

CAAT 94

94E115

CAAT(A)

IN THE MATTER OF a grievance by the union

AND IN THE MATTER OF the arbitration of the grievance

BETWEEN:

Sheridan College

- and -

Ontario Public Service Employees Union

(UROWITZ)

PLACE AND DATES OF HEARINGS: Oakville, Ontario, April 24, September 22, November 10, November 20, December 1, December 5, 1995; January 18, March 7, May 10, June 3, August 12, 1996

BOARD OF ARBITRATION:

Tammy Browes-Bugden
R. J. Gallivan
Stanley Schiff, chairman

APPEARANCES FOR THE EMPLOYER:

Rosalie Spargo, ass't director, human relations
D. K. Gray, counsel (April 24, 1995 only)
F. G. Hamilton, Q.C., counsel (all dates except April 24, 1995)

APPEARANCES FOR THE UNION:

John Monger, counsel

AWARD AND REASONS

The union filed a formal grievance on February 16th, 1994, alleging "management's continued use of sessional appointments to fill ongoing full-time positions in the Faculty of Science and Technology." As a remedy, the union asked that the College "hire full-time faculty to fill full-time positions in the Faculty...".

The matter did not go through the pre-arbitration grievance procedure before it first came before us in April 1995. The College made no objection on that ground. We recessed while counsel exchanged information about the details of the union's complaint. The hearing was then adjourned, and reconvened in September. At the opening the College asked for information about the nature of the activities giving rise to the claim, the number of appointments in question, the provisions of the collective agreement allegedly breached and the nature of the breaches. In response the union said that for several years the College had filled full-time teaching positions in the Faculty of Science and Technology with sessional appointments. Three persons were the immediate concern - Linda Bazinet, Maria De Stefano and Ram Puri - all of whom were former teachers in the Faculty's Engineering Technology Division, Davis Campus. The union put it that what the College has done violated s. 2.03 A and s. 2.03 C of the collective agreement. Beyond that, the patterns of hiring each of them over time violated s. 2.03 B. The histories of the hirings nonetheless rendered them probationers under App. VIII, ss. 1 and 3, and therefore within the bargaining unit.

The provisions the union relies on read this way:

2.03 A The College will give preference to the designation of full-time positions as regular continuing teaching positions rather than sessional teaching positions including, in particular, positions arising as a result of new post-secondary programs subject to such operational requirements as the quality of the programs, enrolment patterns and expectations, attainment of program objectives, the need for special qualifications and the market acceptability of the programs to employers, students, and the community. The College will not abuse sessional appointments by failing to fill ongoing

positions as soon as possible subject to such operational requirements as the quality of the programs, attainment of program objectives, the need for special qualifications, and enrolment patterns and expectations.

2.03 B The College will not abuse the usage of sessional appointments by combining sessional with partial-load service and thereby maintaining an employment relationship with the College in order to circumvent the completion of the minimum 12 months sessional employment in a 24 month period.

2.03 C If the College continues a full-time position beyond one full academic year of staffing the position with sessional appointments, the College shall designate the position as a regular full-time bargaining unit position and shall fill the position with a member of the bargaining unit as soon as a person capable of performing the work is available for hiring on this basis.

APPENDIX VIII SESSIONAL EMPLOYEES

1 A sessional employee is defined as a full-time employee appointed on a sessional basis for up to 12 full months of continuous or non-continuous accumulated employment in a 24 calendar month period. ...

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3 If a sessional employee is continued in employment for more than the period set out in Appendix VIII, 1, such an employee shall be considered as having completed the first year of the two year probationary period and thereafter covered by the other provisions of the Agreement. The balance of such an employee's probationary period shall be 12 full months of continuous or non-continuous accumulated employment during the immediately following 24 calendar month period.

Relevant parts of other significant provisions mentioned in argument are these:

27.02 B The probationary period shall also consist of 24 full months of non-continuous employment (in periods of at least one full month each) in a 48 calendar month period. For the purposes of 27.02 B, a calendar month in which the employee completes 15 or more days worked shall be considered a "full month".

If an employee completed less than 15 days worked in each of the calendar months at the start and end of the employee's period of employment and such days worked, when added together, exceed 15 days worked, an additional full month shall be considered to be completed.

APPENDIX VII

PART I--SENIORITY CALCULATION

1 The following provisions shall govern the calculation of seniority for full-time employees whose service includes some work performed during certain periods, as follows:

(i) Effective September 1, 1976, seniority shall include the period of 24 full months of non-continuous employment (in periods of at least one full month each) in a 48 calendar month period, for those who completed a probationary period on that basis since that date. ...

....

(ii) For the purpose of (i), effective September 1, 1976, a calendar month in which the employee completes 15 or more days worked shall be considered a "full month";

(iii) For the purpose of (i) and (ii), effective September 1, 1981, if an employee completes less than 15 days worked in each of the calendar months at the start and end of the employee's period of employment and such days worked, when added together, exceed 15 days worked, an additional full month shall be considered to be completed.

Section 27.02 B immediately follows ss. 27.01 and 27.02 A. Under s. 27.01, upon completing the probationary period, the employee gets "regular" status and seniority equal to the probationary period. Section 27.02 A 1 defines the probationary period generally as "two years' continuous employment".

Sessional teachers are hired under individual contracts limited in duration by the length of the particular term of the academic year and are paid at an hourly rate for each hour of class contact time they are scheduled to give. Under s. 1.01 of the collective agreement they are excluded from the bargaining unit. Teachers hired on a part-time basis are also under individual contracts for the length of specific academic terms and are also excluded from the unit. While those labelled partial-load are hired under individual contracts for a term, they are covered by some of the agreement's benefits and seniority provisions. The teachers wholly within the bargaining unit are

the permanent academic staff: they have yearly salaries under a continuing employment relationship severable after probation only for just cause. Permanent staff and sessionals meet classes for between thirteen and eighteen hours a week. Partial-load teachers have between seven and twelve hours, and part-timers up to six.

