CHAPTER 10

# THE PUBLICATION OF ARBITRATION AWARDS*

"Much has been said and written over the years in these meetings about the writing of opinions by arbitrators. Thorough examination has also been given to the use of arbitrators' opinions by the parties, by arbitrators in subsequent proceedings, and the extent to which an arbitrator's decision may be useful as a precedent. All of this assumes that there is a body of arbitration opinions which is published and available and accessible to interested parties." With this introduction, Chairman William P. Murphy opened the members-only session at the Academy's 1974 Annual Meeting in Kansas City.

To set the stage for the panel and floor discussion, Chairman Murphy continued by contrasting the limited accessibility of arbitrators' decisions with the almost total availability of decisions of federal agencies and the courts. He pointed out that decisions of the Supreme Court, the National Labor Relations Board, and federal agencies are published in their entirety by the Government Printing Office; and any opinions submitted for publication by the lower federal courts and by state courts are published, unedited, in the various *Report* series of the West Publishing Company, a private firm. "In both of these areas . . . there is no selection by the publisher of what is to be published, and there is no editing of the published product."

Because of the apparent disparities in policies and procedures among the various reporting services that publish arbitration awards, Chairman Murphy indicated that it would be helpful for the Academy to hear a panel of editors explain the editorial process, the selection of cases for publication, and the criteria the publishers apply in making their selections. He also suggested that perhaps it was time to reexamine the validity of the basic premise among arbitrators that an opinion will not be submitted

* This summary was prepared by Co-editor Barbara D. Dennis from the transcript of the session.

for publication to any of the several services handling arbitration awards without the consent of the parties to the dispute.

Representatives of the reporting services on the panel to discuss their publication policies and procedures were as follows: L. Lawrence Schultz, Director of the Office of Arbitration Services, Federal Mediation and Conciliation Service, Washington, D.C.; Morris Stone, Vice President and Editorial Director, American Arbitration Association, New York, N.Y.; Hannah Fellman, Associate Managing Editor in charge of business and labor publications, Prentice-Hall, Inc., New York, N.Y.; and David Kelso, Jr., Managing Editor, *Labor Relations Reporter,* Bureau of National Affairs, Inc., Washington, D.C.[1]

The first speaker, Mr. Schultz, listed what he considered to be the "values" of published awards as these: (1) They constitute a key portion of the current news that makes up the collective bargaining arena. (2) They serve as guidelines for the parties in their continuing relationship and provide information for them to use in resolving their grievances prior to arbitration. (3) They fashion the industrial common law of the shop, which is repeatedly referred to by the highest court of the land. (4) They provide arbitrators with an indication of where others are going in similar situations. And (5) they furnish a complete or partial response to a question he frequently hears. "Who is this arbitrator?"

He expressed his concern over the diminution in the proportion of awards published in relation to the number of arbitration cases heard, attributing the trend to the reluctance of one or both parties to having cases published, the hesitancy on the part of established arbitrators to ask the parties' permission to publish, the apparent growing interest in expedited procedures that probably do not add to the body of knowledge of the common law of the shop, and the apparent tendency to name arbitrators only in cases with unique twists.

Mr. Schultz had the following suggestions for resolving these problems: (1) Publishing services could be encouraged to increase the size and scope of their regular publications. (2) The

[1] Commerce Clearing House, Chicago, Ill., was invited to send a representative but declined.

services could publish, either on a monthly or quarterly basis, awards by less well-established arbitrators. (3) The FMCS could begin publishing awards on a less selective basis. (4) The FMCS might try to obtain special appropriations in the annual budget to subsidize increased publishing by existing services. (5) A new service that would publish all arbitration awards might be created, supported by a combination of government and private funds.

Mr. Stone described the selection procedure for cases appearing in any of the three AAA publications, *Summary of Labor Arbitration Awards in the Private Sector, Labor Arbitration in Government,* and *Labor Arbitration in Schools.* The AAA subscribes to the traditional view that in the private sector the award is the property of the parties and can be published only with their consent. Thus it respects the wishes of some companies and unions that no awards to which they are a party be published. The AAA considers an award in the public sector a public document available to anyone; in addition, it has blanket authorization from several public employee organizations to publish any award in which they are involved. Mr. Stone cited AAA's unique position in that it administers arbitration cases as well as publishing awards and, therefore, is concerned that publication does not interfere with its "customers."

