>:

Tel que mentionné dans mon dernier courriel que je t'ai envoyé le 12 avril dernier, ton médecin devait compléter à nouveau le formulaire *Aptitude au travail* afin de voir si tu peux revenir au travail. Par conséquent, j'attends ce document afin de pouvoir te dire si tu peux revenir au travail ou non.

(Emphasis in original)

23. Mr. Valiquette duly complied with the request and provided an updated Form dated June 3, 2020<sup>22</sup>. The same boxes were ticked "oui" and "non" as in April, *supra*. The Form also provided additional commentary involving cognitive limitations for lowered attention and concentration.

24. Mr. Valiquette's doctor answered "oui" to this question regarding safety:

Votre patient prend-il actuellement des médicaments ou souffre-t-il d'une condition médicale susceptible de constituer une menace pour la sécurité des opérations ferroviaires?

25. BTC's Human Resources department again concluded Mr. Valiquette could not return to work and further asked whether his conditions were permanent<sup>23</sup>:

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<sup>20</sup> TCRC Documents, pages 051-052

<sup>21</sup> TCRC Documents, page 053

<sup>22</sup> TCRC Documents, pages 056-057

<sup>23</sup> TCRC Documents, page 055

Après analyse du document que tu m'as envoyé, tu ne peux pas revenir au travail puisque ton médecin a encore émis des restrictions qui empêchent un retour au travail. J'aimerais savoir si ton médecin t'a mentionné si ces limitations qu'elle a émises sont permanentes? Je pose la question puisque tu ne sembles pas avoir de rendez-vous de suivi avec elle.

26. The Form Mr. Valiquette had submitted did say "equivocal", i.e. unknown or unclear, seemingly in answer to one or both of these questions: "Guérison complète espérée (oui; non)" and/or "Date estimée d'un retour au travail sans restriction"<sup>24</sup>.

27. On June 25, 2019, Blue Cross advised BTC that it had turned down Mr. Valiquette's STD claim on the basis that he had not met the definition of "invalidité totale"<sup>25</sup>:

Nous avons déterminé que les renseignements figurants au dossier ne supportent pas un niveau d'incapacité confirmant une invalidité totale tel que défini au contrat. Pour cette raison, nous avons refusé la demande de prestations d'invalidité de courte durée de Monsieur Jean-François Valiquette.

28. By letter dated August 27, 2019, BTC's Human Resources department wrote to Mr. Valiquette and summarized the situation<sup>26</sup>. It asked him to have his doctor advise if his limitations were permanent and suggested "sanctions" (disciplinary measures) might follow if he did not respond by the deadline:

À ce jour, nous n'avons toujours pas reçu cette information au sujet de vos limitations à savoir si elles sont temporaires ou permanentes.

Par conséquent, nous vous demandons de bien vouloir faire compléter le formulaire ci-joint, aptitude au travail, par votre médecin traitant et advenant qu'elle émet des limitations, bien vouloir lui demander d'indiquer sur le formulaire si vos limitations sont temporaires ou permanentes.

Vous avez jusqu'au **22 septembre 2019** pour nous transmettre cette information à l'adresse courriel suivante...

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<sup>24</sup> TCRC Documents, page 056

<sup>25</sup> BTC Documents, page 114 of 428. Blue Cross provided a more detailed letter to Mr. Valiquette.

<sup>26</sup> TCRC Documents, page 059

Nous désirons vous aviser qu'à défaut de nous envoyer l'information demandée, des sanctions pourront vous être imposées.

(Emphasis in original)

29. BTC again enclosed the letter<sup>27</sup> for the doctor completing the Form to assist with the evaluation of Mr. Valiquette's aptitude. That letter set out the « Éléments à prendre en considération pour évaluer l'aptitude au travail pour les postes liés ou non liés à la sécurité ». That document advised the doctor about the hybrid safety-sensitive nature of Mr. Valiquette's original position:

En ce qui a trait à la sécurité, les postes occupés par les employés de Bombardier peuvent être classés selon trois catégories : postes critiques pour la sécurité, postes liés à la sécurité et des postes non liés à la sécurité. Votre patient occupe un poste appartenant aux deux dernières catégories, **soit liés à la sécurité** ou **non liés à la sécurité**.