The College does not object to the union's claims on behalf of the individuals under s. 32.03 (Step One) of the agreement, defining the content of formal grievances. Nor does the College object on the basis of the distinction s. 32.10 draws between union and individual grievances. The College says that, since this is nonetheless a union grievance, no relief can be given to the three individuals. The College also says that we may not take into consideration any events post-dating the grievance or evidence of those events. To the latter, the union replies that, since the complaints are continuing, such evidence is admissible and the events established relevant.

We will deal with questions of individual remedies later. We deal with the objection to post-grievance evidence here.

The union is right. On the evidence, what the union says violated s. 2.03 A and s. 2.03 C went on continually for several years before the grievance was put in and for years after. The events allegedly violating s. 2.03 B and triggering App. III, s. 3, happened before the grievance came in and again after. Respecting the first breaches, as we see it, the grievance is continuing because the alleged breaches were ongoing. E.g., Re TRW Canada Ltd. and Thompson Products Employees' Ass'n (1992), 31 L.A.C. (4th) 203, 206 (Rose, arbitrator). Respecting the second, the grievance is continuing because the breaches were repeated. E.g., Re Waterloo Regional Credit Union Ltd. and Office Employees' Union (1986), 27 L.A.C. (3d) 361, 377 (Jolliffe, arbitrator), quoting with approval Re Canadian Gen'l Electric Co. and

United Electrical Workers (1952), 3 L.A.C. 980, 982 (Laskin, chairman). The Court of Appeal for Ontario discussed in similar terms the meaning and significance of the parallel concept "continuing cause of action" under the old Rules of Practice in Toronto General Trusts Corp. v. Rowen, [1963] 1 O.R. 312. The College cites Compagnie miniere v. Steelworkers (1995), 125 D.L.R. (4th) 577, where the Supreme Court upheld quashing the award of an arbitrator who had set aside a discharge on the basis of facts post-dating the grievance although he had found just cause in the events the employer had originally relied on. The court stressed the need for the relevance of evidence to the ground of the discharge. Since Compagnie miniere was not an instance of a continuing grievance in either sense we identify, it is distinguishable on the facts. Nonetheless, as the court directed, we admit only evidence relevant to the grievance we have before us, as arbitrators must always do. At all events, any objection to later events has been waived: the College's case rested on considerable evidence it introduced of both the conduct of its administrative officials and its planning projections into the future much post-dating the date of the formal grievance.

As we read the provisions we have set out, they are a kind of union and members' charter of rights. The first sentence of s. 2.03 A aims to get bargaining unit teachers into full-time positions as soon as the positions appear and to keep out sessional appointees unless the College has justification in the shape of some "operational requirement". The second sentence looks to "ongoing" positions, directing the College to put members of the bargaining unit into them instead of sessionals "as soon as possible", subject again to the presence of operational requirements. The exception disappears if a full-time position has been staffed with a sessional for more than a year: under s. 2.03 C, the College must then fill the position with a bargaining unit member as soon as a qualified person is available whether or not there are operational requirements. Together ss. 2.03 A and 2.03 C protect claims

of bargaining unit members to work they ordinarily perform. App. VIII, ss. 1 and 3, provide for the translation of long-time sessional appointees into unit members. The parties call this "rolling over". Section 2.03 B aims to guard the process by barring the College's interference by certain conduct. The package aims at one time to strengthen the union, to empower the person who has rolled over and to protect even more against the College's employing teachers outside the bargaining unit.

Section 27.02 B and App. VII extend unit members' protections further. The first sets out an alternative formula for calculating the probationary period by including any previous sessional service of persons hired directly as full-time permanent teachers. The second sets out the formula for calculating seniority by including previous sessional service of full-time permanent teachers whether hired directly or taken in under App. VIII.

We deal first with the union's complaints under s. 2.03 A.

Whether there has been breach of the first sentence depends, initially, on whether there were "positions" that were "full-time" which the College "designat[ed]" as "sessional teaching positions". If so, the College was bound to "designate" them as "regular continuing teaching positions" unless there were "operational requirements" of the kind the provision sets out, "the quality of the programs, enrolment patterns..." and so on. "[D]esignate" means what dictionaries say - to give a name, title or function to something - and "[d]esignation" means the name, title or function given. As the board said in Re Fanshawe College and OPSEU, Donaldson & Bucek grievances (1987), at 29, 30 (Brown, chairman), "giv[ing] preference" means that the position's "designation" as "regular continuing" takes precedence over a sessional designation.

In other words, absent the presence of any "operational requirement", the College must do it.

The College says, first of all, that there were no "positions" here because, acting under Management Functions' authority in s. 6.01 (iii), the College never created any to encompass what Bazinet, De Stefano, Puri or any other sessional appointee was doing over the years as teachers. We disagree.

A "position" or "teaching position" at a college is a place or a space in, or an element or part of, a complement of teachers the college employs, which is occupied by a person who teaches in the college. That definition we draw from dictionaries, from our reading of the collective agreement and from the understandings of those in the post-secondary education systems. Cf. also Re Fanshawe College and OPSEU, Union & Grunwell grievances (1986), at 3 (Samuels, chairman). Under this agreement, a particular "position" can be designated as sessional. That is shown by what is said in ss. 2.03 A, 27.05 (iii) and 27.09 A (ii). The label means, we infer, that the position is occupied or to be occupied by someone hired under a sessional contract. A "position" can be designated as "partial-load": see s. 2.02 and s. 27.05 (iii). A position can even be designated as part-time: see again s. 27.05 (iii). And, very importantly, the position can be "regular" and "continuing", see s. 2.03 A, or, in other language meaning the same thing, "regular full-time", see s. 2.03 C, or even just "full-time", see ss. 27.06 (i) and 27.06 (vi) (c). The particular designation of the position someone is occupying shows whether the collective agreement affects that person: those occupying sessional or part-time positions are outside the bargaining unit; those occupying the "regular, continuing, full-time positions" are within.

