In the Matter of an Arbitration Pursuant to a Collective Bargaining Agreement respecting a Policy Grievance

Between:

Administrative and Supervisory Personnel Association

("Union")

and

The University of Saskatchewan

("Employer")

Before

Sheila Denysiuk, K.C. **Sole Arbitrator**

Heard on December 13 & 14, 2021

Gary Bainbridge, K.C. **For the Union**
Marie K. Stack and Robert Emes **For the University**

AWARD

1. This arbitration concerns a policy grievance filed by the Administrative and Supervisory Personnel Association ("ASPA") against the University of Saskatchewan ("the University") claiming that the University transferred ASPA bargaining unit work to members of another bargaining unit in breach of the collective agreement.

2. The grievance was filed in August 2020 in response to the University's decision to appoint members of Canadian Union of Public Employees, Local 3287 ("CUPE 3287") to teach certain courses previously taught by ASPA members. The CUPE 3287 instructors are commonly referred to as "Sessional Lecturers". In this award, the University's decision will be referred to as "the Sessional Lecturer Policy".

3. It is important to define the disputed work. Throughout the hearing and in submissions, the University described the work in issue as online for-credit instruction. ASPA clarified that it claims all online teaching work, regardless of whether the assignment is for-credit or not. ASPA also clarified that it isn't claiming virtual or remote teaching instituted by the University in response to the COVID-19 pandemic.

4. The University relies on its right to manage the workplace and takes the position that the disputed work isn't ASPA bargaining unit work because it has never been integral to or at the core of the positions within the scope of ASPA. Alternatively, there is no express or implied prohibition in the collective agreement against transferring the work and, even if

there is a restriction, the University didn't breach it in that the work was never guaranteed to be available and, when it was, it was never guaranteed to be assigned to ASPA.

5. The parties filed a joint book of exhibits at the outset. The exhibits are listed in Appendix "A" and will be referred to as necessary in the award.

6. The parties agreed to bifurcate the hearing between liability and damages. In the event the grievance is upheld, the parties requested that I retain jurisdiction should they be unable to agree on damages or any other matter respecting implementation of the award.

7. The parties consented, pursuant to Section 6-50(3) of *The Saskatchewan Employment Act,* to extend the time for me to provide this decision beyond the 30 days required by Section 6-50(1).

8. CUPE 3287 is aware of the grievance and had notice of the hearing, but chose not to apply for intervener status or participate in any way.

9. For the reasons that follow, the grievance is allowed.

EVIDENCE

10. ASPA called three witnesses. Darcy Hryn-Bird, Member Services Officer, gave evidence about the bargaining unit, job families and classifications within the unit, background information regarding the instructional work performed by ASPA members and how they are compensated. She also testified about the events leading up to filing the grievance. Rita Matlock and Lee Sanders have been instructors at the University for many years in both ASPA and CUPE 3287. They testified about their teaching history, how they received contracts, their compensation, and so on.

11. The University called two witnesses. Cheri Spooner has been employed at the University since 1989, starting in the Extension Division, then the Center for Continuing Distance Education ("the CCDE"), and now as Director of the Distance Education Unit ("the DEU"). Her entire career has been focused on distance education and off-campus learning. She gave historical background regarding distance education on campus and the teaching work assigned to ASPA and CUPE 3287 over the years. Colin Weimer, Director, Employee & Labour Relations, explained why the University decided to implement the Sessional Lecturer Policy.

12. The essential facts giving rise to the grievance aren't in dispute. The background that follows is largely taken from the witness testimony. The written submissions filed by the parties at the conclusion of the hearing contained helpful summaries of the background facts.

ASPA Bargaining Unit

13. ASPA is the certified bargaining agent for all "administrative and professional persons and all technical officers" employed by the University, with certain exceptions, pursuant to a certification order issued by the Saskatchewan Labour Relations Board on October 31, 1978, as amended on November 1, 2001.

14. The original certification order includes some nine pages of variously named positions in colleges and departments across campus, including coordinators, programmers, departmental assistants, administrative assistants, and so on. The exceptions are for those employees covered by the University of Saskatchewan Faulty Association ("Faculty Association") certification order dated January 26, 1977, those employees covered by CUPE, Local 1975 pursuant to various certification orders, and a number of specific positions including the President, Vice-Presidents, University Secretary and so on.

15. The collective agreement in place when the grievance was filed covers the period May 1, 2019 to April 30, 2022. There are 1,400-1,500 members in the bargaining unit.

16. The round of bargaining leading to the 2005-2008 collective agreement determined that the positions in the bargaining unit are based on the "job family" the position falls into and the "phase" within that job family. The "family" and "phase" system continues to govern compensation.

17. The collective agreement lists five job families – Information Technology, Instructional, Managerial, Specialist/Professional, and Operational Administrative. The job family relevant to this grievance is the "Instructional" family which has been in place since the 2005-2008 collective agreement and forward. Each job family includes a number of classifications/positions. Some are specific to the family while other positions appear in every family, and some have existed since the original certification order.

18. Article 3.4 sets out four types of employees in the bargaining unit. The types and current numbers in those categories are permanent (991 positions), term (310 positions), seasonal (6 positions), and casual (191 positions). ASPA members in the instructional family are considered term employees. This job family is comprised of various positions, including online facilitator, departmental assistant, digital assistant, lab demonstrator, and tutor/marker/proctor.

19. The ASPA Family & Phase Criteria Matrix (J6) provides a description for each of the five job families and sets out the primary purpose, education/experience and accountability for each family. The instructional family is described as, "A combination of education and experience, duties and career path allows for participation in the development, co-ordination and delivery of instructional materials to students."

20. There are two salary phases in the instructional family. The salary grid in Schedule 1 to the collective agreement provides for minimum and maximum salaries for each of the two phases. ASPA instructors are paid a base amount per-course and an additional sum based

on a "per-student" rate which varies according to the member's job title and length of service. Base rates are bargained at each round of bargaining whereas the "per-student" rate is set by the University. Instructors are eligible for benefits depending on hours worked.

21. Instructors are hired into term positions, coinciding with the University's teaching terms, through an offer letter or some other written communication, setting out the class, the term, the rate of pay, etc. There is no requirement to post teaching assignments because Article 7.1 only requires posting for positions with a term of more than six months.

22. Prior to the Sessional Lecturer Policy, ASPA instructors taught all online for-credit and non-credit courses, as well as in-person non-credit courses. In terms of how courses are assigned, the collective agreement doesn't provide for seniority or bidding rights. More will be said about this later. Hryn-Bird confirmed that the teaching work isn't guaranteed.

23. Also prior to the Sessional Lecturer Policy, the instructional family had 257 members whereas at the time of hearing the family had 156 or 157 members. To be clear, ASPA isn't suggesting that the reduction is solely attributed to the change in policy.

CUPE 3287 Bargaining Unit

24. CUPE 3287 is the certificated bargaining agent for certain instructors on campus pursuant to a certification order issued by the Saskatchewan Labour Relations Board on July 26, 1995, some 17 years after ASPA was certified. The employees in the unit are described as follows:

> …. that Teaching Associates in the College of Medicine and all employees of the University of Saskatchewan who are responsible for teaching a credit course and remunerated on a per course basis, excluding all graduate teaching fellows, adjunct professors, professors without term, clinicians and clinical appointments in the Departments of Medicine, Nursing, Veterinary Medicine and Dentistry, all academic student assistants, all monitor instructors and correspondence instructors in the Department of Independent Studies and all employees represented for the purpose of collective bargaining by the University of Saskatchewan Faculty Association, are an appropriate unit of employees for the purpose of bargaining collectively.

25. The bargaining unit is comprised of members who teach credit courses. As with ASPA, this order contains a number of exclusions, including graduate teaching fellows, adjunct professors, and so on. One of the exclusions in the order are correspondence instructors in the Department of Independent Studies; however, Spooner testified that there was never a department by that name.

26. Members of the bargaining unit are commonly referred to as "Sessional Lecturers". They are compensated on a per-course basis, not by way of base salary plus a per-student payment as for ASPA members. In other words, CUPE 3287 instructors are paid the same rate per-course regardless of the number of students in the course.

27. Also unlike ASPA where teaching contracts are offered, teaching positions in the CUPE 3287 bargaining unit are posted. Members with sufficient seniority have a right of first refusal ("ROFR") over non-members for posted positions.

28. The appointment process is the same as for ASPA in that instructors are hired into contracts coinciding with the University's teaching terms. Like the ASPA work, the teaching work isn't guaranteed.

29. The teaching appointments to CUPE 3287 members refer to the member as a Sessional Lecturer whereas the ASPA appointments refer to a number of titles – mostly online facilitator, but also tutor marker, specialist, and coordinator.

30. Prior to the Sessional Lecturer Policy, CUPE 3287 members taught for-credit in-person courses.

Historical Background

31. Teaching at the University has historically been shared amongst multiple bargaining units – the Faculty Association (both in and out-of-scope), ASPA, CUPE 3287, and graduate students who teach as part of their academic program. Out-of-scope senior administrators also teach from time to time.