(Emphasis in original)

30. Mr. Valiquette returned the completed Form<sup>28</sup> to BTC on September 19. The Form contained similar information, including a suggested graduated return to full time work over a 4-week period. This time, the physician replacing Mr. Valiquette's doctor, who had left on maternity leave, responded "no" to the question "Guérison complète espérée". The doctor continued to mark "no" for "Vigilance" and "Concentration".

31. During the period from April 2019 to the end of September, Mr. Valiquette received employment insurance (EI) benefits. Those benefits ended on September 29.

32. Mr. Valiquette started working as a mechanic at a Ford dealership on September 30, 2019. On October 1, 2019, Mr. Valiquette wrote BTC asking what was happening with his file<sup>29</sup>. The TCRC also wrote to BTC asking about the state of his return to work. BTC's Human Resources department advised the TCRC that it could not accommodate him<sup>30</sup>:

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<sup>27</sup> TCRC Documents, pages 062-064

<sup>28</sup> TCRC Documents, pages 067-069

<sup>29</sup> TCRC Documents, page 072

<sup>30</sup> TCRC Documents, page 071



Based on the information he has sent, he still has the same restrictions who seems to be permanent even if he changed the doctor. His job is safety-sensitive and he must be fit and we don't think we can accommodate him. I will send shortly a convocation for a formal investigation. (sic)

33. On October 4, 2019, BTC sent Mr. Valiquette a letter<sup>31</sup> advising him of a formal investigation into his continuing absence since November 21, 2018. The letter's Re line read "Convocation pour enquête formelle" and it contained 24 appended documents. An extract from the letter read:

La présente est pour vous informer que vous êtes convoqué pour une enquête formelle concernant votre absence continue au travail entre le 21 novembre 2018 et ce jusqu'à ce jour.

...

Veillez noter que si vous le désirez, vous pouvez être accompagné d'un représentant syndical de votre choix.

34. The TCRC commented that the meeting should be for fact finding and not for discipline and asked that the meeting be moved from October 9 to October 21<sup>32</sup>. BTC agreed to the change of date<sup>33</sup>.

35. On October 10, 2019, Mr. Valiquette wrote BTC to advise he could not attend the October 21 meeting<sup>34</sup>:

Je ne suis pas disponible le 21 octobre.

Mes disponibilités sont tous les jeudis et vendredis sans exceptions.

Merci de votre compréhension.

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<sup>31</sup> TCRC Documents, page 075

<sup>32</sup> TCRC Documents, page 078

<sup>33</sup> TCRC Documents, page 079

<sup>34</sup> TCRC Documents, page 100

36. BTC advised Mr. Valiquette that it determined the meeting date and noted that it had already rescheduled it at the TCRC's request<sup>35</sup>:

Cela n'est pas une option. C'est nous qui déterminons la date que nous voulons programmer une enquête et non l'employé.

...

Par conséquent, je m'attends à ce que tu sois présent à cette enquête le 21 octobre sinon, une deuxième avis de convocation te sera émise pour ne pas t'avoir présenté à l'enquête.

À toi de prendre les dispositions nécessaires pour être présent le 21 octobre.  
(sic)

37. Mr. Valiquette did not attend the October 21 meeting. On October 16, he had advised the TCRC, but not BTC, that he had started part time work and could not get time off. He advised the TCRC that he had Thursdays and Fridays off<sup>36</sup>. Due to vacation, the TCRC did not send an email to BTC until October 20 at 10:29 pm advising that Mr. Valiquette would not attend<sup>37</sup>.

38. On October 21, 2019, the TCRC filed a grievance for Mr. Valiquette alleging that BTC had failed to accommodate him<sup>38</sup>.

39. BTC convened a meeting for Wednesday, October 23 to consider why Mr. Valiquette did not attend the Monday October 21 meeting<sup>39</sup>. The TCRC advised BTC that Mr. Valiquette could not attend on that date either<sup>40</sup>:

J'ai reçu un courriel de Jean-François Valiquette, pour m'informer qu'il ne pourra pas être présent à cette rencontre demain.

Par conséquent, ma présence en tant que représentant syndical d'un membre n'est plus nécessaire et comme convenu je serais présent aux négociations.