Section 6.01 (iii) empowers the College alone to create a position, and the power is confirmed in s. 27.05 (iii). But nothing in the agreement says that the College can do it only by formal, internal procedures. The procedures we were told about, focussing exclusively on full-time permanent positions, include determinations of need within programs, followed by permission from various academic administrators and a committee. If what the College does by its conduct in fact creates one or more positions, they exist whether the College acted according to the procedures or not. That certainly is what arbitrators have long said in the industrial context. E.g., Re TRW Canada Ltd., at 208-09, applying Re Horton Steel Works Ltd. and Steelworkers (1973), 3 L.A.C. (2d) 54, 56 (Rayner, chairman). The same thinking has been applied to the colleges. Re Centennial College and OPSEU, Kositsky grievance (1987), at 13 (Samuels, chairman); Re Fanshawe College and OPSEU, union policy grievance (1995), at 7-8 (McLaren, chairman). Indeed, the very collective agreement terms we have just listed designating positions as sessional, partial-load and part-time show that the parties at the bargaining table assumed that the positions so designated exist. Since we infer from the College's argument that the College does not create them by using the internal procedures described, they must come into existence by what the College factually does. The particular designations result from the College's choice to have certain teaching duties performed by persons in one or other of the categories of non-permanent staff.

In looking to see whether the College by conduct created a "position", we recognize that the existence of a "position" is not necessarily shown by the courses the occupant teaches. As we know from the evidence, the College has sought applicants for postings on the basis of their particular qualifications to teach certain courses, and once hired an occupant has taught courses associated with the qualifications. But course assignments vary over a teacher's career and may indeed vary considerably.

The College may change the assignments from time to time and, it is common knowledge, teachers' interests evolve over the years. So, while a showing of the particular courses or pattern of courses the occupant has taught over an extended time period may help show that a position exists, it is not definitive. Once a position is seen to exist, though, the showing may establish that the position is "ongoing". At the same time, variety and lack of pattern in the courses taught over time do not necessarily show that there is no position. So long as the courses are within the occupant's qualifications and experience, a position may still exist.

Bazinet was hired to teach on a sessional basis in the fall and winter terms of academic year 1992-93, the fall term of 1993-94 and the fall and winter terms of 1994-95. By the definition in App. VIII, s. 1, she was a full-time employee. Indeed, in each of these terms, she carried a course load of between fourteen and nineteen hours, well above the minimum limit of a full-time employee and precisely comparable to the load carried by regular and continuing employees who are within the bargaining unit. In the fall terms of academic years 1993-94 and 1994-95, she taught the same selection of Chemistry courses. She also taught one of those courses as part of the load in the fall term of 1992-93. As of early 1996, when Gordon Lalonde, the Faculty's dean, testified on the point, most of the courses she had taught were still being offered.

In all, on the basis of the definition of "position" and the factors going into deciding whether one exists, we conclude that, during academic year 1992-93, fall term 1993-94 and academic year 1994-95, there existed a position which was full-time and which the College had by its conduct designated as a sessional teaching position, all within the meaning of the first sentence of s. 2.03 A. Since the position continued from the 1992-93 academic year into the fall term of the 1993-94 year, it was an "ongoing" position within the meaning of the second sentence. That position is the

one Bazinet was occupying. We know that Re Fanshawe College and OPSEU, MacDiarmid grievance (1993), at 14 (Brown, chairman), says that a full-time position cannot be created by a series of sessional appointments. Our reasoning about what a position is, how it may be identified and why a position occupied by a sessional appointee is full-time shows why we disagree with that.

Unless the College has shown that designating the position as sessional and failing to fill it with permanent staff was appropriate because of operational requirements of the kind set out, both sentences of s. 2.03 A were violated. Whether that showing was made we leave until we have considered the records of Di Stefano and Puri.

Di Stefano was hired to teach on a sessional basis in the fall and winter terms of the 1992-93 academic year, the fall term of 1993-94 and the fall and winter terms of 1994-95. By definition she too was a full-time employee, and carried in each of those terms a course load of between fourteen and nineteen hours. In each of the terms she taught two or three of the same package of Chemistry courses. In the winter term of 1993-94, she was hired only on a partial-load basis, teaching one of those courses; another course, part of her full-time load both earlier and later, was given to another instructor who had been hired on a part-time basis. In the fall term of 1995-96, two of the courses in the package, somewhat revised in form, were divided among two partial-load instructors and the same part-time instructor.

We conclude that, during the academic years 1992-93 and 1994-95 and during the fall term of 1993-94, there existed another position that was full-time which the College had by its conduct designated as a sessional teaching position. Since the position continued from one academic year to the next it was ongoing. That position

for those periods Di Stefano occupied. We also think that the winter term of 1993-94 should be included: by dividing the full-time position into two parts for the duration of the term and then bringing the parts together the next fall, the College cannot escape its duty under s. 2.03 A. See Re Fanshawe College and OPSEU, union policy grievance (1995), at 8 (McLaren, chairman). The same applies to the fall term of 1995-96, even though we have no evidence of what happened to the cluster of courses in the winter term and after. Again, to escape violation of s. 2.03 A, the College must show the operational requirements for what it had done.

We move on to Puri.