32. It is well understood by the parties that faculty have priority to teach credit courses. The Faculty Association collective agreement provides that 70% of credit courses must be taught by faculty, leaving 30% that can be delivered by non-faculty. The provision doesn't contemplate how the non-faculty course is delivered, nor does it stipulate whether the course will be offered to ASPA or CUPE 3287.

33. Further in respect to the role of faculty, Hryn-Bird was asked what would happen to ASPA instructors if the University decided that teaching would only by done by faculty. She responded that the scenario is unlikely to occur, but conceded that faculty get "dibs" on in-person teaching.

34. Distance education was introduced at the University via correspondence courses and independent studies which have been around since 1929. Correspondence and independent studies eventually morphed into online teaching which began in the mid-1990s through the Extension Division, which became the CCDE in the early 2000s, and was renamed the DEU in 2015.

35. Online teaching was seen as a good way to reach off-campus students. Faculty taught online at the outset, but it gradually reached the point where there was less interest from faculty which meant there weren't enough instructors available to teach the online courses. Online for-credit work that was "leftover" from faculty went to ASPA and face-to-face for-credit work went to CUPE 3287. Face-to-face was still considered distance education because many classes taught by Sessional Lecturers are off campus.

36. Despite the difficulty getting faculty interested in teaching online at the outset, Spooner indicated that more and more faculty have an interest in technology and some now teach online as part of their regular workload.

37. Department heads typically look to faculty to teach. As indicated, courses not taken up by faculty went to ASPA and CUPE 3287. As for online courses, the DEU, or the Extension Division and the CCDE in the past, handles administration, but colleges and department heads decide who will instruct the course. Once approved, the instructor is approached and asked if they are interested in teaching the class. If accepted, the University issued a letter of appointment setting out the position, appointment dates, renumeration, benefits, and so on.

38. Some instructors taught more than one class during the term and would either be given a separate letter for the additional class(es), or "a remuneration letter" referring back to the original appointment letter. The same process was used for CUPE 3287 appointments.

39. Once hired into a term position, and assuming the instructor performed satisfactorily, a new term for the same course was frequently offered at the conclusion of the previous one. Many ASPA instructors had unbroken service with the University for years and years. It wasn't unusual for ASPA instructors to also teach as sessional lecturers, and vice versa; that is, some instructors are members of both ASPA and CUPE 3287, Matlock and Sanders for example.

40. Matlock started her employment at the University in 1989 marking essays for instructors and/or faculty through the Extension Division. The payroll report (J9) indicates her first appointment was as a tutor marker, and further indicates that she has had continuous employment at the University from 1999 and forward. Most of the appointments are as a tutor marker or online facilitator through the Extension Division, the CCDE and the DEU.

41. Matlock explained that the Extension Division delivered off campus courses online and through independent studies. Her first online course appointment was in 2012 when she taught English 110 as an online facilitator. All appointments mirror the University term schedule. Matlock frequently had more than one teaching appointment in the same term and sometimes with both ASPA and CUPE 3287.

42. Matlock explained that teaching as a sessional lecturer differs from online only in terms of the mode of delivery in that sessionals teach in-person, but otherwise the duties are the same.

43. Sanders started her employment at the University in 2003, first as a research assistant. She began instructing through ASPA in 2012. The payroll report (J10) indicates she was appointed as a coordinator in the Psychology Department. The report indicates that Sanders has had continuous employment at the University from 2016 and forward. Most of the appointments are as online facilitator or specialist through the CCDE and the DEU.

44. Sanders taught as a sessional lecturer in CUPE 3287 starting in 2014 when she heard about a posting and was successful in applying for the position. She has taught numerous courses as a sessional since then, but most of her work is through ASPA offerings. She holds term positions, but considers herself working full time in terms of hours.

45. Sanders testified about what online teaching is compared to other modes of delivery. The instructor develops the course in modules. They don't meet with students, except perhaps for labs. Occasionally a video is shown to make the course interesting. Instructors do a module weekly and post answers to questions and deliver exams online. Face-to-face teaching generally involves three-hour sessions that include a lecture, discussion and in-class exams. Most ASPA courses are online. CUPE 3287 appointments are face-to-face.

46. Regarding remuneration, and as indicated earlier, ASPA instructors receive a base amount per-course plus a per-student rate whereas CUPE 3287 instructors are compensated on a per-course basis. The "per-student" model was developed decades ago for correspondence, and based on the theory that more students in the class meant more work for the instructor.

47. It is agreed that class sizes have increased over the years, both online and in person. An online class with 30 to 40 students would roughly equal the stipend for CUPE 3287 instructors; however, many online classes could have upwards of 100 students. The key duties, course objectives, and the way the objectives are assessed are largely the same. This was confirmed by Matlock, Sanders and Spooner. Spooner indicated that the University intends that the expected workload for instructors be the same regardless of the mode of delivery.

48. In any event, as a result of higher enrollments, ASPA instructors often receive more compensation than CUPE 3287 instructors for teaching the same class as a result of the per-student rate. The disparity in compensation appears to have occurred gradually as class sizes have increased. There was no evidence that the University or CUPE 3287 ever attempted to deal with the disparity in bargaining, or that the issue was ever raised by the University in bargaining with ASPA.

49. COVID-19 had a significant impact on workplaces across the country. In response, the University decided that all courses would be delivered on a virtual or remote basis. Virtual teaching is the same as in-person teaching, but done remotely using a platform such as Zoom or WebX. The course is in essence still being taught face-to-face. Virtual teaching is different than online teaching because online doesn't have a virtual face-to-face component.

50. It is evident that the move to virtual teaching was a factor in the University's decision to institute the Sessional Lecturer Policy. The difference in compensation as between ASPA and CUPE 3287 instructors was more evident than it had been prior to the pandemic which then became an issue for the University.

Sessional Lecturer Policy

51. In May 2020, ASPA was contacted by a member about a rumor that the University intended to change how ASPA instructors are compensated. ASPA made an inquiry and was advised by the University that a committee had been struck to review the issue of remote teaching. ASPA wasn't invited to be part of the committee.

52. At a meeting with the University on July 6, 2020, ASPA was advised that the University intended to offer for-credit courses, whether online or in-person, as follows: first to faculty, then to sessional lecturers, and finally, and only exceptionally, to ASPA members. This meant that all online credit courses taught by ASPA would move to CUPE 3287.

53. On August 14, 2020, the University sent ASPA a communication document that had been provided to department heads as guidance for discussions with employees about the upcoming change in policy. The document indicates that, effective September 1, 2020, the University "will move to appoint all of those being remunerated to teach a for-credit course as CUPE 3287 (Sessional Lecturers) regardless of the mode of delivery". In other words, all for-credit courses, whether online or in-person, would be taught by sessionals.

54. ASPA asked the University for a list of members who would be impacted by the change. The list (J13) indicates that 78 members would be affected, and of the 78 on the list, 31 members held both ASPA and CUPE 3287 appointments. As indicated earlier, Matlock and Sanders were in the group of members who had taught, or were concurrently teaching, in both bargaining units.

55. The change in policy became known as the "Sessional Lecturer Policy" and was felt by ASPA members in two ways. First, instructors who previously taught an online for-credit course could now only do so in CUPE 3287. In many instances the pay would be less for teaching the same course they had previously taught in ASPA. Second, some ASPA instructors wouldn't be appointed because the contract might be awarded to a CUPE 3287 member with ROFR. In other words, ASPA instructors now had to compete against CUPE 3287 instructors and the ASPA instructor, without ROFR or with little ROFR, might not be appointed despite having taught the same course for many years.

56. Matlock testified about the impact of the change in policy had on her in terms of teaching load and compensation. In the fall of 2020, she taught English 113 as a sessional, the same class she had taught as an ASPA member the previous term. She earned less because she didn't receive the per-student rate. As well, she wasn't able to teach the same number of courses in CUPE 3287 because there is an 18-credit limit regardless of whether the course is online or in-person. She lost all of the web-based courses she had previously taught as an ASPA member. In fact, she hasn't received any ASPA appointments. The change in policy resulted in a 50-60% drop in Matlock's income, together with the psychological distress at having classes taken away without explanation.

57. Sanders testified that in early August 2020, she realized she hadn't received any ASPA appointments. She inquired and was told that teaching was transferred to CUPE 3287 and

she would have to apply to postings. She did apply and was appointed to teach Psychology 120.3, a course she had previously taught with ASPA. Like Matlock, she lost all of the web-based courses she had previously taught as an ASPA member. She taught five web-based courses in 2019, but received none in 2020. Also like Matlock, Sanders has sustained a large reduction in income, and lost Psychology 120, a course she had developed. The entire experience has been demoralizing.

58. Hryn-Bird summarized ASPA's concerns about the change in policy. In addition to the absence of any dialogue prior to the change being implemented, and the direct impact on members, ASPA was faced with a reduction in membership and a corresponding reduction in union dues. In cross-examination, it was suggested to Hryn-Bird that ASPA members would have more protection in CUPE 3287 given the existence of ROFR. She agreed, but also stated that instructors who hadn't worked as sessionals wouldn't have ROFR going in and would lose out to CUPE 3287 instructors with ROFR. Accordingly, some ASPA instructors might have no courses to teach.