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<sup>35</sup> TCRC Documents, page 100

<sup>36</sup> TCRC Documents, page 085

<sup>37</sup> TCRC Documents, page 087

<sup>38</sup> TCRC Documents, page 117

<sup>39</sup> TCRC Documents, page 091

<sup>40</sup> TCRC Documents, page 089

40. BTC hired a private investigator who conducted surveillance on Mr. Valiquette on October 27-29, 2019. A few days prior to the July 23, 2020 arbitration, BTC provided the TCRC with the Investigation Report and a video. The TCRC objected to the admissibility of this surveillance evidence<sup>41</sup>.

41. On November 4, 2019, BTC scheduled another meeting for Thursday November 7 to consider Mr. Valiquette's non-attendance at the October 21 and 23 meetings<sup>42</sup>. On November 7 at 6:23 am, Mr. Valiquette advised BTC that he had just seen their email and that he would be unable to attend the meeting<sup>43</sup>.

42. On November 7, BTC sent a letter to Mr. Valiquette advising him, *inter alia*, of the end of his employment based on abandonment<sup>44</sup>:

Votre comportement fait en sorte que nous croyons que votre persistance à ne pas vouloir vous présenter aux nombreuses enquêtes planifiées indique que vous avez abandonné votre poste chez Bombardier Transport Canada. Par conséquent, nous mettons un terme à votre emploi ainsi qu'à tous les avantages et bénéfices qui y sont liés, en fermant votre dossier en date du 7 novembre 2019.

43. On December 15, 2019, the TCRC filed a second grievance contesting the termination and BTC's position that Mr. Valiquette had abandoned his employment<sup>45</sup>.

44. BTC did not file responses to the TCRC's two grievances.

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<sup>41</sup> TCRC Brief, paragraph 76

<sup>42</sup> TCRC Documents, page 093

<sup>43</sup> TCRC Documents, page 107

<sup>44</sup> TCRC Documents, page 111

<sup>45</sup> TCRC Documents, page 125

## ANALYSIS AND DECISION

45. The arbitrator will review the following issues:

1. What legal principles apply?
2. Did BTC demonstrate undue hardship?
3. Did Mr. Valiquette abandon his employment?

### 1. What legal principles apply?

46. The duty to accommodate is one of the most challenging areas for employers, trade unions and employees. All those involved have certain obligations. The principles are relatively straightforward but their application divides even the Supreme Court of Canada<sup>46</sup>.

47. The duty to accommodate often involves a tripartite process, though the employer remains the main player. The process itself produces helpful evidence if a dispute later arises<sup>47</sup>:

14. This Office has mentioned in the past the importance of the tripartite process when an employee requires accommodation. The parties have in the past shown their ability to work together, though not without occasional difficulties, to help accommodate an employee: CROA&DR 4588. The tripartite process also provides essential evidence to this Office about the parties' collective accommodation efforts.

48. The accommodation process can be challenging, particularly if an employee's restrictions include alertness, as was the case in *Rubino*<sup>48</sup>:

18. In an accommodation case, the issue is not whether the employer and the trade union reach an agreement. The issue is whether CP's evidence demonstrates that it could not have accommodated Mr. Rubino without undue hardship.

19. Mr. Rubino had restrictions impacting safety sensitive positions, as well as others which could present challenges, including "Not always fully alert" and

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<sup>46</sup> See, for example, the differing sets of reasons in [Stewart v. Elk Valley Coal Corp.](#), 2017 SCC 30.

<sup>47</sup> [CROA&DR 4609](#)

<sup>48</sup> [CROA&DR 4648](#)

“Requires frequent supervision”. The TCRC suggested this latter restriction related to the Conductor job description which had been attached to the return to work papers.

49. An arbitrator focuses ultimately on the evidence of how an employer attempted to accommodate an employee<sup>49</sup>:

30. CP’s evidence, while showing it respected its duty during part of the Period, did not satisfy this burden for the entire Period. Duty to accommodate cases are about evidence. As CP previously demonstrated in CROA&DR 4609, *supra*, that evidence can include the efforts made to find accommodated positions and attempted accommodations, even for limited periods. There is no absolute obligation to find a position. If that obligation existed, the analysis for these cases would be quite simple.

