# IN THE MATTER OF AN ARBITRATION

BETWEEN

**VIA RAIL CANADA INC.**

(The "Company")

AND

**UNIFOR**

(The "Union")

RE: Whether the Corporation had the right to implement the VIA 360 program without the Union's consent and whether the implementation of the 360 program violates the Collective Agreement; particularly articles 1.1 (t), 2.1, 4.12, 4.23, 4.27 (a), 7.3, 7.4, 7.7 (a) (b) (c) (d), 7.8 (d), 7.11, 7.15, 13.12, 13.13, 13.14, 13.15, 13.16, 24.17, Appendix 4, Appendix 19, Appendix 25 and any other article or local agreement referring to calling procedures.

**SOLE ARBITRATOR: ANDREW C. L. SIMS, Q.C.**

There appeared on behalf of the Company:

| | |
|---|---|
| C. Cadotte | – Business Partner, VIA |
| B. A. Blair | – Business Partner, VIA Rail |
| S. Schofield | – Business Process, Change, Innovation |
| S. Duffy | – Senior Manager, Customer Experience |

There appeared on behalf of the Union:

| | |
|---|---|
| R. Fitzgerald | – Unifor Staff |
| B. Kennedy | – President Council 4000 |
| D. Kissack | – Regional Representative |

A hearing in this matter was held in Montreal on May 26, 2017.

**DISPUTE:**

Whether the Corporation had the right to implement the VIA 360 program without the Union's consent and whether the implementation of the 360 program violates the Collective Agreement; particularly articles 1.1 (t), 2.1, 4.12, 4.23, 4.27 (a) 7.3, 7.4, 7.7(a)(b)(c)(d), 7.8(d), 7.11, 7.15, 13.12, 13.13, 13.14, 13.15, 13.16, 24.17, Appendix 4, Appendix 19, Appendix 25 and any other article or local agreement referring to calling procedures.

**THE UNION'S EXPARTE STATEMENT OF ISSUE:**

On April 12, 2016 the Corporation implemented its new crew assignment program (also known as VIA 360). The Union contends that changes to working conditions are a violation of the collective agreement and therefore any change must be mutually agreed upon by the parties. The Corporation unsuccessfully attempted recently at collective bargaining to change and/or remove language that would facilitate the new 360 program. Failing that, the Corporation implemented the change anyway; despite the Unions objections and violations of the collective and local agreements.

The Corporation contends that the process implemented with the new technology, known as "VIA360", conforms to the letter and the spirit of the collective agreement as it is currently written and therefore there is no violation of the collective agreement.

The Union seeks the VIA 360 program to cease immediately until a mutually agreed upon procedure can be implemented; and the Corporation compensate employees for all lost wages and benefits; and also compensate for any loss or damage to the Union.

**THE EMPLOYER'S EXPARTE STATEMENT OF ISSUE:**

The crew management system implemented at VIA Rail Canada known as "VIA360" conforms to the letter and the spirit of the collective agreement.

This system is used for crew scheduling, schedule bidding, spare board duty allocations, and employee pay.

The Corporation maintains there is no violation of the collective agreement regarding its implementation or application.

Prior to implementation, a management project team vetted and selected a supplier, analyzed the terms and conditions of the collective agreement and programmed these terms and conditions into the VIA 360 system.

The VIA 360 system centralized staff crewing in order to increase the efficiency of the operations and the consistent application of the collective agreement.

The Corporation had been crewing its 475 weekly trains and approximately 1000 employees using varied manual crewing systems across the country creating discrepancies in the application of the national collective agreement and inconsistent local practices.

In an email dated February 11, 2016, VIA confirmed to Unifor that it would be implementing a Crew management system to manage the crewing of VIA On Board services staff.

All employees were given the tools to use the new system ("iPhone") and were trained in the use of the crewing system.

Prior to the implementation of VIA 360m, information sessions and meetings were held, and in-class training and on board practical coaching given.