59. Weimer downplayed ASPA's participation in teaching on campus. He confirmed that teaching is shared amongst multiple bargaining units, but described ASPA's role as "overload" resulting from faculty and administrators not being able to handle all of the required teaching. He testified that ASPA members were assigned courses on a "supplemental and incidental basis". Interestingly, despite not describing CUPE 3287's role in the same way, the evidence indicates that it was also assigned "overload" courses that faculty either wasn't able to take on or didn't want to take on.

60. In addition to downplaying ASPA's role, Weimer described ASPA instructors as having an "odd employment relationship" compared to the rest of the in-scope employees on campus in respect to "term" employment. He acknowledged that ASPA instructors are referred to as term employees, but he struggled with the description because it differs from term appointments in other bargaining units where the employee likely has layoff and bumping rights. When the term of an ASPA instructor ends, the University isn't obligated to offer the course to the instructor in the future.

61. Weimer reviewed the process used to determine what courses will be offered and what courses faculty will teach through regular assignment of duties. If no faculty is available to teach a particular course, one option is for the college to reconsider whether the course is offered at all. If the decision is to continue the course, the college offers it to non-faulty.

62. Weimer doesn't view teaching as a primary component of an ASPA member's regular duties which is why he referred to teaching as supplemental or incidental. He is undoubtedly correct with respect to members of the four other ASPA families, however, not necessarily for the instructional family. More will be said about this later.

63. According to Weimer, the main rationale for instituting the Sessional Lecturer Policy was to remove work from the ASPA bargaining unit that didn't belong in the unit – "to get it out of ASPA where it didn't belong and put it in the right place". He testified that concerns were raised – he didn't say by who – that instructional work was being inappropriately

done by ASPA members. He referred to it as a "blurring of jurisdictional lines". This occurred in late 2019/early 2020. HR representatives were tasked to address the concerns. The COVID-19 pandemic hit and all teaching moved to remote delivery.

64. The move to remote delivery in turn led to an interest in online instruction and how instructors were compensated. A committee was appointed to address the whole issue – remote learning, different appointment processes, different compensation, and so on. The group expanded to include representatives from compensation and labour relations. The Faculty Association sought clarification as to how online teaching was accounted for and concerns were expressed that mode of delivery shouldn't dictate who teaches the course or how compensation is determined.

65. The focus on online teaching, and the cost thereof, was an issue even before the pandemic. Spooner testified that colleges began to take an interest in the cost of instruction after the University implemented a new compensation model a few years ago. Colleges suddenly had questions about the differences in compensation between ASPA and CUPE 3287 instructors. Like Weimer, she said there was confusion in the colleges relating to the different compensation models for the two bargaining units.

66. Senior administrators became involved in June 2020. After seeking a legal opinion, the University determined that it had the right to organize the workplace and could move work from one bargaining unit to another. Weimer testified that the University took the position then, and now, that nothing in the ASPA collective agreement prohibits the University from moving the work. Further, the CUPE 3287 certification order supports the decision. The University considers that credit courses should be posted, not simply "offered".

67. In summarizing the rationale for the change in policy, Weimer testified that the change was implemented to address the jurisdictional issues, confusion in bargaining unit work, differences in compensation and hiring processes, and to achieve budget certainty. He indicated that the University considered the impact on ASPA instructors when making the decision. He testified that the University looked to the ASPA collective agreement to see what rights were available to instructors and determined that no rights were afforded to the group in terms of notice or severance. Weimer downplayed the impact on ASPA instructors. Of the 78 who were on the list of those affected, some continued instructing with CUPE 3287. He thought a majority would continue with CUPE 3287, but couldn't be certain. The remaining ASPA instructors would continue to receive assignments on a supplemental and incidental basis, and might teach credit courses on an exceptional basis.

68. Weimer confirmed that CUPE 3287 never filed a grievance in the past relating to online for-credit instruction, nor was it ever raised in bargaining. He also acknowledged that the instructional family has been in the ASPA collective agreement since 2005, and it includes a position called "online facilitator". He further acknowledged that the University knew that online facilitators were paid on a per-student basis in addition to a base rate. In other words, the difference in the pay model of ASPA instructors compared to CUPE 3287 instructors was known to the University.

69. In cross-examination, Weimer was asked what he meant by jurisdictional lines being "blurred". In response, he referred to the certification orders and the job titles, duties, and exclusions in the orders. With respect, his response didn't explain why the University was concerned about jurisdiction, particularly given that none of the affected unions had raised the issue in the past.

70. In cross-examination, Weimer confirmed that the change in policy wasn't made to meet the 30% restriction in the Faculty Association collective agreement; however, he noted that the Faculty Association raised questions about whether online instruction was included in the calculation. He conceded that the Faculty Association didn't take the position that ASPA couldn't or shouldn't do the work.

71. In cross-examination, Weimer was questioned about his assertion that the change in policy was required because there was "confusion and inconsistency". He explained that individuals involved in appointing for-credit work didn't know whether to appoint ASPA or CUPE 3287, and that the DEU's practice of appointment created uncertainty. That said, he didn't give any examples of who on campus was confused about the online work. Counsel for ASPA put to Weimer that Spooner wasn't confused – she clearly knew that online instruction went to ASPA and in-person went to CUPE 3287. Weimer responded that others might have been confused.

72. The within grievance was filed on August 18, 2020. The relevant paragraphs from the grievance read as follows:

> The specific incident giving rise is that the employer unilaterally moved ASPA bargaining unit work to another bargaining unit in direct violation of, but not limited to Article 3, in particular 3.1 of the ASPA/U of S Collective Agreement (May1, 2014 – April 30, 2019).
>
> Accordingly, ASPA is seeking the following redress: that all work be returned to the ASPA unit and those members impacted by this move be made whole in all respects, which would include, but not be limited to, compensation for lost wages and benefits. Further, the Union claims damages for lost Union dues.

ISSUES

73. The grievance raises the following issues:

    a. Whether the disputed work is ASPA bargaining unit work;

    b. If it is, whether the collective agreement contains an express or implied restriction preventing the University from transferring such work outside the bargaining unit; and

    c. If there is an express or implied restriction, whether the Sessional Lecturer Policy violates the restriction.

COLLECTIVE AGREEMENT PROVISIONS

74. The provisions referred to by the parties as being relevant to the within dispute are:

ARTICLE 2 – MANAGEMENT OF THE UNIVERSITY

The Association recognizes that the management of the University and the direction of employees are vested exclusively with the University. The University agrees that the exercise of its management and directory functions will be consistent with the terms of this Collective Agreement.

ARTICLE 3 – SCOPE AND RECOGNITION

3.1 Recognition

The University recognizes the Association as the exclusive bargaining agent of the members of the bargaining unit (whether probationary, permanent, seasonal, term or casual) as defined by the Order of the Saskatchewan Labour Relations Board, dated at Saskatoon, Saskatchewan on the 31st day of October, A.D. 1978, or as may be amended from time to time by the Labour Relations Board or by mutual agreement of the parties to this Agreement.

3.4 Types of Employees

3.4.1 **Permanent Employee** refers to a member who has successfully completed the probationary period (Article 8) and whose employment is expected to continue indefinitely.

3.4.2 **Seasonal Employee** refers to a member who occupies a recurring seasonal position and who has successfully completed the probationary period (Article 8). Such a member has the expectation that the recurring employment will continue indefinitely.

3.4.3 **Term Employee** refers to a member hired for a stated period of time. A term employee will be eligible for benefits as provided in Article 12. In such cases, any waiting period shall be calculated taking into consideration any previous continuous employment.

3.4.4 **Casual Employee** refers to a member whose hours of work are for brief or irregular periods.

ARTICLE 7 – RECRUITMENT AND RETENTION OF EMPLOYEES

7.1 Advertising of Positions

All Association positions of a duration of more than six (6) months **will be advertised**.

Unposted terms shall not be extended beyond six (6) months without posting the position.
…

ARTICLE 9 – ASSIGNMENT AND ASSESSMENT OF DUTIES

9.7 Other Assignments

> **9.7.1 Additional Assignments**
>
> Under certain circumstances, it may be appropriate for members to assume responsibilities in addition to their regular duties for which they may receive extra remuneration, e.g. teaching a class, marking papers, additional administrative duties, assuming more senior responsibilities in a temporary capacity, or any project where significant extra time is required.
>
> Permission to assume such additional responsibilities must be obtained from the department head and **People and Resources**.
>
> [Emphasis in original]

POSITIONS OF THE PARTIES

75. The parties made extensive written and oral submissions in support of their respective positions. The briefs include summaries of the facts, at least from each party's perspective, and reference numerous judicial and arbitral authorities. The authorities with full citations and short form names are listed in Appendix "B". Reference to an authority in the award will be by the short form name.

Union Position

76. ASPA begins by asking whether an employer, after decades of providing work to bargaining unit members pursuant to successive collective agreements, can suddenly decide to award the exact same work to a different bargaining unit.