50. In rare cases, an arbitrator, based solely on the medical evidence, may conclude undue hardship exists even in the absence of any investigation into possible accommodated positions. That scenario is loosely analogous to employment law situations examining whether a disability had frustrated an employment contract<sup>50</sup>:

70. The medical evidence was consistent and showed, on a balance of probabilities, that DL could not return to competitive employment. The adjudicator did pause to consider the evidence regarding the utility of a vocational rehabilitation assessment but ultimately considered that evidence within the overall context of the medical opinions suggesting DL could not return to competitive employment.

71. The evidence demonstrated that DL, who had not worked for 3.5 years, had no reasonable prospect to return to work within a reasonable period.

51. An employee has an obligation to assist with the accommodation process<sup>51</sup>:

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<sup>49</sup> *Ibid.*

<sup>50</sup> [Laponsee v LTS Solutions Ltd., 2019 CanLII 75034](#)

<sup>51</sup> [CROA&DR 4505](#)

6. An arbitrator must examine the entire process, including the assistance provided by the trade union and the accommodated employee, plus the specific factual context, when deciding whether undue hardship exists.

...

19. CP has clearly tried to accommodate Mr. Danchilla. This is not a case of an employer simply concluding undue hardship exists, but without offering any evidence to support that conclusion.

20. For employees like Mr. Danchilla requesting accommodation, it is clearly in their interest to provide up to date medical information on a timely basis as part of the process. Their efforts in facilitating the accommodation process allow them to maintain their employment relationship with their employer, despite providing no services. Both sides have important obligations in this process, as does the TCRC.

52. Various cases have considered when an employer may close an employee's file administratively. In *Lunnin*<sup>52</sup>, the arbitrator examined the employee's duty in an accommodation case and upheld the administrative closing of his file:

20. The duty to accommodate does not apply only to the employer. The employee has significant obligations as well. For example, an employee may lose an entitlement to any further accommodation if he/she turns down a reasonable accommodation offer. Similarly, an employee loses the right to maintain an employment relationship, despite providing no services, by failing to provide the important medical information and updates an employer requires when managing an accommodated work scenario.

21. While the parties submitted numerous authorities in support of their positions, the arbitrator is satisfied that this situation of an employee not keeping an employer advised of his medical situation is comparable to the situation in CROA&DR 4276. That decision similarly upheld the closing of an employee's file for a failure to provide medical information to justify a continued absence from work.

53. In *Toor*<sup>53</sup>, the employer closed the employee's file after the latter had abandoned his employment:

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<sup>52</sup> [CROA&DR 4504](#)

<sup>53</sup> [CROA&DR 4585](#)

14. The arbitrator concludes that Mr. Toor, for reasons known only to him, ignored CN's efforts to contact him to discuss his situation following GWL's termination of his LTD benefits.

...

17. The arbitrator agrees with the TCRC that there may have been issues to discuss regarding Mr. Toor's fitness for work. The GWL letter, the RTWRR, as well as a March 2015 periodic medical from Mr. Toor's doctor, appear to contain differing conclusions. These matters could have been discussed as part of the tripartite accommodation process. However, Mr. Toor short-circuited that process by refusing to stay in touch with CN or respond to its legitimate requests for additional information.

...

21. Mr. Toor chose to ignore CN's legitimate requests for information. The arbitrator concludes on the facts and on the above authorities that Mr. Toor abandoned his employment with CN.

54. An arbitrator will nonetheless consider the entire context, even when an employee has refused to cooperate, as noted in [CROA&DR 4611](#):

2. Locomotive Engineer (LE) X had worked for CP for over 36 years. By letter dated August 9, 2016, CP closed X's employment record for being absent from work and for failing to contact CP despite multiple requests. In CP's view, X's failure to return calls and attend three (3) properly scheduled investigations concerning his unauthorized absence from the workplace justified the employment record closure.

...

21. CP had made appropriate efforts to communicate with X and had also asked the TCRC for its assistance in contacting him (U-1; TCRC Submissions; Tab 8). Despite all of this, X made no effort to communicate with CP. CP's actions must be analyzed based on what it knew at the time it made its decision, rather than on what it might have known had X responded.

22. However, unlike in cases like CROA&DR 4276 and CROA&DR 4504, CP was not totally in the dark about X's situation. About a month prior to the closure of the employment file, CP knew that X had applied to Manulife for STD benefits. The arbitrator finds unconvincing the suggestion that a procedural error had resulted in CP filing the employer portion of the Manulife application. CP further knew prior to its August 9, 2016 file closure letter that Manulife had considered the medical evidence and approved X's STD benefits.