The National system was initially launched in Halifax in April 2016, after 18 training sessions in February 2016.

The Union contends the VIA 360 program cannot be implemented without the Union's consent and that the system violates the terms and conditions of the collective agreement.

The Union seeks the VIA 360 program to cease immediately until a mutually agreed upon procedure can be implemented; and the Corporation compensate employees for all lost wages and benefits; and also compensate for any loss or damage to the Union.

The Corporation's position is that the VIA 360 is a business tool and no union consent for this business practice was required, that the new system is on a continuum of the evolution of changes to crewing procedures, and that there is no violation of the collective agreement.

**FOR THE UNION:**
**Danny Andru**
**Secretary-Treasurer**

**FOR THE COMPANY:**
**Marc Benoit**
**Counsel**
**Kseniya Veretelnik**
**Counsel**

## AWARD OF THE ARBITRATOR

VIA Rail, after raising this topic unsuccessfully in bargaining, proceeded to implement a new method of notifying employees on its call board about the work they were called in to perform. In the past, a caller would telephone an employee on the spare board and tell them of a job. The spare board employee would be required to answer their telephone any time during a four-hour window. With the change, no one phones; instead the employee is required to log onto a website, during a designated one hour period, and by doing so, receive and acknowledge a message containing their assignments, if any.

The Union grieves this change in working conditions. Behind that specific grievance is a serious concern about the Employer's having implemented this system unilaterally, something it views as undermining the Union's role as bargaining agent. The Union's grievance alleges that the changes violate a variety of articles, most of which use the term "call" or "call in".

This award includes more of the preliminary materials than might otherwise be necessary for a CROA decision. The parties, rather than collaborate on a joint statement of issues, each presented an "exparte" statement. The process, as much as the product, of crafting a joint statement is central to a successful CROA process. It assures CROA that the parties have actually worked together to express, in common terms, the issues upon which they agree and the issues upon which they differ. Adjudicators are spared the task of trying to sort that out from the grievance procedure documents and conflicting opening statements.

Initially, this case was scheduled for a regular CROA hearing. However, due to travel difficulties the matter was rescheduled as an ad hoc hearing.

The VIA Rail employees that Unifor represents work under two separate agreements; the one relating to on-board service employees (Agreement #2) and the other off-board employees (Agreement #1). The employees on the spare board are on-board employees; those who used to call them are off-board employees.

## The Grievance

The April 12, 2016 Grievance reads:

> Please accept this as a Step One grievance as per Article 24.21 of Collective Agreement Number Two between UNIFOR and Via Rail Inc. This grievance is being submitted on behalf of the membership of Agreement Number Two.
>
> The Union contends that the Corporation has implemented crew assignment procedures that do not comply with Article 7 of the Collective Agreement, without the consent of the Union.

> On April 12, 2016, the Corporation implemented its new crew assignment program, known as “Via 360”. Several aspects of Via 360 are at odds with Article 7 of Agreement Number Two. Most notable is the absence of an equivalent to “unable to contact” (UTC), which makes every failure to accept work a “refusal”. This unapproved change could have serious ramifications with regards to the income of employees on the spare board. Another serious problem is that the new program’s two-step procedure places an onus employees to be at the Corporation’s disposition for a significant period of time on their days off, for which they are not compensated. There also appear to be serious faults in the manner in which work is assigned, which could, and likely will, result in employees not being given work to which they are normally entitled under the terms of Article 7. For example, it appears that if an employee accepts work as an SSA and if afterwards, work at a higher rate for which that employee is qualified becomes available, they will not be assigned the higher-paid work, but will be bypassed for the next available qualified employee. Other variances will certainly become manifest once the program has been running for a period of time.
>
> Needless to say, the implementation of a program so manifestly at odds with the Collective Agreement will lead to a flood of grievances and will cost the Corporation a great deal of money they might have saved by developing Via 360 in collaboration with the Union. Its implementation at a time when the Union and the Corporation are in contract negotiations is particularly vexing. The Union is not opposed to innovation in crew assignment protocols, but we must be a partner in its development and implementation.
>
> The Union therefore demands that Via 360 be suspended without delay, until such time as the Union and Corporation are able to negotiate mutually agreeable terms for its implementation.