77. ASPA notes that the University has characterized its "about-face" as a delayed realization that the certification orders necessitated the change; or, to put it another way, the certification orders require that the ASPA instructional work of online for-credit courses be the work of CUPE 3287. ASPA's response is that the order is "spent" and has been replaced by the collective agreement, specifically the recognition clause, and the parties' bargaining and practices since then. *Interprovincial Concrete*, *Dynamex* and *SMI* are cited in support.

78. The certification order provides a foundation to commence the collective bargaining relationship; however, the recognition clause governs. Even where the order is explicitly referenced in the recognition clause, it remains open to the parties to negotiate changes without returning to the Labour Relations Board for amendment. This is evident from the recognition article in the ASPA collective agreement which begins by referring to the initial certification order, but goes on to note that scope may be amended by mutual agreement of the parties.

79. While the recognition clause hasn't been expressly amended, the scope of the collective agreement has been amended by the inclusion of the instructional family. The parties have been operating on that basis since 2005 when the instructional family was included in the collective agreement. Since then, ASPA has been recognized as the exclusive bargaining agent for all members teaching online credit courses. Given that the University has applied

the collective agreement to online instructors since online teaching began, and not just intermittently or to scattered employees, and that the Criteria Matrix (J6) describes the instructional family as "the delivery of instructional material of students", ASPA contends that this is clear support for its position that online instruction belongs to ASPA.

80. ASPA submits that *Interprovincial Concrete* is directly on point. In that case, the union was the certified bargaining agent for labourers employed north of the 51st parallel in Saskatchewan. The employer began employing employees at its operation south of the 51st parallel over time, and applied the terms and conditions of the collective agreement to those employees. When a dispute arose about group benefits, the employer took the position that the certification order didn't cover employees south of the 51st parallel. The board disagreed, finding that the parties had enlarged the scope of the bargaining unit. A key fact leading to this conclusion was that the employer had followed the collective agreement for many years respecting the disputed employees. At para 50, the board stated:

> Surely there can be nothing more convincing that the employer intended the collective agreement to apply to employees outside of the geographical jurisdiction contained in the Certification Order than the fact that the employer has negotiated wage rates and benefits for those employees with the union and set them forth in the collective agreement.

81. ASPA isn't attempting to "enlarge" the certification order; instead, it is obvious that the parties agreed on the interpretation of the certification order by bargaining an instructional class of employees into the collective agreement, and recognizing ASPA as the exclusive bargaining agent for that class of employees. The University can't unilaterally resile from the scope it has itself bargained.

82. This arbitration is about existing positions. The reasoning of the Court of Appeal in *SMI* applies here in that the scope of the collective agreement governs, and the certification order, as amended, is "spent". The scope of the agreement has nonetheless been amended by the inclusion of the instructional family. To repeat, there is no clear evidence of this than the fact that the University has applied the ASPA collective agreement to online instructors since online teaching began.

83. Having addressed any concerns respecting the certification orders, ASPA submits that the next question is to determine what the parties have agreed to regarding ASPA's scope relating to teaching online credit courses. ASPA contends that the facts are longstanding and undisputed. Online instruction has been the work of its members for years without any significant exception. Matlock and Sanders confirmed that online course they have taught was in the ASPA bargaining unit, and their appointments in CUPE 3287 are solely for in-person assignments.

84. Everything changed in September 2020 when the Sessional Lecturer Policy was rolled out. ASPA refers to Weimer's testimony in-chief where, in explaining why the change was made, he said, "the decision was made to remove bargaining unit work from the ASPA bargaining unit, where it didn't belong". ASPA notes that, despite Weimer's testimony, the

University tendered no evidence that the online courses being taught by ASPA members were ever taught by CUPE 3287 members.

85. There is no evidence the University ever questioned the propriety of this work being in the ASPA bargaining unit during any round of bargaining. Equally important, at no time did CUPE 3287 file grievances alleging that the University had improperly assigned online teaching work to ASPA.

86. In view of the instructional category having been bargained, the many appointment letters assigning this work to ASPA, the University's unwavering and extensive past practice in doing so, and CUPE 3287's failure to object to the work being in ASPA, it is indisputable that the parties have expressly bargained an agreement to recognize ASPA as the certified bargaining agent for this instructional work.

87. Alternatively, if it is found that the parties haven't expressly bargained the disputed work, ASPA argues that the substantial past practice whereby online work has gone to ASPA gives rise to an implied restriction. This work has never been shared with CUPE 3287. Whilst faculty have "first dibs" on all teaching work, including online, it is also indisputable that all online teaching thereafter went to ASPA instructors.

88. ASPA relies on the majority decision in *SUN/SHA*, a board chaired by myself, in support of its argument for an implied restriction. In that case, the employer abolished a SUN bargaining unit position, and created an almost identical position in the CUPE bargaining unit, to address recruitment problems in filling the SUN position. The collective agreement didn't expressly prohibit assigning work outside the unit. In allowing the grievance, a restriction was implied given the past practice of this work being assigned to the SUN bargaining unit. The board concluded that virtually the entire job had been transferred, not simply a few duties. In that case, the board rejected the employer's argument based on a line of cases, called "overlap" decisions, holding that where the work of two bargaining units is overlapping, an implied restriction won't be found. The board accepted and followed the "type and volume" of work approach.

89. ASPA submits that the "type and volume" of work approach should be applied here. On the facts, entire jobs were transferred from ASPA to CUPE 3287. In some instances, the incumbent who had taught in ASPA, was contracted to teach in CUPE 3287.

90. ASPA requests a declaration that the University violated the collective agreement in transferring the online instruction work to CUPE 3287. ASPA also seeks an order that all transferred work be returned to the ASPA bargaining unit, and those members impacted by the Sessional Lecturer Policy be made whole in all respects, including compensation for lost wages and benefits; and that ASPA be compensated for all lost union dues.

Employer Position

91. The University relies on the management rights clause in the collective agreement as permitted it to rearrange the workplace. The University submits that arbitrators typically

avoid interfering with a reasonable, good faith exercise of an employer's right to manage and organize its workforce. See *SEIU/SHA*, *Centennial Auditorium*, *CUPE/City of Regina* and *Municipal Police/Halifax.*

92. Absent evidence that management decisions are unreasonable, made discriminatorily or in bad faith, or contrary to the collective agreement, arbitrators ought not to interfere with management's right to operate its business. See *SUN/SHA*, *PEI Department of Health*, and *Dalhousie University, Air Canada/CUPE* and *RWDSU/Temple Gardens*.

93. Prior to the Sessional Lecturer Policy, both ASPA and CUPE 3287 members taught for-credit classes. The University argues that the evidence of Weimer and Spooner confirms that this was an administrative burden, created unfairness in instructor remuneration, and raised issues about the scope of each union's jurisdiction. The University denies that it was discriminatory, arbitrary, or intended to weaken ASPA's bargaining unit.

94. There is no evidence the University acted in bad faith and no evidence of an intended or actual impairment of ASPA's bargaining unit. The Sessional Lecturer Policy didn't result in layoffs of any ASPA instructors since they were appointed to fixed-term contracts. Assignments weren't posted and no job bidding or recall rights attach to the work. Importantly, the University never agreed that any particular course would be offered in a particular term or, if it was, that an ASPA member would be assigned the work. Hryn-Bird confirmed that the collective agreement doesn't provide that ASPA instructors would teach a particular course in perpetuity.

95. As previously noted, the University's written and oral submissions describe the disputed work as for-credit instruction despite ASPA clarifying that it claims all online instruction, whether for-credit or not. Regardless, according to the University, for-credit instruction has never been integral to or at the core of positions within the scope of ASPA; therefore, it isn't ASPA bargaining unit work. In the circumstances, the Sessional Lecturer Policy was a reasonable and good faith exercise of the University's management rights.

96. The University refers to the *PEI Department of Health* decision where, at para 69, Arbitrator Richardson summarized the principles that have been developed to deal with cases involving the assignment of work outside of a bargaining unit, as follows:

- Absent an express restriction, management is free to reorganize its workforce and reassign duties, as long as it does so in good faith for valid business purposes.
- Employees have no proprietary right in any particular job or bundle of duties.
- Management has a presumptive right to assign duties from one classification to another.
- To establish a breach of a provision restricting work outside of a bargaining unit, the evidence must demonstrate that substantially the whole job of a non-bargaining unit employee is bargaining unit work.
- The jobs or duties in question must be exclusive to the bargaining unit.

97. The University maintains that ASPA members didn't have a proprietary right to the work and that implementing the Sessional Lecturer Policy didn't result in substantially the whole job of CUPE 3287 members being the performance of ASPA work. The work has never been exclusive to ASPA, doesn't form part of the core functions of the membership, and has been widely shared in the past.

98. The University submits that ASPA must prove that the work was its bargaining unit work. The University, like ASPA, also refers to *SUN/SHA* where the board considered the two tests that have been applied by arbitrators to determine if certain work is bargaining unit work; the exclusivity test, also referred to as the "overlap" test, and the "type and volume" test. The University submits that the disputed work isn't ASPA bargaining unit work under either test.