23. Given this factual situation, and despite X's conduct, the arbitrator has concluded that a 36-year employee like X should be reinstated in his employment. The arbitrator has not been convinced to award compensation to X, but he will have no loss in his seniority.

55. The arbitrator will apply these principles to the facts in this case.

## 2. Did BTC demonstrate undue hardship?

56. The parties did not dispute that *prima facie* discrimination existed in this case. Therefore, BTC had the burden to demonstrate undue hardship<sup>54</sup>.

57. BTC argued that the medical evidence, which it argued showed "severe cognitive impairment", prevented it from accommodating Mr. Valiquette without undue hardship<sup>55</sup>:

71. Bombardier submits that it considered whether there were other positions that the Grievor could occupy, that were not safety sensitive. There were no non-safety sensitive positions available within the Grievor's scope of knowledge. Moreover, any non-safety positions would have still required safety responsibility, and attention and focus. It also considered whether various job functions could be modified or rearranged to create an accommodated position for the Grievor. However, the Grievor's restrictions make it essentially impossible for him to occupy any available position or perform various tasks required at the workplace. Working on site at all would have proven to be a serious safety risk for the Grievor.

58. The record contains no evidence to support BTC's suggestion of an extensive search for accommodated work or the existence of a BFOR<sup>56</sup>. Instead, the record suggests that BTC's Human Resources department concluded within a few hours of receiving Mr. Valiquette's April 2019 Form that it could not accommodate him<sup>57</sup>.

59. They continued to hold this view in June 2019<sup>58</sup> and in October 2019 when they advised the TCRC they could not accommodate Mr. Valiquette in his safety-sensitive

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<sup>54</sup> [Stewart v. Elk Valley Coal Corp., 2017 SCC 30](#) at paragraph 23

<sup>55</sup> BTC Brief, paragraph 71

<sup>56</sup> BTC Brief, paragraph 63

<sup>57</sup> TCRC Documents, page 049

<sup>58</sup> TCRC Documents, page 055



position<sup>59</sup>. BTC took this position despite the fact it had advised Mr. Valiquette's doctor that he held a hybrid position, a part of which was not safety sensitive<sup>60</sup>. The record contains no evidence that BTC ever investigated modifying his home position to fit within his restrictions.

60. Similarly, there is nothing in the record about a search for other positions, including non-safety sensitive ones, or bundled duties. Often, employers may use an occupational health department to assist in the accommodation search while keeping an employee's medical information confidential. But this possible approach is just one of many.

61. BTC did refer to the tripartite process in accommodation<sup>61</sup>, which is very helpful in these challenging cases, but nothing formal ever occurred. BTC did copy the TCRC on certain documents, but the record discloses not a single meeting convened to discuss possible accommodation. An employee and his representative, in this case the TCRC, are often well positioned to provide input into possible accommodated positions.

62. BTC might have been trying to conduct such a meeting in October/November 2019, though its documentation had a decidedly disciplinary tone. For example, it threatened "sanctions" if Mr. Valiquette did not return BTC's Form by a certain date<sup>62</sup>. The TCRC questioned this approach when it commented on BTC's use of the expression "Convocation pour enquête formelle" when there had never been an accommodation meeting of any type between the parties<sup>63</sup>.

63. Rather than showing the extent of an accommodation search, the evidence in the record suggests that BTC came to an initial conclusion about undue hardship and never wavered from it. Mr. Valiquette's doctor had suggested a gradual return to work. Blue Cross had found Mr. Valiquette was not totally disabled and denied him STD benefits. Despite this material, BTC never requested an IME or consulted with a medical expert about accommodating Mr. Valiquette's restrictions.

64. In its oral argument, BTC urged the arbitrator to find that Mr. Valiquette was "playing games" throughout the process and to note that BTC experienced persistent

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<sup>59</sup> TCRC Documents, page 071

<sup>60</sup> TCRC Documents, page 062

<sup>61</sup> BTC Brief, paragraph 91

<sup>62</sup> TCRC Documents, page 059

<sup>63</sup> TCRC Documents, page 078

difficulty in communicating with him<sup>64</sup>. It is true that initially after going off work in November 2018, Mr. Valiquette did not provide BTC with its Form until April 2019 when his doctor indicated that he was able to return to work. That Form, however, seems designed to assist with an employee's return to work rather than providing additional information about why they are off<sup>65</sup>.