**The VIA 360 Spare Board System**

A spare board list consists of employees who are not assigned a regular run but who have declared themselves willing and available to take runs that become open. While Article 7 applies nationally, it contemplates a degree of local variation. This

particular grievance arose out of the Halifax spare board but similar issues could arise as the VIA 360 program extends to other locations.

Article 7.7 reads:

> (a) Hours of call shall be established in accordance with service requirements. The names of employees will not be dropped to the bottom of the spare board if they are not available for a call outside the call hours locally agreed upon.
>
> (b) If employees cannot be contacted during call hours, their names will be placed at the bottom of the spare board as at midnight that day.
>
> (c) If employees refuse a call, their names will remain off the spare board, until the earliest time the employees who were assigned to the run would return, at which time their names will be placed at the bottom of the spare board in the order they would have arrived.
>
> (d) If employees refuse a call or cannot be contacted during call hours for standby or terminal duty only, their names will be placed at the bottom of the spare board as at midnight that day.

Prior to VIA 360, Unifor employees covered by Agreement #1 maintained spare board lists in each designated terminal. Under VIA 360, a new Crew Management office in Montreal manages each of the regional spare boards, using a computerized system.

The Employer replaced the 4 hour wait for a telephone call with a one hour confirmation period. Using a computer or a Company supplied cell phone, employees are now required to log into the VIA 360 computer portal to see if they have been allocated a trip and, if so, to confirm that they will take that trip. The actual process is a little more complex with three waves, the first 30 minutes used for initial confirmation followed by a 15 minute reallocation period if needed, and by a second wave for late allocations.

The allocation of assignments to persons on the spare board, both before and after VIA 360, is done of the principle of First in – First out, based on the employee's qualifications for the assignment in question.

**Bargaining Background**

Part of the Union's concern here arises from the way this issue arose in the last round of collective bargaining. The Employer in its initial proposal package, under the heading "housekeeping" proposed:

> • Change language to reflect new spare board work assignment process and calling procedures.

The Union took strong objection to this being characterized as housekeeping, insisted it viewed it as an item of wide impact that had to be bargained, and opposed change on the basis that it would affect the many collective agreement provisions now referred to in this grievance. The Union says:

> The Corporation eventually ceased discussing their alleged housekeeping item entirely, so the Union assumed the Corporation was no longer interested in pursuing the issue. Since the changes the Corporation requested never materialized, it meant the wording in the collective agreement would remain the same, and the present wording remains today in the Collective Agreement.

The contrary proved true. Via unilaterally introduced VIA 360 and on February 11, 2016 advised the Union that, in its view, "the calling procedure within the collective agreement remains intact and as stated, the VIA 360 is consistent both with the language and the spirit of the applicable provisions". Basically it was saying then what it is saying

now; that the VIA 360 procedures comply with the existing collective agreement language and can therefore be implemented without contract violation, unilaterally, and as an exercise of management's rights.

The Union was saying during bargaining that VIA 360 would require a change from the words "call" or "calling" to something else; since those words meant, in the Union's view, the existing telephone call system. It says the same thing now.

The bargaining that took place, and the dispute about whether this was properly a "housekeeping matter" does not assist in deciding this issue. The Employer is either right or wrong in its assertion that VIA 360 falls within the existing "call" language. It is not disproved by an effort in bargaining to make the change easier, or by the Union's assumption without being told as much, that the Employer was abandoning the initiative.

**Agreement No. 1 Issues**

Under Agreement #1, the callers were given a notice under Section 8.1 of that agreement that their positions would be eliminated by this change.