99. The University argues that the grievance fails when the exclusivity test is applied because the work has always been shared. ASPA can't show that the work is exclusive to its bargaining unit given the past sharing. In support, the University refers to *Health Prince Edward Island, PEI Department of Health, Pepsi Bottling* and *Brockville General Hospital.*

100. The University argues that ASPA's distinction between online and for-credit instruction should be rejected on the basis that the work was substantially the same and the key duties were the same. Further, because of the COVID-19 pandemic, the mode of delivery wasn't a distinction in the 2020/2021 academic year.

101. The grievance also fails under the "type and volume" test because, as stated in *Irwin Toy*, the reassigned work "must be enough to fill most if not all of a bargaining unit employee's regular shift on an ongoing basis". The University argues that the amount of work that has ended up in CUPE 3287 is insufficient to meet the test because the work was contingent term work with no recall rights, ASPA instructors weren't guaranteed teaching beyond the terms for which they were appointed, and the work didn't entail a full-time position.

102. Additionally, the integrity of ASPA's bargaining unit isn't threatened by CUPE 3287 performing the work. Given the wording in Article 9.7.1, teaching is considered to be beyond an ASPA's member's core duties and is thus not bargaining unit work. There has been no reassignment of those core duties, only work that has always been shared by multiple bargaining units.

103. The University argues that there is no express restriction in the collective agreement prohibiting the assignment of the work at issue outside of ASPA. The certification order provides the right of representation, but doesn't confer jurisdiction. An express restriction can't be found in the recognition clause either. Even if a certification order could confer jurisdiction, the University submits that ASPA positions, in general, are administrative, supervisory and technical in nature.

104. Notwithstanding that arbitrators sometimes imply restrictions on assigning work outside of the bargaining unit, the University argues that there is no basis to do so here. A restriction

is sometimes implied because of seniority, layoff and recall rights in the collective agreement, as was the situation in the *Nova Scotia* decision where Arbitrator Veniot implied a restriction after reviewing the collective agreement as a whole. At the same time, he said there could be circumstances where no implied restriction is found.

105. The University emphasizes that ASPA instructors don't have recall or layoff rights under the collective agreement. They are considered term employees and don't have the same rights as permanent and seasonal employees. Instructor positions are either for two or four months and the positions don't have to be advertised or posted. All of this strongly suggests that no restriction was intended.

106. Importantly, as set out in Article 9.7.1, the University can't require an ASPA member to teach. If ASPA's position is accepted, and work can't be assigned outside of ASPA, but ASPA members can't be required to do the work, finding an implied restriction would lead to the absurd result that ASPA members could refuse teaching assignments and the University would then be unable to provide courses.

107. In the event it is found that the disputed work was ASPA bargaining unit work, and the collective agreement restricts assigning such work outside of ASPA, the University submits that the Sessional Lecturer Policy didn't breach the collective agreement.

108. The jurisprudence relied upon by the University indicates that arbitrators normally consider whether a "sufficient" amount of work has been transferred. Assignments that don't impair the integrity of the bargaining unit, or that aren't so great as to bring the non-bargaining unit employee within the bargaining unit, won't violate the restriction. The University cites *St. Michael's Health Centre* where Arbitrator Moreau referred to *Irwin Toy* and went on to summarize the law as to when an implied restriction on assigning work outside of a bargaining unit is triggered:

> The *Irwin Toy Ltd. and United Steelworkers of America* (1982) 6 LAC 328 decision, which is cited as the leading case in a number of awards, refers to a restriction being placed on management rights as a result of certain standard provisions found in most collective agreements. The following reference from *Irwin Toy* is found at p. 24 of the *Banff Mineral Springs Hospital* case:
>
> > The implied restriction flows from the clauses in the collective agreement dealing with seniority, job posting and lay-off and recall. These clauses give rise to rights in connection with job bidding, bumping and recall in respect of certain job or job vacancies. These rights. however, can only be exercised in respect of jobs which occupy a bargaining unit employee for most if not all of a full shift. It follows that if the implied restriction flows from a balancing of management's right to assign bargaining unit work to supervisors and the employee's right to claim a job, the amount of work in issue must be sufficient to trigger the exercise of the employee's job bidding, bumping or recall rights.

109. I note here that the above passage omits the introductory sentence in the passage, namely, "The majority of the authorities in this area arose out of situations where supervisors or other management employees had performed work that was normally assigned to

bargaining unit members." I agree with Arbitrator Moreau that most of the jurisprudence regarding restrictions on transferring work outside of a bargaining unit involves work that was normally performed by in-scope employees now being performed by managers.

110. The quantum of work required to trigger a concern is also addressed in *Algonquin College* where it was held that the work must be sufficient to occupy a bargaining unit employee on a full shift. The University submits that the work assigned to CUPE 3287 wasn't sufficient enough to raise a concern. The work couldn't trigger any ASPA member's job bidding, bumping, or recall rights because ASPA members don't have those rights.

111. The University maintains that the Sessional Lecturer Policy hasn't impaired ASPA's bargaining unit. The work at issue was "additional" or beyond the ordinary administrative, supervisory, or technical scope of an ASPA member's duties. Multiple bargaining units have historically "overlapped" and performed the work, therefore assignment outside ASPA shouldn't be considered a breach of the collective agreement. Accordingly, even if there is an implied restriction, it wasn't breached in this case.

Union Reply

112. In reply, ASPA addressed three aspects of the University argument.

113. First, ASPA notes that employers typically argue that management rights provide authority to assign and direct work and, while this is true, it is only as far as it goes because management rights are always subject to other provisions in the collective agreement which is precisely what the management rights clause states here. The jurisprudence is clear that there are constraints on employers assigning the tasks of members of one bargaining unit to persons outside the bargaining unit. See *London & District Service Workers'.*

114. ASPA notes that the University repeatedly states that the work in question isn't ASPA work because it is also done by the Faculty Association. In saying this, the University suggests that since online instruction was done by faculty at one point, the work isn't exclusive to ASPA. ASPA acknowledges that it has no legal basis to claim the work in priority to faculty. It should be noted that ASPA's certification order specifically excludes employees of the Faculty Association. Accordingly, ASPA can't claim online instructional work where the work is done by faculty.

115. Further, ASPA has never claimed priority over faculty in relation to online instruction. The work faculty isn't able to do or chooses not to do then falls to ASPA or CUPE 3287. All of that said, the online stream of work done by ASPA over the years belongs to ASPA, and the in-person stream of work belongs to CUPE 3287. This is entirely consistent with Spooner's testimony that the DEU issues the contracts for the two bargaining units and that ASPA got the online work and CUPE 3287 the in-person work.

116. ASPA repeats that prior to advent of online teaching, distance courses were offered as correspondence or independent studies, all of which were taught by ASPA members, and compensated on a per-student basis. This model was followed when online courses began

to be delivered. Importantly, CUPE 3287's certification order specifically excludes "correspondence instructors" which later became the online work. Everyone understood that this type of work belonged to ASPA and any concern between ASPA and faculty regarding "ownership" of this work isn't an issue in this hearing.

117. Finally, regarding the University's repeated reference to ASPA instructors having term employment, and no guarantee of continued employment, ASPA counters that while this is true, it is also irrelevant. ASPA isn't claiming that its members were unlawfully terminated, or that they had the work in perpetuity. Whether contracts were tenuous or not, the contracts are governed by the collective agreement, and the "tenuousness" of the contracts is to be dealt with in bargaining. ASPA's position is that the term contracts, whether they were renewed or not, are subject to the collective agreement. What changed in September 2020 is that contracts that had been subject to the ASPA collective agreement in August, were now the subject of the CUPE 3287 collective agreement for the exact same work.

ANALYSIS

118. The onus is on ASPA to prove, on the required balance of probabilities, that the Sessional Lecturer Policy breached the collective agreement.

119. There is little dispute about the facts giving rise to the grievance. Teaching at the University has been shared amongst multiple bargaining units and out-of-scope senior administrators. Faculty have priority to teach credit courses. The Faculty Association collective agreement provides that the University won't allow more than 30% of all credit courses to be taught by non-faculty. Leftover work has gone to ASPA and CUPE 3287 for many years. Leftover work has included online teaching for the reasons explained by Spooner, namely that faculty, until more recently, have been reluctant to teach online.

120. There is no dispute that online teaching, both for-credit and no credit, went to ASPA, and in-person credit courses went to CUPE 3287. Hryn-Bird and Spooner were very clear about the division of leftover work. The evidence establishes that online teaching was performed exclusively by ASPA in circumstances when faculty chose not to teach the course. Moreover, it is uncontradicted that CUPE 3287 instructors were never contracted to teach any online courses prior to the Sessional Lecturer Policy.

121. This collective agreement has a management rights clause giving the University broad authority to manage the workplace and direct employees. Arbitrators are agreed that management decisions shouldn't be overruled unless there is evidence that the decision is discriminatory, made in bad faith or in an arbitrary manner, or the collective agreement contains a provision to the contrary. As I stated in *SUN/SHA*, it is also generally accepted that the management rights of an employer can't be triggered in the absence of an explanation for the decision. Once the onus of explanation is met, the onus shifts to the union to establish that the decision was made for an improper purpose, or otherwise violates the collective agreement.

122. ASPA isn't arguing discrimination, bad faith or arbitrariness in relation to the Sessional Lecturer Policy. The central issue is whether the University's decision to transfer online instruction outside of the ASPA bargaining unit otherwise violates the collective agreement.

