

IN THE MATTER OF AN ARBITRATION

BETWEEN

BOMBARDIER TRANSPORTATION CANADA INC. (BTC)

And

TEAMSTERS CANADA RAIL CONFERENCE (TCRC)

Yassine El Borte - No RTW Accommodation

Date: October 23, 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

Heard via videoconference on October 20, 2020

Award

BACKGROUND

1. The parties are members of the Canadian Railway Office of Arbitration and Dispute Resolution ([CROA](#)). Exceptionally, they decided to proceed by way of Ad Hoc arbitration to plead four separate grievances on October 20, 2020.
2. The TCRC alleged that BTC failed to accommodate Mr. El Borte upon his return to work. Mr. El Borte turned down a partial accommodation offer for family reasons which also impacted his insurance benefits.
3. BTC argued it had acted reasonably when attempting to accommodate Mr. El Borte. However, he had not provided his FAF in advance which made it difficult to accommodate him for a short 5-day period. Nonetheless, BTC had offered him work within his restrictions but he refused it.
4. In this somewhat unique situation, the arbitrator has decided to dismiss the grievance given BTC's efforts to accommodate despite not receiving the crucial FAF information until Mr. El Borte returned to work.

FACTS

5. Due to a hand injury, Mr. El Borte took medical leave from September 3-13, 2019 (Page BT046). BTC's third party insurance provider paid him benefits during this period (Page BT050).
6. The medical absence had originally been scheduled for September 3-10. On September 9, 2019, Mr. El Borte sent BTC an updated medical note extending this period to September 13 (Page BT048). On September 10, BTC emailed Mr. El Borte and asked him to complete its FAF and return it before coming back to work:

Merci pour le document. Mais pour pouvoir revenir au travail le 16 septembre il faut que ton médecin remplisse le formulaire ci-joint que tu devrais avoir reçu de l'assureur. Sans ce formulaire complété, tu ne peux pas reprendre le travail.

7. BTC wrote Mr. El Borte again on September 13 about its need to receive the FAF:

Je fais un suivi à savoir si tu as remis le formulaire que je t'avais envoyé afin de pouvoir revenir au travail lundi. Sans ce formulaire tu ne peux reprendre le travail. Bien vouloir m'aviser svp.

8. Mr. El Borte did not email the FAF to BTC but instead said he would bring it with him to work (Page BT054):

Merci pour le rappel, oui j'ai déjà rempli le formulaire et je vais l'apporter avec moi lundi.

9. Mr. El Borte provided the FAF when he arrived at work on September 16, 2019. While his supervisor initially allowed him to perform light duties, BTC later asked him to return home when it discovered that the FAF indicated his medical condition could pose a safety risk. The doctor when completing the FAF had answered "yes" to this question:

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?

10. There was a suggestion at the hearing that Mr. El Borte stated this FAF information was wrong and he would follow up with his doctor (BTC Brief, paragraphs 31 and 51). However, he never provided any further information to BTC.

11. Later that day, BTC offered Mr. El Borte work for 4 hours a day in a temporary non-safety sensitive position in downtown Montreal. He usually worked in Lachine. Mr. El Borte declined the offer of accommodated work since he had to pick up his child at daycare at 5 pm. He advised he did not have time to make alternative daycare arrangements for that week.

12. The insurer later advised Mr. El Borte that it would reduce his benefits since he had refused an offer of 4 hours of work per day (TCRC Brief, Tab 4).

13. Mr. El Borte returned to his full-time duties, without restrictions, on September 23, 2019.

ANALYSIS AND DECISION

14. The TCRC alleged that BTC failed to respect its duty to accommodate Mr. El Borte. It suggested BTC could have found other duties in Lachine. Moreover, Mr. El Borte's family responsibilities justified his refusal of BTC's offer of a position in downtown Montreal.

15. For several reasons, the arbitrator has decided to dismiss this grievance. The parties are fully versed in the applicable principles for these types of cases: see, for example, [CROA 4503](#).

16. The arbitrator agrees with BTC that the context of this case is essential. BTC had to scramble to find a very short-term solution in real time because it did not learn of Mr. El Borte's medical/safety limitations until he showed up for work on September 16.

17. It is unclear why Mr. El Borte did not send BTC the FAF despite its request on September 10 and then again on September 13. He had no difficulty emailing medical notes to BTC. The arbitrator appreciates the TCRC's comment that this was a novel situation for their member who might not have understood the importance BTC placed on the FAF. But the arbitrator cannot ignore how his actions placed BTC in a challenging situation.

18. BTC proactively requests information from its employees who need accommodation, as examined recently in [AH707 \(Valiquette\)](#). A different conclusion may arise, as happened in that case, depending on how BTC analyzes that information. But BTC consistently requests relevant information as part of the accommodation exercise. Employees have an obligation to assist in providing that relevant information.

19. In this case, because Mr. El Borte did not provide the FAF as requested, BTC only learned he could not perform safety-sensitive work after he had already been permitted to work by his supervisor. BTC's decision to send Mr. El Borte home was hardly surprising given the work he performed ran counter to the FAF's medical restrictions.

20. BTC then contacted Mr. El Borte later that day and offered 4 hours of work a day in a non-safety sensitive position. Mr. El Borte declined that opportunity due to his family responsibilities and insufficient time to change them. The arbitrator can appreciate that challenge. But part of that difficulty, if not all of it, arose from Mr. El Borte not providing BTC with his FAF in advance, despite two written requests to do so starting on September 10, 2019.

21. One can only speculate what arrangements Mr. El Borte and BTC might have been able to make had the FAF been provided in advance as requested.

22. The arbitrator also dismisses the TCRC's argument that BTC had to give Mr. El Borte 5 days notice before offering accommodated work, given the wording in article 12.1 (temporary replacements) of the collective agreement. That article seems to apply to a different scenario than the one raised in this case. In addition, even if it did apply, the accommodation exercise sometimes requires modifications to collective agreements to assist employees. This is especially the case for a short 5-day accommodation following which Mr. El Borte would resume his full-time duties without any restrictions.

23. The arbitrator concludes that BTC did not violate its duty to accommodate Mr. El Borte. The issue of the insurer's decision to reduce his benefits, assuming it is arbitrable, was never placed before the arbitrator. The arbitrator has no jurisdiction to consider it under the parties' expedited process¹.

DISPOSITION

24. For the reasons set out above, the arbitrator dismisses this grievance.

25. BTC made bona fide efforts to accommodate Mr. El Borte during the short 5-day period when he had safety-related limitations. BTC only realized upon Mr. El Borte's return to work that he could not perform work in a safety sensitive position. This obliged it to deal with the accommodation issue in real time. Despite this challenge, BTC provided Mr. El Borte with a viable partial work option.

¹ [Canadian National Railway Company \(CN\) v International Brotherhood of Electrical Workers System Council No. 11, 2019 CanLII 123925](#)

26. The lack of time Mr. El Borte had to make alternative daycare arrangements arose from his failure, however innocent, to provide BTC with the FAF which contained essential information about his safety limitations.

SIGNED at Ottawa this 23rd day of October 2020.

A handwritten signature in cursive script, appearing to read 'G. Clarke', written in black ink.

Graham J. Clarke
Arbitrator