He was hired on a sessional basis for the fall term 1992-93, the summer term of 1993, the fall term of 1993-94, the summer term of 1994 and the fall term of 1994-95. He too was by definition a full-time employee and always carried a course load of between thirteen and eighteen hours. Unlike Bazinet and Di Stefano, the courses he taught within his areas of expertise varied widely from term to term, never creating a package that was repeated. However, the courses in Mathematics and Electricity he taught as the full load in fall 1992 were repeated as part of his load in fall 1993. The Electricity course was also part of the load in the fall of 1994. As of early 1996, all the courses he had taught were still being offered.

We might see here one full-time position the College designated as sessional existing during the fall terms of 1992-93, 1993-94 and 1994-95, as well as the summer terms of 1993 and 1994. Or we might see five full-time positions - each existing for the span of one term. On either view, Puri was occupying it or them over time. If the first, since the position was occupied and reoccupied over the years, it was ongoing. If the second, since each position did not extend beyond the term, it was not.

We choose the second. Section 2.03 A contemplates that the designation shall happen as soon as the full-time position exists. The pattern of Puri's hirings shows that a position first existed in the fall term of 1992-93. Thereafter there was no package of courses or repetition of courses and packages providing a continuity in the assignments. The changes as term succeeded term show that on each re-hire the previous position disappeared and a new one was created.

Apart from what we learned about Bazinet, Di Stefano and Puri, there was evidence tending to show the existence of some other full-time positions occupied by sessionals over the years. Since the evidence was not nearly so full as that about the three of them and since, at the end, the union did not base argument on it, we make no findings about the existence of any other position.

We now examine the question of "operational requirements".

As we read the "subject to..." clauses in s. 2.03 A, they oblige the College to establish that the "operational requirements" of a particular program necessitate designating the position in question as a sessional position. At the least, we may concede, there must be a showing that the "operational requirements" of the division's programs taken as a whole necessitate that.

Dean Lalonde testified at length about the processes of altering the nature and direction of programs, the qualities sought in new appointments to the full-time academic staff and the methods of assigning courses. What we heard was a fine exposition of academic planning to respond to the needs of students and the customers for the skills they have gained in the programs - planning now exercised under the pressures of ever-increasing financial constraints caused by government

cut-backs. During Lalonde's explanation, we heard specifically how the various listed operational requirements were satisfied in the hiring of several fine scholar/teachers in Chemistry and Chemical Engineering. What we did not hear was any evidence tending to show why any of the positions we have identified had to be sessional rather than regular continuing positions because of any operational requirement of any program or the programs generally.

Lalonde detailed how courses in the curriculum are assigned each year. The cutting-edge courses, courses in development and upper year courses are assigned to members of the permanent full-time staff. The remaining pool of courses, some twenty percent of the curriculum, is then parcelled out to sessional, partial-load and part-time appointees who are hired for the particular jobs. Doing that can satisfy the operational requirement of "the need for special qualifications" in a course, for example, on Law or on Architecture when a practising member of the profession must be hired for his expertise. But that does not apply to the positions in question: there was no evidence that any course taught by Bazinet, Di Stefano or Puri needed a specialist or that any of the three was such a specialist. Indeed Lalonde was at pains to say that various members of the permanent teaching staff could teach any course the three had taught. The courses taught by Bazinet and Di Stefano, he said, were taught by sessionals and other non-permanent staff because they have been left over after the assignments to permanent staff were finished.

Lalonde also told us that, when members of the permanent staff take various kinds of leave - sabbatical, sickness, pregnancy - sessional and other non-permanent staff are hired. We may accept for the purpose of this grievance that filling a position with a sessional in those situations can be an "operational requirement". As the board

said in Re Humber College and OPSEU, union grievance (1994), at 9 (Howe, chairman), the list of requirements set out in s. 2.03 A is not exhaustive. Filling a position because the usual occupant is away temporarily on leave seems at least analogous to doing that in a situation where fixing the appropriate complement is difficult because of fluctuating enrolment, a stated "operational requirement". But, whether that fits or not, there is no evidence that any leave of any teacher in any program required designating the positions in question as sessional and staffing them with sessional appointees.

Lalonde was candid that the College had not considered hiring permanent, full-time staff to teach the courses in the balance of the twenty percent pool. He conceded that his analysis of how courses are allocated was not done on the basis of what courses are taught in particular programs. Nor, he said, had he tried to determine which courses in particular programs are being taught by non-permanent staff of the various categories. He was unsure that such an analysis had been done.

On the evidence we heard, we infer that, after hiring some non-permanent staff for their "special qualifications" and to fill positions temporarily vacated by permanent staff on leave, the College allocated the balance of the twenty percent course pool to sessionals and the others largely to avoid the costs of supporting a larger group of permanent full-time teachers with the salaries, benefits and tenure bargaining unit membership entails. From a business point of view, especially in this time of diminishing financial resources, that makes sense. But, hiring sessionals for that reason is not responding to any "operational requirement" s. 2.03 A contemplates. As other arbitration boards have said, operational requirements do not include financial considerations or budgetary constraints. Re Fanshawe College and OPSEU,

Donaldson & Bucek grievances (1987), at 30 (Brown, chairman); Re Humber College and OPSEU, Union grievance (1994), at 9-11 (Howe, chairman).

In all, we cannot hold that the College was excused from designating the full-time positions Bazinet, Di Stefano and Puri occupied as regular continuing teaching positions because of an operational requirement of any particular program or the programs in general. The College therefore violated the duty in the first sentence of s. 2.03 A. Respecting the positions occupied by Bazinet and Di Stefano, the College also violated the duty in the second sentence.