123. The University, through the testimony of Weimer, explained the rationale for instituting the Sessional Lecturer Policy. According to Weimer the division of leftover course instruction between ASPA and CUPE 3287 was an administrative burden, it resulted in unfairness in instructor renumeration, and raised issues about the scope of each union's jurisdiction. Spooner also indicated that there was some confusion in the colleges about the two bargaining units.

124. In my view, the assertion that the *status quo* prior to the change created an administrative burden wasn't supported by the evidence. There is no doubt that higher enrollments meant that ASPA instructors could receive more compensation than CUPE 3287 instructors for teaching the same class, given the different pay models and dependent upon higher enrollments.

125. Notwithstanding, it is difficult to view the disparity as "an administrative burden". Surely it would have been a more significant burden for CUPE 3287 instructors than the University in that instructors were paid less pay than ASPA instructors in certain circumstances. It may be that colleges were now noticing the "inequity", but again, that doesn't equate to a burden for the University.

126. As for the assertion regarding confusion about jurisdiction, there is no evidence that anyone was confused about the way leftover work was divided. Everyone knew that in-person credit courses went to CUPE 3287 and online credit and no-credit courses went to ASPA. No grievances were filed relating to jurisdiction and there is no evidence that CUPE 3287 ever approached the University to claim jurisdiction over online instruction. To the extent that colleges were confused, it would have been relatively simple for administration to clarify the mechanics of distributing the work. Granted, colleges might notice how the different pay models affected their budgets; however, the concern is cost, not jurisdiction.

127. Despite there being little evidence to this effect, it may well be that colleges, or others, were concerned at having to pay more to an ASPA instructor to teach an online course than to a CUPE 3287 instructor to teach the same course in-person. Consistency is desirable, but that is an entirely different matter than asserting that colleges, or others, were confused about jurisdiction, particularly since colleges had worked with the DEU, and its predecessors, for many years in appointing ASPA instructors to teach online.

128. If the University was of the view that CUPE 3287 was the "proper" bargaining unit for the disputed work, one has to ask why the jurisdictional issue was never raised in the past.

129. It is evident that cost, and the disparity between the bargaining units, was a factor in the University's decision to institute the Sessional Lecturer Policy. The disparity became particularly evident in the pandemic when all courses were delivered remotely. Cost and

budgetary constraints are valid business purposes; however, the question is whether the collective agreement permitted the University to shift the work from ASPA to CUPE 3287.

130. The grievance can only succeed if the evidence establishes that the change in policy was contrary to the collective agreement. ASPA argues that the creation of the instructional family (which includes online facilitators), the appointment letters assigning this work to the ASPA members, the University's unwavering and extensive past practice in doing so, combined with CUPE 3287's failure to ever object to this work being in ASPA, should lead to a finding that the collective agreement expressly prohibits assigning the disputed work outside of ASPA.

131. While the factors cited by ASPA are accurate, I am not persuaded that the collective agreement expressly restricts the assignment of work outside of the bargaining unit. It was open to the parties to negotiate specific language conferring on ASPA exclusive jurisdiction over specified work. It is trite to observe that an express restriction can't be found by implication.

132. In my view, the factors relied upon by ASPA are more appropriately advanced in relation to an implied restriction. Accordingly, if a restriction is to be found, it will have to be implied.

133. Before addressing the arguments regarding an implied restriction, I want to comment on the certification orders. A large part of ASPA's submissions focus on the relevance of the certification orders in general. ASPA submits that orders are "spent" upon issuance, and that the recognition clause, other bargained provisions, and past practice, govern the issue of scope. Numerous cases were cited in support.

134. The University didn't address any of ASPA's cases on the relevance of the certification orders. From this, it is evident that the University doesn't take issue with the assertion that the certification orders aren't determinative. Nor do I. Arbitrators have repeatedly stated that certification for a unit of employees entitles the union to bargain for those employees over terms and conditions of employment; it doesn't confer on the union any proprietary interest in the work performed by members of the unit.

135. Absent a restriction in the collective agreement, the employer retains an inherent right to assign or reassign bargaining unit work. The question remains whether the collective agreement restricts transferring bargaining unit work and, if it does, whether the Sessional Lecturer Policy violated the restriction.

136. Historically, the absence of a specific prohibition generally meant that an employer could assign work to any individual in order to meet the needs of the workplace. The jurisprudence has evolved and the preponderance of authorities now recognize that the arbitrators can imply a restriction as a fetter on management's discretion. Indeed, the University acknowledges that arbitrators have sometimes implied restrictions in the absence of an express prohibition.

137. The jurisprudence with respect to implying restrictions is well set out by Arbitrator Ready, at paras 33 and 34, of *J.S. Jones Timber.*

> 33 At law, it remains open for the parties to negotiate, into their Collective Agreement, express language conferring upon the Union exclusive jurisdiction over specified work. In the absence of such an express work jurisdiction provision, arbitrators will imply the existence of certain restrictions on management's freedom to have non-bargaining unit members perform work. The concept of "bargaining unit work" encompasses work which normally and traditionally has been performed by persons within the bargaining unit to the exclusion of persons outside the unit.
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> 34 In *Re British Columbia Hydro and Power Authority and I.B.E.W., Loc. 213*, unreported, January 31, 1986, Arbitrator H. Allan Hope, Q.C., reviewed the authorities considering the implied restriction on the assignment of work. The learned arbitrator concluded:
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> > The reasoning in *Re Orenda* (1 L.A.C. (2d) 72, Lysyk) is based upon the presumption that a collective agreement contains an implied term that bargaining unit work will not be assigned to non-bargaining unit employees to such an extent as to have that work dominate the duties of the non-bargaining unit employee. The term used in the arbitral authorities is that bargaining unit duties should not be assigned to a non-bargaining unit employee to such an extent as to bring that employee within the bargaining unit. However, in order for that reasoning to apply, it must first be established that the subject work is bargaining unit work in the sense of being work that is performed exclusively by the bargaining unit. In short, work that is performed by both bargaining unit and non-bargaining unit employees cannot be seen as bargaining unit work in the jurisdictional sense. That is, it is a contradiction in terms to imply an intention in the parties to give the union exclusive jurisdiction over work which has traditionally been performed by non-bargaining unit employees.
> >
> > Perhaps the most assertive declaration in the arbitral authorities in favour of an implied right in employees to claim jurisdiction over bargaining unit work was expressed in *Orenda Ltd. (1971)*, unreported (Shime). That decision, which was cited by Prof. Lysyk on pp. 74-5 in the later decision in *Orenda Ltd.*, included the following passage on p. 75:
> >
> > > In this case the specific consideration given to job classifications, occupational groups and job descriptions can only reflect an intent that the work falling within the purview of those considerations is to be performed by employees in the bargaining unit and not assigned to persons outside the bargaining unit ... These classifications are a function of the work or job content, and the number of employees and their wages is dependent on that job content. That the collective agreement does not preclude the assignment of work outside the bargaining unit in our view does not mean that the company is free to assign the work as it pleases. Clearly the positive and detailed approach to the job content falling within the purview of the collective agreement negates any argument suggesting that there be a specific prohibition before work can be assigned. In short, we hold that the work contained in the job classifications and job descriptions is properly the work of the bargaining unit personnel with the possibility of two exceptions.
> >
> > But even in that articulation of an implied right to claim bargaining unit work the basis for asserting such a right is dependent upon evidence that the bargaining unit performs the work to the exclusion of non-bargaining unit employees. Here the

> evidence is clear that the work in dispute has been performed by non-bargaining unit employees for a number of years through a number of collective agreements. [At pp. 21-22.]
> …
>
> The difficulty confronting the Union is that the overlapping of the work of supervision as between field mechanical foreman and distribution supervisors deprives the circumstances of the implication that field mechanical supervisors have an exclusive jurisdiction over the work. In that context it must be appreciated that a jurisdiction divided between bargaining unit and non-bargaining unit employees is no jurisdiction at all in the sense of being able to deprive one category of employees of the work at the expense of the other. [At p. 24.]

138. To repeat, the question is whether a work protection clause should be implied. Not every collective agreement will give rise to an implied prohibition against assigning work. It is necessary to read the agreement as a whole, giving careful attention the nature of the disputed work and all relevant facts.

139. The University argues that the disputed work isn't ASPA bargaining unit work, therefore no restriction should be implied. In addition to the work being shared with other bargaining units, the University argues that ASPA instructors, as term employees, don't have any recall or layoff rights; unlike permanent and seasonal ASPA employees where the collective agreement specifically provides that no such employee will be laid off as a result of anyone outside the bargaining unit performing a majority of their duties. The University concedes that the agreement could be construed as restricting the assignment of work normally performed by permanent and seasonal employees, but the same can't be said for term employees.

140. The University points to other distinctions. For example, there is no need to advertise for ASPA term positions less than six months. Instructor positions are for two months to coincide with the summer term, or four months to coincide with the fall and spring terms. The University also argues that teaching isn't a regular duty of ASPA members given Article 9.7.1 where teaching a class is referred to as an additional responsibility. Finally, the University argues that the disputed work isn't exclusive to ASPA given the reference to voluntary assignment and that teaching is shared with other bargaining units.