65. BTC did convince the arbitrator about the legitimacy of certain of its concerns given what transpired in the Fall of 2019, *infra*. But prior to that time, from April 2019 onward, Mr. Valiquette provided timely responses to every BTC request for medical information.

66. In sum, Mr. Valiquette continuously provided BTC with medical information about his restrictions. There was no evidence that BTC did anything with this information other than to conclude, essentially upon receipt, that he could not be accommodated. That process did not persuade the arbitrator that BTC had reached the point of undue hardship.

67. The arbitrator agrees with BTC that restrictions such as "Vigilance and Concentration" can raise legitimate concerns. But they do not relieve an employer from investigating whether it can accommodate those restrictions, as noted in *Rubino, supra*. The focus remains on the employer's process<sup>66</sup>:

74. The arbitrator does not find it unreasonable for the managers to have had questions about the driving functions given what appear to be significant limitations listed in Dr. G's medical report. There was a safety sensitive position in issue. It was not the medical opinion being disputed, but rather how to understand it within the context of accommodating someone occupying a safety sensitive position.

75. University representatives had trouble reconciling how limitations involving multitasking, concentration, critical decision making and alertness existed for the Team Leader functions, but somehow disappeared for the employee's day to day driving activities. The October 2017 IME later revisited this issue, as will be described below.

76. Accordingly, and subject to the earlier comments above about the lengthy delay it took from March to the end of May 2017 to make an accommodation

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<sup>64</sup> BTC Brief, paragraph 43

<sup>65</sup> BTC Documents, page 78 of 428; page 80 of 428

<sup>66</sup> [International Union of Operating Engineers, Local 772 v University of Ottawa, 2018 CanLII 105364](#)

decision, the University's actions up to the time of the IME did not violate the collective agreement.

68. From April 15 until September 30, 2019, Mr. Valiquette participated in good faith in the accommodation process. BTC did not explore any possible accommodations. Mr. Valiquette is entitled to compensation for this period.

### **3. Did Mr. Valiquette abandon his employment?**

69. As mentioned above, BTC did not respond to the TCRC's grievances. Those grievances and the JSI raise essentially two issues in this case: accommodation and abandonment.

70. However, both parties included in their Briefs submissions about just cause. The TCRC objected to BTC adding any additional grounds but commented on just cause to protect its interests<sup>67</sup>. BTC argued, in the alternative, it had just cause to terminate Mr. Valiquette<sup>68</sup>. The grievances and the JSI are potentially ambiguous given the events of October/November 2019.

71. The parties appear to have agreed at the hearing that just cause was not an issue in this arbitration. But just in case the arbitrator misunderstood, that argument would have been rejected for several reasons.

72. First, if BTC terminated Mr. Valiquette for just cause<sup>69</sup>, it did not mention it in his termination letter. BTC would first have been obliged to conduct a fair and impartial investigation<sup>70</sup>. It did not do so. If the November 2019 meeting was intended to be disciplinary, then BTC did not disclose its October 30, 2019 surveillance evidence despite it being available<sup>71</sup>. This type of omission generally leads to arbitrators declaring any discipline void *ab initio*<sup>72</sup>.

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<sup>67</sup> TCRC Brief, paragraph 74 and 112

<sup>68</sup> BTC Brief, paragraph 114

<sup>69</sup> TCRC Documents, page 111

<sup>70</sup> [Central Maine & Quebec Railway v United Steelworkers – Local 1976, 2019 CanLII 3303](#) at paragraph 23

<sup>71</sup> BTC Documents, page 153 of 428

<sup>72</sup> [Teamsters Canada Rail Conference v Canadian Pacific Railway, 2019 CanLII 89682](#) at paragraphs 35-38

73. Similarly, BTC never responded to the TCRC's grievance to include just cause among the issues. A novel issue cannot be added for the first time in a party's Brief<sup>73</sup>.

74. The parties have agreed to these procedural "rules" in their grievance procedure and as CROA members<sup>74</sup>. This allows them to plead both a termination grievance<sup>75</sup>, and a duty to accommodate grievance, in a single hearing day. They then receive their awards shortly thereafter. Such expedition is unheard of in regular labour arbitration and in civil litigation. These procedural "rules" may appear technical to those outside the system, but they are fundamental to the success of the railway model of labour arbitration.