If possible, our choice of remedy should take into account that much of this happened several years ago. If the College had acted in the interim to avoid continued violation, a simple declaration would be enough. Since the evidence shows the contrary, more is needed: an order for the designation of new regular full-time teaching positions. But three of them is enough. Because of the way we see the succession of positions Puri occupied, we count only the last and add it to the two occupied by Bazinet and Di Stefano.

We direct that the College shall designate three new full-time regular continuing teaching positions in the Engineering Technology Division. Since the evidence does not clearly enough identify the particular department or program to which each may be attached, we cannot be more specific. While only the second sentence of s. 2.03 A refers to filling the positions, we think the duty is implicit in what the first specifically sets out. We agree with the board in Re Centennial College and OPSEU, Kositsky grievance (1987), at 13 (Samuels, chairman), that s. 2.03 A does not contain a commitment to any particular employee. We therefore say nothing about who shall fill those positions. We simply direct that they shall be posted.

The College argues against any order for posting because government cutbacks have already led to layoffs of permanent staff. Those facts of the College's financial life cannot affect its duties under the agreement nor the remedies arbitrators should give when violation has been found. What results from the order must be handled under applicable provisions of the agreement .

We next consider the careers of Bazinet, Di Stefano and Puri in the light of s. 2.03 C.

The full-time position Bazinet occupied as a sessional appointee existed during the first two terms of the 1992-93 academic year, August 31 to December 18, 1992, and January 4 to April 30, 1993. It then continued through the fall term of the 1993-94 year, August 30 to December 17, 1993. Under s. 11.03 of the collective agreement, an "academic year" is ten months long, running from September 1st to the following June 30th. Since permanent full-time staff within the bargaining unit commonly teach only two terms out of the three, had one of them taught during the same terms as Bazinet, there would have been no question that the position the person occupied would have been "a full-time position...continue[d] beyond one full academic year" within the meaning of s. 2.03 C. We find no reason to see what Bazinet did any differently. Respecting that position, the College has violated s. 2.03 C.

Di Stefano, as we have said, also occupied a full-time position as a sessional appointee during the fall and winter terms of 1992-93 and the fall term of 1993-94. While we have said that we include the 1993-94 winter term for the purpose of the s. 2.03 A determination, that is unnecessary here. On the same reasoning we apply respecting the position Bazinet occupied we find that the position Di Stefano occupied

through the 1992-93 academic year and into 1993-94 was a "full-time position... continue[d] beyond one full academic year of staffing with [a] sessional appointee" in violation of s. 2.03 C.

Puri's appointments do not yield a similar result. At no time did any position he occupied stretch beyond a full academic year. Section 2.03 C was not violated respecting him.

As a remedy for the violations, we could order the College to do what s. 2.03 C specifically says it should have done. Since we have ordered the equivalent for the breaches of s. 2.03 A , a remedy here is unnecessary.

We now consider s. 2.03 B in the light of ss. 1 and 3 of App. VIII. Section 3 causes a teacher who was previously a sessional employee to become a probationer within the bargaining unit as soon as the stated condition of length of sessional employment is satisfied: as the parties say, he "rolls over". Section 2.03 B aims to bar the College from hampering a person's satisfaction of the condition by deliberately using a device that nonetheless retains the person as a teacher the College employs. That device is hiring the person in a succession of sessional and partial-load appointments so arranged that the accumulated length of sessional appointments defined in s. 1 of App. VIII is never exceeded and therefore s. 3 not triggered. The device used with that aim is the "abuse" s. 2.03 B forbids. That this is the purpose of s. 2.03 B is shown clearly enough by reading it along with App. VIII, ss. 1 and 3.

We recognize that the precise wording of s. 2.03 B does not quite do what we find to be its purpose. The language strictly contemplates only the College's attempt to prevent the person from completing twelve months of sessional employment within the

24 month period. The words do not on their face prohibit the College from trying to prevent a person from exceeding the twelve months - the trigger of App. VII, s. 3. We are nonetheless bound to read them that way. After all, why would the parties negotiate a provision that has no other purpose? Some history drawn from awards the parties filed during argument helps us a little more. We see from Fanshawe College, Donaldson & Bucek grievances, at 3, and Fanshawe College, MacDiarmid grievance, at 2, that the predecessor provision to s. 2.03 B in identical language in the immediately preceding agreement and one a little further back used to be part of s. 2 of the then appendix III, while the predecessors to App. VIII, ss. 1 and 3, were at that time part of s.1 of the same appendix. So we add, why would the parties have put all these provisions in the same part of the agreement? At all events, even though the chairman raised the question of the wording during final argument, the College said nothing against such a reading in response to the union's urgings that we adopt it. We are entitled to assume that the College has no quarrel with it.

We conclude that the College violated s. 2.03 B in the patterns of hiring Bazinet and Di Stefano over time.

We do this mainly on the evidence of the College's witnesses, Rosalie Spargo and Jean Young. Spargo is the College's associate director of human resources, in whose department records are kept about whether and when particular persons are hired as sessional, partial-load and part-time teachers. Young is the person in the department who, under Spargo's direction, is responsible for collecting the data for the records and responding to questions from heads of academic department about particular potential hirees. Both were of the view, apparently the policy of the College's administration, that creation of a teaching position could occur only through

the College's deliberate exercise of its internal procedures to create the position and that rolling over of a sessional should happen only if there is a position so created and formally posted. So, as both testified, if an inquiry came from an academic department about reappointing a particular person as a sessional, each was careful to report whether the person had already completed 12 months of employment as a sessional in a 24 month period and would therefore trigger App. VIII, s. 3, if hired again as a sessional. To do that they applied to the person's history an interpretation of the 12 in 24 formula with which the union disagrees but which, as we will discuss later, we conclude is essentially correct. Spargo and Young said that, if the records showed that another sessional appointment of the person would indeed cause the status to change, the person was not eligible for the appointment. That, testified Young, was "the rule". And the response of each of them to the department's inquiry followed it. The decision, they told us, was then in the department's hands: was there a full-time position to fill (presumably created by the College's internal procedures)? or should a partial-load or part-timer be hired? or perhaps should no one be hired?