Because of AAA procedures, Mr. Stone's office does not see an award in a AAA case unless it has been released for publication. From among the cases in the hopper, awards most likely to be selected for publication are those that would be instructive for persons other than the parties for whom they were written, but he added, "After all these years of publication of awards, there aren't too many absolutely unique, unprecedented cases." He said that AAA editors exercise a small amount of bias in favor of reporting awards of new, upcoming arbitrators who they believe ought to get some exposure, and they exercise some negative bias against arbitrators who commit certain faults that they regard as disqualifying an award for publication—for example, where an arbitrator delivers a didactic lecture, sometimes full of sarcasm, to the parties; where the facts tend to reveal deficiencies in a company's quality control; where an award is a demonstration of poor workmanship or careless editing; or where an award is overwritten.

The biweekly Prentice-Hall loose-leaf services, *Industrial Relations Guide* (private sector) and *Public Personnel Administration, Labor-Management Relations* (public sector), which are Ms. Fellman's responsibility, contain an average of six long and short articles about arbitration awards. She stressed that the articles are summaries of the content rather than full texts of awards; the name of the arbitrator is included. Her criteria for selection are timeliness (currently, dress and grooming, drug abuse, discrimination, testing, maternity leave, safety); what subscribers have indicated they want covered (according to a survey, absenteeism, insubordination, overtime, leaves of absence, pensions, subcontracting, garnishment, discipline, discharge); and general interest. In the latter category she puts awards that (1) limit or uphold management rights, (2) limit or uphold the arbitrator's authority, and (3) show the conflicting results possible because contract language was ambiguous.

Ms. Fellman outlined what she considers the best organizational form of an award: a statement of the issue; arguments on both sides, each clearly labeled; the decision with reasons; and the award. Because of Prentice-Hall's interest in reflecting the viewpoints from different parts of the country on similar issues, she also is interested in knowing the town or city and state in which the plant or facility is located.

BNA considers its *Labor Arbitration Reports* a library of published awards providing practitioners and arbitrators with a systematic source for research, according to Mr. Kelso. He sees companies and unions using the reports in preparing for their own arbitrations, in formulating policies and standards, in avoiding pitfalls in negotiating collective bargaining agreements and formulating contract clauses, and in assembling case material for training supervisors and stewards. Arbitrators use them to compare their thinking with that of others facing similar problems. Scholars use the material as a research source in labor-management relations.

Mr. Kelso noted that at one time BNA considered reporting all awards received, but rejected the idea as uneconomic because it would entail publication of 16 rather than two volumes a year, "requiring a substantial increase in the cost of the service." Another factor contributing to this decision was the judgment that the additional material would have little value to users, as the

majority of the awards appear to have little general interest, and publishing them would make the location of significant awards more difficult.

The basic criterion for selection of a case for publication in LA is the same as that stated by the previous speakers—the degree to which the award has significance in application to persons other than the parties. Standards for selection are consistency, objectivity, and utility. Screened out immediately are awards that turn on the question of whose witnesses are to be believed, awards involving principles so familiar that they fall into the category of routine, and awards involving unique factual situations of no general application. Of the cases remaining after screening, priority is given to those of general interest and those in which the arbitrator has set forth his reasoning in a manner that is clearly understood by persons other than the parties. No consideration is given to who won the case or to the name of the arbitrator who decided it.

Academy members speaking from the floor expressed the most concern and disagreement on the issue of obtaining the consent of the parties and/or the arbitrator prior to publication of an award. Among the interrelated questions raised were: Do the parties "own" the award? Is it the arbitrator's obligation to obtain their consent to publication of the award? Does, and should, the arbitrator have the right to veto publication of any or all of his awards? Who does, and who should, determine whether or not an award is published?

Most of the arbitrators subscribed to the traditional view—that a private-sector contract belongs to the parties, the arbitrator's award under that contract belongs to the parties, and, therefore, their consent is a condition prerequisite to publication. This position was challenged by at least one member when he said: "I think it's high time for all of us in labor arbitration to reconsider this matter. . . . We now have the Landrum-Griffin law which, I think, contests this old notion that private-sector bargaining agreements, particularly at the federal level, are private affairs. They have to be filed with the government. They have to be given to the employees affected and to other people who can demonstrate interest in those agreements. We also have the Labor-Management Reporting and Disclosure Act. There are other federal agencies that demand, for statistical purposes, filing of these

contracts. . . . I think we are going against the trend of affairs of the day when we try to keep these strictly in camera proceedings, make them secret affairs, and have to solicit the consent of the parties in order to make these awards public." Another member reiterated the distinction between awards in the private and public sectors, the latter being, in his opinion, "technically and actually . . . matters of public record."