> Article 8.1: The Corporation will not put into effect any technological, operational or organizational change of a permanent nature which will have adverse effects on employees without giving as much advance notice as possible…

What may be a change requiring action under Agreement #1 for off-board employees does not necessarily create similar adverse effects for on-board employees. Article 8.1 is also from Agreement #1 not Agreement #2 which is in issue here.

The Union has a major concern with the elimination of the callers' position. They are pursuing it under Agreement #1. If the Union succeeds there it may well alter the Company's plans. However, these issues are separate and must be dealt with under Agreement #1, not as part of this grievance.

**Does VIA 360 Comply with Article 7?**

The Union's position is that "call", when used in Article 7 and elsewhere, means "telephone call", with the Employer initiating and the employee receiving that call. It suggests this is clear from the language and from decades of past practice. It is also obvious from the Employer seeing the need, in bargaining, to try to alter the language.

VIA argues that it has the right to make decisions about how to operate its business unless restrained by express terms in the agreement. It submits that "call" does not only mean "by a telephone call" although that suffices, but also includes other processes that fall within the meaning of call, defined variously as:

- To command or request to come or be present; to cause to come
- To make a request or demand
- Direct to happen; announce
- Order to take place, fix a time for
- Require one's attention or consideration

Article 7.1 provides that:

> 7.1 Spare boards for employees covered by this Agreement will be maintained at Halifax, Moncton, Montreal, Toronto, Winnipeg, Vancouver and other points as may be agreed upon and classification lists shall be set up in accordance with local requirements.

A computerized accessible system can constitute a spare board and I cannot find the fact that it is administered from a centralized location in Montreal is, of itself, objectionable. Whether that offends anything in the off-board employee's agreement is not before me.

The Employer's position is that the spare board list and the assignments relevant to employees are both readily available on-line through the VIA 360 system. The employee once on-line, can see if they are being "called" for an assignment, it is still a call, albeit not a telephone call. The Employer characterizes the change as analogous to the switch from the "door knocking" callers used prior to telephones to a telephone call system. Rather than answer the telephone once, any time during four hours, employees have to log in twice during a 1 hour period, but all to obtain exactly the same information.

The Employer relies on three cases each of which deal with "calls" or "posting" in the context of an advancing technology.

> *St. Joseph's Health Centre v. CUPE Local 1144 Re Bulletin Board Policy Grievance* [2011] CanLii 44554 (Ont. L.A.) (Chauvin)
>
> *Scarborough Hospital and Ontario Nurses' Association* [2014] CanLii 22559 (Ont. L.A.) (Levinson)
>
> *St. Lawrence CHAT – Academic and OPSEU Local 417* [2005] 83 CLAS 236 (Davie)

In *St. Joseph's* the Employer replaced glass-locked wooden bulletin boards with self-serve touch screens. The collective agreement referred to jobs being "posted" and

successful applicant's names being "posted on the bulletin board". The new screen had four touch buttons which variously led to the available jobs list and the successful applicant's list. Only personal information access required a password. The Union argued that the words "post" and "postings" were ambiguous and should be interpreted to mean the practice as it had been followed in the past. The Employer relied on certain dictionary definitions, its management's rights and on the *St. Lawrence* decision listed above.

The Arbitrator found that posting something in a public place was met by displaying the information on a touch screen kiosk. It similarly concluded that an electronic kiosk could be considered a bulletin board. The Arbitrator said:

> [47] Also, there is nothing in the collective agreement that stipulates that a bulletin board can only be in the form of a glass-locked wooden case. To the contrary, the collective agreement provides no explanation of what form the bulletin board should take. Bulletin boards can come in many forms. In today's electronic age, it is perfectly reasonable, and clearly within the common definition of "bulletin board", to find that the touch screen kiosks can be considered to be a bulletin board for the purpose of Article 9.05.
>
> [48] Accordingly, using the common and unambiguous definitions for "post" and "bulletin board", the Health Centre has not violated the collective agreement by providing information regarding job postings by way of the touch screen kiosks.