We infer from the evidence that "the rule" was applied to Bazinet, Di Stefano and Puri. Under the College's interpretation of App. VIII, s. 1, Bazinet had reached the 12 in 24 limit by the end of the fall term of the 1993-94 academic year. Although she wanted a further sessional appointment, she was then hired only as a partial-load teacher in the immediately following winter term. For the fall and winter terms of 1994-95, she was again hired as a sessional. According to the College's interpretation of App. VIII, s. 1, that was safe under "the rule".

Di Stefano had also reached the 12 in 24 limit by the end of the 1993-94 fall term. She too wanted a further sessional appointment, but only got partial-load. Part

of the earlier course cluster she retained; the other part went to a new part-time instructor. The two parts together would have left the full-time teaching load. She was reappointed as a sessional instructor for the fall and winter terms of 1994-95, but appointed only as a partial-load for the summer term. The former was safe under "the rule"; the latter mandated by it. The course she taught was part of the earlier cluster.

Puri, like the other two, reached the 12 in 24 limit by the end of the 1993-94 fall term. The department head told him during the fall that she could not offer him a sessional appointment for the immediately following winter term but was offering a part-time appointment. He accepted and taught as a part-timer. He then received two successive appointments as a sessional during the summer of 1994 and the fall term of 1994-95. The first of these, in Young's estimation, would have violated "the rule" except for Puri's acceptance of the College/union local agreement of May 1994 that sessional appointments during the summer would not count under App. VIII, s. 1. Puri has challenged that result in the circumstances and, according to Young, had the College known that he would do that, he would not have got the sessional appointment. For the winter term of 1994-95 he was appointed as a part-timer.

As Lalonde testified, each of Bazinet, Di Stefano and Puri had a long history of teaching courses fundamental in their areas, some of them core courses. These were assigned to them on the basis of their skills, knowledge and experience and the quality of their work during previous assignments. As for their skills, knowledge and experience, Bazinet and Di Stefano have Master's degrees in Science; Puri has a first degree in Mathematics and Physics and in Education and has completed most courses toward an Engineering degree. Before beginning to teach, Di Stefano and Puri also had years of associated experience in industry. Why, then, did the College hire and re-hire them on these patterns?

In light of what Spargo and Young told us, we can infer no reason other than the deliberate choices of department heads to rehire each of them in a way avoiding their attaining probationary status under App. VIII, s. 3. We remember Lalonde's testimony that the College does not do this and Spargo's testimony that she did not know whether this happened with Bazinet and Di Stefano. Present the detailed testimony about "the rule" and absent any testimony from the particular department heads, we do not credit them. Young's testimony about Puri's sessional appointment for the summer of 1994 not only makes the matter certain about what happened to him; it also helps our inference about the other two.

We hold that the College's pattern of hiring Bazinet and Di Stefano violated s. 2.03 B. We recognize that our conclusions contradict Fanshawe College, MacDiarmid grievance, at 13, 14. The board said that nothing in predecessor appendix III changed a college's discretion to choose whether or not to re-hire someone as a sessional to affect the person's becoming a probationer. Strangely, the board did not refer to the predecessor in identical language to s. 2.03 B then contained in appendix III. It did - and does - exactly that.

The pattern of Puri's hirings only fails to violate s. 2.03 B because the re-hires were as a part-timer and not a partial-load. The purpose of s. 2.03 B encompasses both partial-load and part-time service. The language nonetheless so clearly limits the scope that we cannot find a breach.

What remedy should we give? A simple declaration, we think, would be insufficient. The union asks that we treat the partial-load appointments violating s. 2.03 B as if they had been sessional appointments and let App. VIII, s. 3, cause the

roll-over. The College says that we should not give individual remedies at all, citing Re Fanshawe College and OPSEU, Union grievance (1989) (Brent, chairman), and Re Fanshawe College and OPSEU, Berget & Union grievances (1992) (Brent, chairman).

We conclude that the union is right. The relevant portions of the two Fanshawe awards deal with the board's authority under what is now s. 32.10 to consider individual complaints in a grievance the union has brought upon a college's preliminary objection to jurisdiction. See Fanshawe College, Union grievance at 11-12, and Fanshawe College, Berget & Union grievances at 25-26. They have nothing to say about the final question of remedy when, as we have said happened before us, the college does not at the beginning challenge the board's authority to consider the individual complaints at all. On remedy, we agree with the opinion in Re Cambrian College and OPSEU, Gavreau grievance (1988), at 5 (Palmer, chairman), that a declaration in a union grievance without individual remedies would limit the union's effectiveness as bargaining agent to protect the integrity of the agreement.

There is good reason to assume that, had the College not applied the device violating s. 2.03 B, Bazinet and Di Stefano would have been re-hired as sessionals. At the least, there is no good reason to assume the contrary. The two of them shall therefore be treated under App. VIII, s. 3, as if they had sessional appointments during the winter term of 1993-94.

We think we should go further. As we have said, the College and union divide on the proper reading of the 12 in 24 formula of s. 1. That muddies any determination of precisely when Bazinet and Di Stefano rolled over as well as whether and when each completed the second probationary year. We should give our interpretation of the formula so that all can know precisely what the dates are.