141. In arguing for an implied restriction, ASPA rejects the suggestion that the work was "shared" with CUPE 3287 or any other bargaining unit. The substantial past practice demonstrates that online work has gone to ASPA for years and never shared with CUPE 3287. ASPA emphasizes that the parties not only bargained the instructional family, but also created a position called "online facilitator" to address online teaching.

142. The jurisprudence indicates that two tests have been applied by arbitrators to determine whether certain work is bargaining unit work; the exclusivity or "overlap" test, and the "type and volume" test. Both parties refer to passages in my decision in *SUN/SHA*, wherein the tests were reviewed at some length. In that case, the employer abolished a position in the SUN bargaining unit, and created an identical position in a different bargaining unit. SUN grieved arguing that the employer violated an implied restriction. While the facts are

different, and every case must be determined on its own facts, the review of the jurisprudence respecting the competing tests is helpful. Accordingly, I am quoting extensively from the decision, as follows:

186. Determining whether there is bargaining unit work to protect can be a difficult question. In some cases, the question is answered by applying a definition contained in the collective agreement. Not so here because bargaining unit work isn't defined in the agreement. Absent a definition, arbitrators have defined bargaining unit work as work "normally and regularly done by unit members", as in the above quote from Arbitrator Freedman, or work that is "customarily performed by unit members", as described in Brown and Beatty, at 5:1200:

> Whether work falls outside the scope of the collective agreement may simply be a matter of applying a definition contained in the collective agreement. More often, however, collective agreements do not explicitly define "bargaining unit work". In these circumstances, the concept of "bargaining unit work" has generally been understood to mean work customarily performed by a member of the bargaining unit.
>
> …
>
> Where the collective agreement contains job classifications and job descriptions, they may conclusively delineate the scope of bargaining unit work. However, in the absence of such classifications or descriptions, or where they are described in general terms only, evidence of past practice may be required to determine whether the work in question is bargaining unit work. Where there is an overlapping of tasks between two bargaining units, the assignment of work between them can lead to difficult disputes as, for example, where Registered Nurses and Registered Nursing Assistants belong to separate bargaining units.

…

188. In any event, the leading case on implied restrictions is *Irwin Toy* where Arbitrator Burkett articulates a test to determine whether an implied restriction is triggered. He concluded that the disputed work assignment must be enough to fill most if not all of a bargaining unit employee's regular shift on an ongoing basis.

189. The test in *Irwin Toy* requires a quantitative analysis of the work in dispute. A sufficient amount of work is required to trigger the restriction. For example, in *Grande Prairie*, it was held that the assumption of work by non-unit employees must be "sustained and substantial" and the performance of the work must present a threat to the integrity of the bargaining unit. In other words, a qualitative assessment is added to the analysis.

190. By contrast, other arbitrators have held that work can't be considered bargaining unit work unless it is exclusive to the unit. See *J.S. Jones Timber Ltd. and I.W.A., Local 1-3567* (2000) 93 L.A.C. (4th) 72, where Arbitrator Ready dismissed a grievance because the work in dispute had historically been performed by employees outside the unit, supervisors in that case. The same result was reached in *Weyerhauser Co*. where it was held that "inherently overlapping" duties couldn't be seen as bargaining unit work in the jurisdictional sense.

191. A review of the jurisprudence reveals two distinct lines of arbitral authority. In one line, arbitrators have rejected the protection for certain bargaining unit work unless it is exclusive to the bargaining unit. Where there is an overlap in duties performed by employees in the bargaining unit and persons outside the unit, arbitrators following this line of authority have declined to give protection. *J.S. Jones* is the most frequently cited

decision supporting the "overlap" approach. See also *Weyerhauser Co.* and the *Crown in Right of Ontario (Treasury Board Secretariat)*.

192. The exclusivity test has been rejected by many arbitrators who instead focus on the amount of bargaining unit work assigned, not whether the work is overlapping. The cases illustrating this line of authority include *Irwin Toy*, along with *Grande Prairie*, *Seven Oaks General Hospital* and *Fortis*, all referred to in the SUN brief. The arbitrators in these decisions have looked to the practice of the parties to determine what work is protected and have concluded that work protection clauses protect the type and volume of work historically performed in one unit from being reassigned outside the unit.

193. The conflicting approaches are difficult to reconcile, as noted by Mitchnick and Etherington, at 18.1.2, in the quote that follows:

> Most pointedly, the issue of shared work has arisen in the context of job protection clauses covering, respectively, registered practical nurses(also known as registered nursing assistants) and registered nurses, whose job duties commonly overlap to a regular and significant degree. As Arbitrator Thorne noted in *Fairhaven Home for Senior Citizens and O.N.A.* (1992), 28 L.A.C. (4th) 399, "instances of an overlap in duties have given rise to a number of awards, with results that do not at first blush seem entirely consistent". On the one hand, a number of arbitrators have espoused the view that work which has in the past been shared with employees outside the bargaining unit cannot properly be considered "bargaining unit work" within the meaning of the work-protection clause. Although the volume or frequency of the work at issue may have changed, the non-bargaining unit employees may also rightly be said to be performing their *own* work. Other arbitrators, however, have held that the phrase "normally performed" cannot be read down to mean "exclusively performed" without doing violence to the parties' intentions. Accordingly, in the face of the words "normally performed", where a specific parcel of work has been assigned to bargaining unit personnel on a consistent basis, this work – or "bundle of duties" – is said to fall within the express parameters of the clause. In other words, the terms "normally assigned" or "normally performed" are said to cover both the *type* and the *volume* of the work customarily given to members of the bargaining unit, thus preserving the status quo in existence when the collective agreement was settled. Of this second line of decisions, the award of Arbitrator Howard Brown in *Rideaucrest Home for the Aged and O.N.A.* (1995), 48 L.A.C. (4th) 1 is generally regarded as a seminal example.
>
> Rejecting the approach typified by *Rideaucrest Home for the Aged*, other arbitrators, as noted, have required the union to establish that the disputed work has been performed exclusively by bargaining unit employees. Often cited as a prime example of an award adopting a stricter interpretation along these lines is *Fairhaven Home for Senior Citizens*, above, where Arbitrator Thorne reviewed a number of previous decisions. In his view, in all the awards in which both the type and the volume of work have been held to be reserved to the union, the evidence clearly showed a long-standing and discrete pattern of work assignment in favour of the complainant union. In the case before him, by contrast, the evidence revealed such fluctuations in this pattern that is would have been difficult to reconstruct the exact "type and volume" of work in any event. Thus, the arbitrator ruled, even if the *Rideaucrest Home for the Aged* approach were followed, the union's grievance would fail.

> As Arbitrator Thorne indicated, the apparent divergences in the jurisprudence can often be reconciled by a close examination of the historical evidence in each case; that is, by focusing on the extent to which a discrete allocation of duties as between the two classifications can be clearly identified. In the words of Arbitrator Haefling in *St. Joseph's General Hospital and S.E.I.U., Local 478*, [1999] O.L.A.A. No. 782 (QL), the applicable clause will protect "those work tasks, responsibilities or functions which have some historical precedent or are observable through some continuum". The award in *St. Joseph's General Hospital* reflects as well the practical approach increasingly being adopted by arbitrators when wrestling with this problem. Where the reassignment of overlapping duties occurs on a fluctuating and day-to-day basis, without any obvious impact on job security, the employer will be able to avoid liability under the collective agreement by invoking the *de minimis* rule. Where, however, the realignment of duties has the effect of undermining the integrity of the bargaining unit, the clause will operate more restrictively.
>
> (emphasis in original)

194. The jurisprudence reveals a hybrid approach where arbitrators have held that shared or overlapping work may still be protected if there is evidence the assignment of work to non-bargaining unit members would impair the integrity of the unit. See for example *Pepsi Bottling Group* and *Fortis*. This approach was rejected in *Weyerhauser Co*. where the arbitrator concluded that the assessment of damage must be preceded by a finding that the work in issue is bargaining unit work, i.e., work which was normally and traditionally provided by the bargaining unit to the exclusion of persons outside the unit. Nonetheless, the hybrid approach has been advanced in some cases.

…

196. From our review of the jurisprudence, it is evident that the bargaining unit work issue typically arises in the context of the assignment of bargaining unit work to out-of-scope supervisors. This is the fact pattern in *Irwin Toy* and *J.S. Jones*, the leading cases in the completing lines of authority and also the fact pattern in several of the cases cited by the parties. Additionally, often the assignment of work in these cases only involves a few shifts over a short period of time as opposed to the movement of an entire block of work, i.e., a position or positions.

197. It bears repeating that what constitutes bargaining unit work is a question of fact and is also decided on the basis of the past practice of the parties. Decisions involving work assigned to supervisors for a few shifts over a short period of time, or to employees in another bargaining unit in those circumstances, might not be that helpful for this reason. In fact, very few cases cited by the parties involve fact patterns identical to the one before us – namely elimination of a position in one bargaining unit and replacing it with a position in another unit.