The Arbitrator was influenced by the fact that employees were equally able to use the new technology (see para. 64) and that it provided a better way of communicating the information (see para. 67). Lastly, the arbitrator found the change fell within the scope of management's rights (para. 70).

In *Scarborough Hospital* (*supra*) the arbitrator had to decide whether the Employer had stopped making a commitment form available to nurses when it discontinued a paper form in favour of an on-line form on an intranet to which nurses had access. He found this satisfied the collective agreement obligations despite the former practice. The earlier *St. Lawrence* case also involved a paper to screen transition.

> 42 The translation from paper to the computer may have resulted in a different "look" to the SWF, but increasing the size of a box, eliminating lines, or using a drop-down menu to check off classification status has not revised, modified or changed the SWF. These cosmetic differences are no different than, for example, using a different size font, or different size paper, to insure the form "fits" on two pages rather than the three pages found in the bound version of the Collective Agreement. There has not been any revision, or amendment to the substantive information presented, or the manner and sequence in which it is presented, when the paper form was translated into this electronic, computerized format.

The Union advances four arguments as to why the new system is not providing the "calls" provided for in the agreement and why its implementation is contrary to the agreement.

> (a) It eliminates the no-response provision;
> (b) It is contrary to local agreement provisions;
> (c) It violates ancillary clauses in the agreement;
> (d) It will be ambiguous in operation and continue to cause grievances.

**The Unable to Contact Option**

The Union argues the changes result in the elimination of a bargained item in Article 7.7 which reads:

> 7.7(a) Hours of call shall be established in accordance with service requirements. The names of employees will not be dropped to the

> bottom of the spare board if they are not available for a call outside the call hours locally agreed upon.
>
> (b) If employees cannot be contacted during call hours, their names will be placed at the bottom of the spare board as at midnight that day.
>
> (c) If employees refuse a call, their names will remain off the spare board, until the earliest time the employees who were assigned to the run would return, at which time their names will be placed at the bottom of the spare board in the order they would have arrived.
>
> (d) If employees refuse a call or cannot be contacted during call hours for standby or terminal duty only, their names will be placed at the bottom of the spare board as at midnight that day.

Under the former system a caller made a series of calls, all during the four hour window period, contacting the "first-in" qualified employee for assignment. Those required to be available for a call could accept the assignment or refuse it, in which case the consequence in 7.7(c) would follow. What also happened is that employees on the list might fail to answer in the window period. Their names under 7.7(d) would go to the bottom of the list as at midnight; often an earlier time than had they answered the call and refused the assignment.

The Union argues that this new system eliminates the "unable to contact" situation. VIA maintains it still has meaning, but now only when technical difficulties with the website or the employee's phone prevents a successful log-on. In the Employer's view, the "cannot be contacted" provision in 7.7(b) does not represent an employee option or right to simply ignore or fail to take a call, so as to requalify as at midnight instead of as at the later point had they answered the call but refused the assignment.

The Union sees this elimination or at least substantial reduction of the unable to contact option as “resulting in hundreds, if not thousands, of dollars in lost income to employees every year”. While this may be so in some instances, it is largely due to employees who have agreed to be available to work and have agreed to take calls over a four hour period failing to answer their phones to avoiding the consequences of a refusal. Their prior ability to do that is not a contractual entitlement that the Employer is now breaching.

**Local Agreement Issues**

The Union argues that this change interferes with Local Agreements in place across the Country, one function of which is to establish the hours when employees must be available for a call (see 7.7(a) above). I agree with the Union that Local Agreements are negotiated with the Union, not individual employees. I accept the Union’s proposition that if the Employer wishes to cancel a Local Agreement, it must give 30 days notice to the Union, or whatever other procedure such agreements call for. However, if the Employer fails to properly terminate an agreement that conflicts with its VIA 360 calling procedure that does not make the VIA 360 system itself illegal, it just gives rise to grievances for breach of the Local Agreements (some, I understand, have already been filed). Those issues are not properly part of this grievance. Whether the Employer’s position that official notice nullifying the Local Agreements on October 6, 2016 is correct, or not, does not affect the validity of the VIA 360 system itself. Similarly, I do not need to address Mr. Blair’s email of February 11, 2016. The basic fact is that such agreements can be

cancelled with proper notice and any grievance is limited to the consequences of not giving that notice.