What is a "full month" for the purpose of s. 1 and what is a "calendar month" are crucial to the proper reading. Although neither is defined in App. VIII, the parties agree that the definition of "full month" in s. 27.02 B and the identical definition in App. VII can be at least helpful. Indeed, the College has adopted the definition exclusively. The union argued alternatively that "full month" should mean the time period a regular full-time teacher would have worked in any given month: after all, sessionals perform identical duties. But sessionals work under individual contracts limited in length to an academic term and at an hourly rate for each scheduled class contact hour. Regular full-time staff are tenured with continuing contracts and yearly salaries. Measuring "full months" of employment differently makes sense.

In our opinion, the College's recourse to s. 27.02 B and App. VII is right. We agree with Spargo's view that the App. VIII provisions are linked together with the others in function and goal. Each set defines a measure of sessional employment for use in giving rights under the agreement. Sections 1 and 3 of App. VIII deal with establishing probationary status in the bargaining unit and measuring its length as a result of extended sessional service outside the unit; they do not however define the crucial words in the statement of the necessary time periods. Section 27.02 B deals with measuring the length of probationary status within the unit taking into account previous sessional service of someone hired directly from outside. Except for the numbers of months, the formula is identical to that in s. 1 of App. VIII. And there is an added definition. That may have happened, it seems not unreasonable to assume, because the parties at the bargaining table saw the problem of using the existing formula in a different context without some elaboration. Appendix VII deals with measuring the seniority of persons within the bargaining unit taking into account previous sessional service whether they entered the unit on a direct hire or because of

a roll-over under App. VIII. The same formula is there. And so is the same definition. In all, we conclude that it is reasonable and appropriate to look exclusively to s. 27.02 B and App. VII for the applicable definition of "full month" in App. VIII.

The parties then divide on what are "days worked" in the definition. It is common ground that teachers may be scheduled to meet classes on only some days of the week. The union says that, since all teachers - those who are regular permanent members of the bargaining unit and those who are sessionals - customarily perform out-of-class duties such as preparing for classes and marking examinations on any day of the week, we should read "days worked" to mean all seven days of the week. Several arbitration boards have agreed. Re Loyalist College and OPSEU, Daniels grievance (1985), at 6-7 (Delisle, chairman); Re Mohawk College and OPSEU, Sobczak grievance (1993), at 12 (Mitchnik, chairman). The College says no: "days worked" means days on which teachers could have class contact hours, that is, Monday through Friday not counting statutory holidays. Neither reading, we think, responds adequately to the precise words. Not all teachers do work of the kind the union points to on every day. Moreover, it would be very difficult, if not impossible, to keep track and verify if and when any teacher had completed a "day worked" in preparation and marking. Nor, obviously, as we consider the College's argument, do teachers' potential days of contact hours equal their days of actual class contact work. Having said that, we think that the College's reading is closer to the linguistic demand of the words than the union's and certainly allows easy tracking and verification. It also much more easily yields "full months" than an interpretation looking only to days when the teacher actually meets classes. We adopt it.

We note that, in applying the second paragraph of s. 27.02 B and the identical provision in App. VII, s. 1(iii), the College has assumed that a total of fifteen days

worked is sufficient to constitute the "additional full month" upon adding together "the calendar days at the start and end of the employee's period of employment". The board in Mohawk College, Sobczak grievance, at 12, 13, made the same assumption. Strictly speaking, that is wrong: the provision says that the total must "exceed 15 days worked" (emphasis added). That is however the College's practice and its counsel did not propose that we interfere. We accept the practice and the concession. Fifteen days are enough.

Applying to themselves a version of the College's interpretation, Bazinet, Di Stefano and Puri added to the count of their "accumulated employment" the days at the end of August when the term began shortly before September 1, notwithstanding that they had added the days to those at the end of the term in December to get "an additional full month". That cannot be right. The provisions allowing the addition of days at the beginning and the end of the terms take the August days into account for the purpose of determining the "12 full months of...accumulated employment" in App. VIII, s. 1. Once added together for the purpose, as the three individuals and the union say they must, the days cannot be counted again.

Di Stefano also claimed to add five days in May 1994 when she worked in rewriting a lab outline at the department head's request. While we do not doubt the expertise necessary for the job, we do not find that she was then working under a sessional appointment. We accept the College's evidence that she was retained for several days of part-time duties.

The union then says that "calendar month" in App. VIII, s. 1, should be read to allow counting from any particular numerical date of a named month to the same

numerical date of the next succeeding named month, for example, from January 15th to February 15th. The twenty-four month count can then begin anywhere in the named month. The College says that "calendar month" means a named month of the calendar. The count must begin at the end of the named month during which the particular term ended. According to dictionaries, either reading of "calendar month" is acceptable. What matters is context. Since we and the parties are looking to s. 27.02 B and App. VII for the interpretation of "full month" as it appears in s. 1 of App. VIII, we should read "calendar month" in s. 1 consistently with how the term is used in the other provisions. Particularly in the second paragraph of s. 27.02 B and in s. 1(iii) of App. VII, "calendar month" must be read to mean a named month of the calendar. "[C]alendar month" in s. 1 must mean the same. The count should be made the way the College says.

We now apply our reading of App. VIII, ss. 1 and 3, to Bazinet and Di Stefano to elaborate the remedy we have given under s. 2.03 B. Each of them completed "12 full months of...accumulated employment" as sessional employees under s. 1 by the end of the fall term 1993-94. The winter term began on January 3rd, 1994. Had they been hired for that term as sessionals instead of as partial-load, each would have achieved probationary status under the first sentence of s. 3 on the first moment of that day. "[T]he first year of the two year probationary period" would therefore "be considered as having been completed" and they would "thereafter [be] covered by the other provisions of the Agreement." That we say is what the legal status of each was. According to the second sentence of s. 3, the balance of the period would be served by working another 12 accumulated months during the immediately following 24 months, the same formula as in s. 1.