143. In upholding the grievance, the majority of the board in *SUN/SHA* adopted the "type and volume" test, finding that there had been substantial past practice in the work being assigned to the SUN bargaining unit. Significantly, it wasn't simply a few duties which had been transferred, but the whole job.

144. It bears repeating that most of the cases dealing with the protection of bargaining unit work arise out of situations where supervisors perform work that is normally assigned to bargaining unit members, and many cases involve a shift or a partial shift from time to time, as opposed to an entire job or most of the job being transferred out permanently. This

is significant when it comes to assessing the impact of an assignment outside of a unit on the integrity of the unit.

145. The University argues that the disputed work fails under the exclusivity test since teaching has been shared amongst multiple bargaining units and, in particular, that faculty and senior administrators have taught online courses. While this is accurate with respect to faculty, there was no evidence that senior administrators have taught online. Regardless, the evidence establishes that online teaching was performed exclusively by ASPA in those circumstances when faculty chose not to teach. This is the "leftover" work assigned to ASPA, and never assigned to CUPE 3287.

146. While teaching isn't exclusive to ASPA, online teaching has been exclusive. Accordingly, I am satisfied that the disputed work is the work of the ASPA bargaining unit. The work is exclusive in the sense contemplated under the test, namely it has normally and traditionally been performed by ASPA members to the exclusion of others, with the only exception being faculty from time to time.

147. In the event I am wrong with respect to the application of the exclusivity test, I would reach the same conclusion by applying the "type and volume" test. ASPA is a diverse bargaining unit with numerous variously named positions/classifications. ASPA is unlike the unions in the *SUN/SHA* case where all members held the same or similar positions and had the same or similar educational backgrounds. ASPA is much different which is likely why the parties bargained five job families into the 2005-2008 collective agreement. It is evident that each family was created to house members holding similar positions.

148. The University argues that teaching has never been integral to or at the core of the positions within the scope of ASPA. While this might be accurate with respect to the other job families, in my view it isn't accurate in respect to the instructional family. Further, given the diversity of positions in the families, it would be challenging to arrive at a generic set of core duties of ASPA as a whole, as opposed to the core duties pertaining to each family.

149. The University also argues that ASPA isn't an academic unit whereas CUPE 3287 is. I disagree in part. While it is the case that CUPE 3287 members are instructors, it is also the case that the ASPA instructional family includes a significant number of instructors, generally known as online facilitators, but also including positions such as tutor markers, coordinators, and so on. Their core duty is to prepare and deliver courses. ASPA, as a whole, might not be considered an academic unit, but it is my view that the instructional family should be considered an academic unit in the circumstances.

150. The quantum of work assigned out of ASPA was significant to the instructional family. Many ASPA instructors taught more than one course each term and considered their employment to be full time. The work reassigned to CUPE 3287 wasn't "additional" to their duties – it was all they did. I agree with ASPA that their "term" status doesn't lessen the impact or damage. I make the same comment about the University's argument that ASPA instructors had no guarantee of continued employment. As argued by ASPA, the "tenuousness" or otherwise of the appointments is a matter for ASPA to deal with.

151. In these circumstances, the impact is also felt by the bargaining unit as a whole. To put it another way, the integrity of the bargaining unit has been damaged by the Sessional Lecturer Policy. The type and volume of work assigned out of ASPA offends the implied restriction.

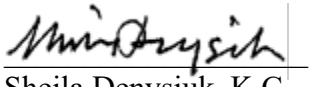
152. To summarize, I am satisfied that the disputed work is work of the ASPA bargaining unit. The evidence supports implying a restriction on transferring the work outside the bargaining unit. I am further satisfied that the integrity of the ASPA bargaining unit was impaired when the University transferring all online teaching outside the bargaining unit. The disparity in compensation between the units is concerning and should be addressed through bargaining.

DECISION

153. For all of the foregoing reasons, I have concluded that the Sessional Lecturer Policy violates an implied restriction in the collective agreement on assigning online instruction work outside of the ASPA bargaining unit. The University is directed to abide by the collective agreement and return the disputed work to ASPA.

154. As requested by the parties, I retain jurisdiction should they be unable to agree on damages or any other matter respecting implementation of the award.

DATED as Saskatoon, Saskatchewan on December 20, 2022.



Sheila Denysiuk, K.C.

Appendix "A"

Joint Exhibits

J1	Grievance – August 18, 2020
J2	Original ASPA Certification Order
J3	Latest ASPA Certification Order
J4	ASPA Collective Agreement 2002 – 2005
J5	ASPA Collective Agreement 2005 – 2008
J6	ASPA Criteria Matrix April 2015
J7	CUPE 3287 Cert Order
J8	Draft ASPA Pay Rates 2017_18_Jan 16_2017
J9	About US reports – Rita Matlock
J10	About US reports – Lee Sanders
J11	May-June 2020 email exchange
J12	August 2020 email exchange
J13	2019 Printout
J14	Lee Sanders Contract
J15	Rita Matlock Contract
J16	CUPE Collective Agreement – Sept 2019 to Aug 2021
J17	ASPA Collective Agreement – May 1, 2019 to April 30, 2022

Appendix "B"

ASPA Authorities

Interprovincial Concrete Ltd. v. Construction & General Workers' Union, Local 890, 1989 CarswellSask 667 [*Interprovincial Concrete*]

Dynamex Inc. v. Teamsters, Local 141, 2002 CarswellNat4446 [*Dynamex Inc.*]

Saskatchewan Mutual Insurance Co. v. United Steel, Paper and Forestry, Rubber Manufacturing, Energy, Allied Industrial and Service Workers International Union, Local 8933, 2021 SKCA 137 [*SMI*]

Saskatchewan Joint Board Retail, Wholesale, and Department Store Union v. Kindersley and District Co-operative Ltd., [1998] S.J. No. 776 [*Kindersley Co-op*]

Saskatchewan Assn. of Health Organizations and HSAS (Midwives Rates of Pay), Re, 2014 CarswellSask 864 [*SAHO/HSAS*]

SUN and Saskatchewan Health Authority, (2021) 327 LAC (4th) 93 [*SUN/SHA*]

University Hospital v. London & District Service Workers' Union, Local 220, 1994 CarswellOnt 1279 [*London & District Service Workers'*]

University Authorities

Air Canada v Canadian Union of Public Employees, Air Canada Component, 2020 CanLII 17275 (CA LA) (Stout) [*Air Canada*]

Algonquin College and OPSEU, 2005 CarswellOnt 12063 (LA) (Tacon) [*Algonquin College*]

Brockvillle General Hospital v OPSEU, 2011 CarswellOnt 5914 (Ont LA) (Stephens) [*Brockville General Hospital*]

Canadian Union of Public Employees, Local 805 v Health Prince Edward Island, 2021 CanLII 43179 (PEI LA) (Filliter) [*Health Prince Edward Island*]

Civic Employees' Union (Canadian Union of Public Employees, Local 21) v Regina (City), 1996 CanLII 11471 (Sask LA) (Popescul) [*CUPE/City of Regina*]

Dalhousie Faculty Association v Board of Governors of Dalhousie University, 2021 CanLII 160001 (NS LA) (Knopf) [*Dalhousie University*]

International Alliance of Theatrical Stage Employees, Local 300 v Centennial Auditorium & Convention Centre Corporation, 2017 CanLII 85784 (Sask LA) (Denysiuk) [*Centennial Auditorium*]

*Irwin Toy Ltd. v USWA.,*1982 CarswellOnt 2526 (LA) (Burkett) [*Irwin Toy*]

J.S. Jones Timber Ltd. and IWA, Local 1-3567 (2000), 93 LAC (4th) 72 (BC LA) (Ready) [*J.S. Jones Timber*]

MOVEUP v United Steelworkers, Local 2009, 2016 CanLII 62606 (BC LA) (Hall) [*Moveup*]

Municipal Association of Police Personnel v Halifax (Municipality), 2012 CanLII 97776 (NS LA) (Archibald) [*Municipal Police/Halifax*]

North West Co v RWDSU, Local 468 (1996), 57 LAC (4th) 158 (Man) (Freedman) [*North West Co*]

Nova Scotia (Department of Transportation) (1991), 19 LAC (4th) 23 (NS) (Veniot) [*Nova Scotia*]

PEI Union of Public Sector Employees v PEI Department of Health (2010), 197 LAC (4th) 330 (PEI) (Richardson) [*PEI Department of Health*]

RWDSU, Local 558 v. Pepsi Bottling Group (PGB), 2009 CarswellSask 807 (Pelton) [*Pepsi Bottling*]

Saskatchewan Joint Board, Retail Wholesale and Department Store Union v Temple Gardens Hotel & SPA, 2019 CanLII 130468 (Sask LA) (Denysiuk) [*Temple Gardens*]

SEIU and Saskatchewan Health Authority (2020), 317 LAC (4th) 1 (Sask) (Wallace) [*SEIU/SHA*]

St. Michael's Health Centre v UNA, 2002 CarswellAlta 2488 (LA) (Moreau) [*St. Michael's Health Centre*]

SUN and Saskatchewan Health Authority (2021), 327 LAC (4th) 93 (Sask) (Denysiuk) [*SUN/SHA*]