From the discussion it appeared that all of the reporting services respect the parties' right to give or withhold consent to publication of a private-sector award, although their methods of obtaining consent differ. Prentice-Hall and BNA assume, when they receive an award from an arbitrator, that the parties have consented to its publication. Mr. Stone reported that under the new procedure for AAA-administered cases a release-for-publication form will be included in the letter of transmittal that goes to the parties along with the award; however, he urged arbitrators submitting non-AAA cases to him for publication to write a covering letter stating that the parties' consent had been obtained. With respect to the FMCS report form, most arbitrators favored retention of that part of it where they could indicate their own permission to publish, but a number of them objected strongly to being required to get the parties permission—labeling it "demeaning," "inferentially coercive," and an "inappropriate function for an arbitrator." They were almost unanimous in their preference for having FMCS, rather than the arbitrator, ask the parties for their consent to publication. Mr. Schultz indicated that FMCS was considering modification of its procedure.

Also at issue was the question of whether or not an arbitrator had any control over publication of his awards. One member summarized the position of others when he said: "I think that publication of awards is a good thing. But this gets mixed up with the whole question of how arbitrators write awards. . . . When I write an award in one case, I may write it in an entirely different manner . . . than when I write another award. Some awards are written for the people in the shop, or for the grievant himself, or for the business agent, or for the personnel manager. Others are written because I think I have my teeth into some very important precedent-making situation, and then I write hoping that my words will echo endlessly down the corridors of history. Now it seems to me that elimination of the arbitrator as a

person who determines what awards should be published is not a healthy thing, . . . and I think the services are getting to that point."

Ms. Fellman responded that arbitrators need not worry about publication of an award written for the parties because the services are not interested in publishing them, but she questioned why arbitrators feel they have, or should have, any control over whether an award is published or not.

Although the arbitrators apparently were not seeking veto power over publication of any one of their awards, a number of them indicated that they would prefer to be queried, or at least notified, prior to publication and to be given an opportunity to let the services know if they or one of the parties objected. On this question, Mr. Stone had the following response: "I'm now inclined to think that we ought to be asking the arbitrators whether they want an award published or not—but not all or nothing. I think we ought to do it on an ad hoc basis. I think our insight is pretty good, so we can eliminate a lot of awards that would really not be useful or helpful. . . . And I think, on an ad hoc basis, giving the arbitrator a veto power would have no ill effect on our publication program." Others on the panel did not express an opinion on this particular issue, but they did indicate that an arbitrator could inform the services that he did not wish any of his awards published.

A related question from the floor was whether and to what extent the arbitrator is consulted when the services summarize an award rather than publish it verbatim. Mr. Stone responded that the AAA does not knowingly omit important details in summarizing an award, but if a summary is inaccurate, it should be brought to the editor's attention.

Another challenge to the panel concerned the services' emphasis on the "unusual" in making their selections for publication. The speaker questioned whether they felt any responsibility for possibly disseminating unsound doctrine by publishing awards contrary to the weight of authority. Mr. Stone answered that he saw no harm in stressing unusual cases unless they were "utterly absurd." His prime criterion in choosing cases for publication was to serve the process.

Although there was considerable doubt among Academy members about whether all awards should be published, there was none about the value of publication—to themselves, to the parties, to anyone wanting to keep abreast of developments in the field, and especially to young arbitrators in making their names and availability known. Also mentioned was the value of published awards in the classroom and in the shop—to teach people how to deal with their own problems. Several arbitrators favored the idea of a depository for all awards, where they would be accessible both to researchers and to parties who might want to know what a particular arbitrator's "track record" had been.

In summary, Chairman Murphy said, ". . . in addressing itself to a large number of topics, this Academy has never yet sought to develop recommended guidelines and criteria for publication of awards to provide to the publishing services. Nor have we developed a mechanism whereby an individual arbitrator could indicate to a publishing service when he feels a particular award should be published and why. It may be too late in the game to do this; but, if the Academy is dissatisfied with publication policies, then the Academy is to a large extent to blame. It behooves us to take some steps to let the publishers know how we feel about it, and this program has been to that purpose."