There is here a problem for Bazinet: after the winter 1993-94 term, she was hired twice as a sessional and then not hired again. As a matter of fact, then, she never completed another twelve months of accumulated employment during the next 24 month period. We are reluctant to decide on the legal significance of that without counsel's further submissions. We invite their help.

Di Stefano has no such problem. We count what happened in the winter term of 1993-94 as a sessional appointment. After that she got successive sessional appointments in the fall and winter terms of academic year 1994-95 and a partial-load appointment during the summer term of 1995. On that schedule she completed the balance of the probationary period under s. 3 on April 28th, 1995, the end of the 1994-95 winter term .

We have interpreted App. VIII, s. 1, for the purpose of elaborating the remedies we have given to Bazinet and Di Stefano under s. 2.03 B. Puri does not get the same remedy because, as we have said, what happened to him did not violate s. 2.03 B. That, however, does not deprive him of all remedy.

Interpreting s. 1 of App. VIII was the final step in responding to the union's complaint under s. 2.03 B. Since the job is finished, we see no reason to bar Puri from whatever remedy he may have under App. VIII alone. The award in Cambrian College. Gavreau grievance, we think, takes us that far. But, even if not, absent the College's objection to our authority to consider the individual complaints within the union's grievance, we may grant any remedy now available under s. 1. And that is so even though the three individuals launched their own grievances under App. VIII some time in mid-1995 and they are now before another arbitration board. The fates of

Bazinet and Di Stefano we have decided, with the former subject perhaps to refinement after we have heard the invited submissions. Their grievances before the other board are probably now moot. A decision here and now about Puri will largely parallel what we have already done for the other two, will avoid continued multiple proceedings and will give him earlier justice.

As we have said, Puri had a sessional appointment in the fall term of 1992-93, running from August 31 to December 18. Under our reading of s. 1, that amounted to four full months' employment. He then had a sessional appointment in the summer term of 1993. Although the term ran from May 3rd to August 20th, because of the August municipal holiday, there were not "15 days worked" in that month. The session therefore extended over only three full months. The following sessional appointment in the fall term 1993-94 counted for another four. The total so far was eleven.

We come now to the summer term of 1994, running from May 2nd to August 19th, when Puri had another sessional appointment. He indeed signed a document agreeing that the term would not count for the 12 in 24 calculation. But the College/union local agreement authorizing the waiver required the College to get affected employees' approval in writing before the term began. Puri signed on May 24th, over three weeks late. The requirement was a condition of the waiver's validity: its purpose, as we see it, was to give the employee advance opportunity to choose whether to take the job with the waiver attached. As far as the evidence goes, Puri had no such opportunity.

The College suggests that, since neither Puri nor the union made an objection to the late signing at any time before the hearing, it is barred now. We cannot see how

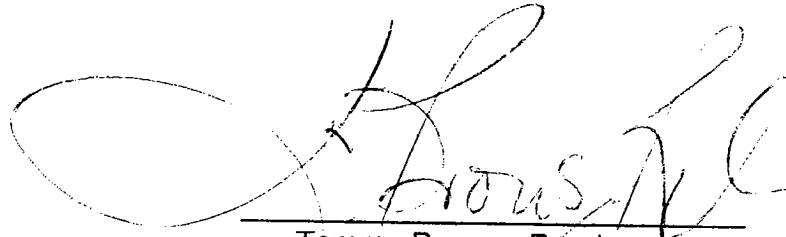
the earlier failure to object matters. There is no evidence that Puri or the union made any representation to the College before the term started that getting his approval then was unnecessary to create the waiver. Nor is there evidence of the College's reliance on such a representation resulting in the failure to get the approval in time. Both representation and reliance are necessary for a bar. E.g., Re Monarch Fine Foods Co. and Milk & Bread Drivers Union (1985), 18 L.A.C. (3d) 257, 264-65 (Schiff, arbitrator). The lateness of the objection therefore makes no difference. Since the condition was not satisfied, the waiver does not operate and the months of the summer term count.

By the end of May, Puri's accumulated employment reached twelve months and by June 1st it went over. Under the first sentence of s. 3, he completed the first year of the probationary period on June 1, 1994. August does not count toward the further total under the second sentence because the municipal holiday is not added in calculating fifteen days worked in the month. So, by the end of 1994, he had completed another six months of accumulated employment. In the winter term of 1995, he was a part-timer. The four months there nonetheless count: nothing in the sentence requires that the employment must be wholly on a sessional - or any other particular - basis. The total then was ten. Since the College did not employ him again, he never completed more months to accumulate twelve. As before, we invite counsel's help before we decide what the legal significance of that is.

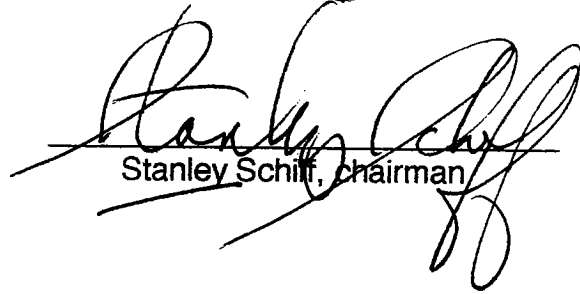
We add at the end that, on our reading of App. VIII, s. 1, standing alone, no matter which twenty-four month window we choose, neither Bazinet nor Di Stefano had sessional appointments adding up to more than 12 in the 24. Under the circumstances, that does not matter.

To the extent we have set out, the grievance is allowed. We remain seized of this matter to determine the issues respecting Bazinet and Puri about which we invited submissions and otherwise to determine any other issue arising from what we have said.

DATED at Toronto this 6th day of November 1996.



Tammy Browes-Bugden



Stanley Schiff, chairman