**Ancillary Collective Agreement Issues**

The grievance includes a long list Agreement #2 provisions said to be violated. Article 2.1 recognizes the Union's right as exclusive bargaining agent over working conditions. It says Via 360 changes working conditions, but this is so only if the new system is not a "call" system. I find nothing in the past practice or the more recent negotiations that creates an estoppel.

Article 24.17 refers to employees being "called" for a hearing. Appendix 19 commits the corporation to "record all calls made from its O.T.S. office to employees and that types of those calls will be returned for a period of one year". Neither of these provisions becomes unworkable because of the VIA 360 system. Telephone calls can still be used; records of computer call entries can still be retained.

Article 7.14 allows employees to book off a trip. The Union gives, as an example, an employee asking not to work a trip on a set date due to a wedding or a doctor's appointment. Articles 7.14 and 7.15 read:

> 7.14 Regularly assigned employees will not be permitted to book after the established "cut-off" time without the permission of the Corporation.
>
> 7.15 If regularly assigned employees are permitted to book off after the "cut-off" period, and the employee "first-out" cannot be contacted on short notice, employees on standby will be assigned in their order on the spare board and, if necessary, available spare board employees who have accumulated less than 144 hours in their basic four-week

> period may be assigned. Under such circumstances, the employees who could not be contacted will not lose their turn on the spare board.

The Union says that, with the advent of VIA 360, the Employer now denies all requests to book off regardless of the circumstances. Article 7.14 appears to provide the Corporation with a discretion to be exercised. A blanket refusal to exercise that discretion may give rise to a grievance, but it is not a direct consequence of the VIA 360 program. Whatever they involve, the obligations in Articles 7.14 and 7.15 remain and, if a person is booked off, the consequences in Article 7.15 still have to be incorporated into the functioning of the VIA 360 system. It is no answer to tell employees to "book off sick" in circumstances where that is inappropriate, and certainly not to require employees to get a sick note from a doctor when so doing.

**Ambiguity and Confusion**

The Union argues that the new system is complex and inconsistent. The instructions given so far do not appear overly complex, but there have an no doubt been growing pains and initial problems due to unfamiliarity. Those facts alone do not render the initiative contrary to the collective agreement; nor does the fact that numerous grievances have been filed across the country.

**Decision**

The core question is whether substituting an obligation to dial up a website to get information falls within the requirements of Article 7 of the collective agreement, despite decades of past practice using a telephone system. Despite the significance of this

change for employees, the new system still meets the obligation to provide a call, albeit by a technologically new method. The requirement to check a website using a company supplied phone or a computer, in this day and age, adds little burden. It is insufficient to outweigh the prior burden of waiting for and answering a telephone over a 4 hour period. I find placing “the call” on a readily accessible web portal is still placing a call.

The Employer sought to deal with this in bargaining, but by calling this a “housekeeping change”. Strategically that may have been inopportune because it carried the clear implication that language change was necessary. However, the view that the Company could make this change under existing language was either correct or incorrect. I have concluded it was correct, although saying that does not mean some of the consequential impacts may not still generate grievances. This is not to imply the Employer can act unilaterally in all things; had the Company’s view proven incorrect it most certainly would have been obliged to negotiate the matter with the Union as exclusive bargaining agent.

Having found the VIA 360 dial up system complies with the call requirement and does not violate the agreement this grievance must be dismissed.

August 4, 2017

ANDREW C. L. SIMS
ARBITRATOR