75. Accordingly, the arbitrator would have rejected BTC's just cause arguments in the circumstances of this case. The issue requiring resolution concerns whether Mr. Valiquette abandoned his position.

76. The TCRC objected to the introduction of the video surveillance BTC obtained showing Mr. Valiquette returning from a hunting trip and working at a Ford dealership. The arbitrator does not need to decide this objection given that the TCRC's documents and Brief commented on those same facts and provided an explanation for Mr. Valiquette's actions.

77. The arbitrator concludes that Mr. Valiquette did not abandon his position despite failing to attend BTC's scheduled meetings.

78. The abandonment issue must be analyzed within the context of an ongoing accommodation. Mr. Valiquette had been off work for almost a year. When his doctor indicated in April 2019 he could return to work on a gradual basis, Mr. Valiquette patiently waited for BTC to conduct its accommodation process.

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<sup>73</sup> [Canadian National Railway Company \(CN\) v International Brotherhood of Electrical Workers System Council No. 11, 2019 CanLII 123925](#) at paragraphs 31-34

<sup>74</sup> The parties noted this case was a CROA case; it was simply done by way of Ad Hoc arbitration for expediency. See, for example, BTC's Brief at paragraph 99.

<sup>75</sup> [AH706](#)

79. Mr. Valiquette repeatedly wrote to BTC asking when he could return to work, including on October 1, 2019<sup>76</sup>. This seemingly precipitated BTC's convocation of a meeting which, as noted, had disciplinary overtones<sup>77</sup>.

80. Mr. Valiquette's actions, when viewed in the context of his long wait for accommodation, do not demonstrate any intent on his part to abandon his employment. These facts differ significantly from those in the *Toor* and *Lunnin* cases, *supra*, where the employees simply ignored legitimate requests for medical information.

81. However, the arbitrator will not order any further compensation from October 2019 onwards. Accommodation is a tripartite process. While BTC did not meet its obligations from April to September for the accommodation process, Mr. Valiquette did not fulfill his obligations starting in October 2019.

82. Despite the TCRC describing the situation in the Fall of 2019 as normal and suggesting that BTC would have learned about Mr. Valiquette working at the Ford dealership had it only asked<sup>78</sup>, candour disappeared for unknown reasons. Mr. Valiquette could easily have advised BTC that he was working from Monday to Wednesday since his EI benefits had run out. But he did not.

83. Similarly, when the third meeting was scheduled for a Thursday, a day on which Mr. Valiquette had earlier said he would be available, he again could have advised BTC that, exceptionally, he had to work a Thursday. He did not.

84. The TCRC was aware of Mr. Valiquette working at the Ford dealership and yet it did not advise BTC that this work prevented him from attending the meeting.

85. This collective behaviour falls below the standard expected for the tripartite accommodation process. It brings this case more in line with the reasoning set out above in [CROA&DR 4611](#).

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<sup>76</sup> TCRC Documents, page 072

<sup>77</sup> TCRC Document, page 075

<sup>78</sup> TCRC Brief, paragraph 52

86. The arbitrator accordingly returns Mr. Valiquette to employee status with BTC, without loss of seniority, but declines to award any compensation from October 2019 onwards. The parties will have a fresh opportunity to obtain updated medical information and to discuss possible accommodations in a process similar to that contemplated in [CROA&DR 3487](#).

87. Should the parties fail to agree on the issue of accommodation, then that matter can be the subject of a new grievance.

## **DISPOSITION**

88. BTC did not demonstrate that it had reached the point of undue hardship when considering accommodation for Mr. Valiquette. BTC will compensate Mr. Valiquette from April 15 to September 30, 2019.

89. Mr. Valiquette did not abandon his position in October/November 2019 and is accordingly reinstated without loss of seniority. However, due to his conduct, he will not be compensated for the period starting on October 1, 2019.

90. The parties will review Mr. Valiquette's accommodation needs forthwith. Any disputes about whether BTC can accommodate Mr. Valiquette can be resolved through the parties' grievance process and arbitration, if necessary.

91. The arbitrator retains jurisdiction to resolve any issues arising from the Award.

Signed at Ottawa this 11<sup>th</sup> day of August 2020.



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Graham J. Clarke  
Arbitrator