

IN THE MATTER OF AN AD HOC RAILWAY ARBITRATION

BETWEEN

**TEAMSTERS CANADA RAIL CONFERENCE – MAINTENANCE OF WAY
EMPLOYEES DIVISION (TCRC-MWED)**

And

CANADIAN PACIFIC RAILWAY COMPANY (CP)

Motion re covid masking at an in-person hearing

Date: August 26, 2021
Arbitrator: Graham J. Clarke

Appearances

TCRC-MWED:

D. Brown Legal Counsel

CP:

M. MacKillop Legal Counsel

Motion heard via brief written submissions: August 24-25, 2021.

Decision

BACKGROUND

1. In January 2021, the parties retained the arbitrator to hear a termination grievance. The parties requested an in-person hearing because the matter would turn on credibility.

2. Due to the pandemic, the parties originally scheduled the matter for June 8-9, 2021, in the hope the arbitrator could hold an in-person hearing in Ottawa at that time. The parties later agreed to adjourn the matter to September 20-21, 2021, again due to the pandemic and their desire for an in-person hearing.

3. The arbitrator reserved space in Ottawa for the arbitration. The issue then arose whether legal counsel would have to be masked throughout the hearing.

ANALYSIS AND DECISION

4. The *Canada Labour Code*¹ (*Code*) governs this arbitration. The *Code* and the parties' collective agreement² govern the process by which the TCRC-MWED can contest the termination of one of its members.

5. The parties use the "railway model" for their arbitrations which allows for a highly expedited process. The parties adhere to various principles, including the need for a fair and impartial investigation³, to achieve this expedition⁴. Oral testimony is rare under the railway model. Exceptionally, the parties have both agreed that some oral evidence will be needed.

6. The Ontario government has passed legislation and regulations due to the pandemic.

7. The *Reopening Ontario (A Flexible Response to COVID-19) Act, 2020*⁵ set out a phased approach to reopening businesses and organizations. The Regulation *Rules for*

¹ [RSC 1985, c L-2](#)

² Section 15

³ Section 15.1

⁴ See, for example, [International Brotherhood of Electrical Workers System Council No. 11 v Canadian National Railway Company, 2021 CanLII 41839](#).

⁵ [SO 2020, c 17](#)

*Areas in Stage 3*⁶ established various rules once Ontario entered Stage 3, which it did on July 16, 2021. Ontario Regulation 520/21⁷ amended parts of Regulation 364/20. For ease of reference, the term Regulation will refer to the amended regulation.

8. As of the date of this decision, Ontario remains in Stage 3. The parties can revisit the issues raised should the situation change.

9. The Regulation imposes a masking obligation on any business or organization which has people inside its premises⁸:

(3.1) The person responsible for a business or organization that is open shall ensure that any person in the indoor area of the premises of the business or organization, or in a vehicle that is operating as part of the business or organization, wears a mask or face covering in a manner that covers their mouth, nose and chin during any period when they are in the indoor area unless subsection (4) applies to the person in the indoor area.

10. The Regulation sets out some exceptions to the masking requirement, including for those eating in a restaurant or working out in a gym⁹:

(4) Where there is any requirement under this Order that a person wear a mask or face covering, the requirement does not apply to a person who,

(a) is a child who is younger than two years of age;

(b) is attending a school or private school within the meaning of the Education Act that is operated in accordance with a return to school direction issued by the Ministry of Education and approved by the Office of the Chief Medical Officer of Health;

(c) is attending a child care program at a place that is in compliance with the child care re-opening guidance issued by the Ministry of Education;

(c.1) is attending a day camp or overnight camp for children that is in compliance with section 19 of Schedule 2;

⁶ [O Reg 364/20](#)

⁷ [O. Reg. 520/21](#)

⁸ Subsection 2 (3.1) of Schedule 1 to the Regulation.

⁹ Subsection 2 (4) of Schedule 1 to the Regulation.

(d) is receiving residential services and supports in a residence listed in the definition of “residential services and supports” in subsection 4 (2) of the Services and Supports to Promote the Social Inclusion of Persons with Developmental Disabilities Act, 2008;

(e) is in a correctional institution or in a custody and detention program for young persons in conflict with the law;

(f) is performing or rehearsing in a film or television production or in a concert, artistic event, theatrical performance or other performance;

(g) has a medical condition that inhibits their ability to wear a mask or face covering;

(h) is unable to put on or remove their mask or face covering without the assistance of another person;

(i) needs to temporarily remove their mask or face covering while in the indoor area,

(i) to receive services that require the removal of their mask or face covering,

(ii) to engage in an athletic or fitness activity,

(iii) to consume food or drink, or

(iv) as may be necessary for the purposes of health and safety;

(j) is being accommodated in accordance with the Accessibility for Ontarians with Disabilities Act, 2005;

(k) is being reasonably accommodated in accordance with the Human Rights Code; or

(l) performs work for the business or organization, is in an area that is not accessible to members of the public and is able to maintain a physical distance of at least two metres from every other person while in the indoor area.

(Emphasis added)

11. CP asked that legal counsel not be required to wear masks “while counsel is doing submissions or examining a witness”¹⁰.

¹⁰ CP submission, August 24, 2021.

12. For the following reasons, the arbitrator, who must ensure a procedurally fair arbitration¹¹, has concluded that the applicable legislation allows legal counsel and others at the hearing to remove their masks temporarily.

13. First, the arbitrator concludes that the exception in subsection 2(4)(i)(i) of Schedule 1 to the Regulation, *supra*, would apply to the arbitration. The “service” being provided to the parties is a labour arbitration under the *Code* which will determine whether CP had just cause to terminate the employee’s employment.

14. Second, the parties have indicated that this arbitration turns on credibility. The wearing of a mask could potentially impact the ability of the parties and the arbitrator to assess credibility. That could impact the “service” being provided to the parties.

15. Third, the arbitrator is satisfied that the parties might be deprived of a procedurally fair hearing if those participating could not temporarily remove their masks when pleading their case. Labour arbitrations do not use transcripts so the parties must hear the evidence clearly and take their own notes.

16. The arbitrator emphasizes that masks may only be removed temporarily when someone is actively engaged in the arbitration. This decision does not authorize anyone to forego wearing a mask in the hearing room at all other times.

DISPOSITION

17. For the reasons given above, the arbitrator makes the following orders:

1. Subject to the exceptions below, everyone attending the September 20-21, 2021 hearing will wear a mask at all times when in the hearing room;
2. Legal counsel may remove their mask when generally pleading the case, such as for their own opening statements, examinations in chief, cross-examinations and closing arguments;

¹¹ [Code, s.61](#)

3. Any witness called to testify will not be required to remain masked during their live testimony; and
4. When communicating with anyone in the hearing room, the arbitrator may temporarily unmask to ensure clarity.

SIGNED at OTTAWA this 26th day of August 2021.

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

Graham J. Clarke
Arbitrator