inquire about party wishes will sometimes diminish trust in the process; or that a substantial source of opinions will dry up. We can easily avoid those difficulties—and should.

**Comment—**

EARL M. CURRY, JR.*

I found the Stieber-Block-Corbett paper of great interest although I do not feel as qualified to comment on the content of this paper as I am sure some of you in the audience are, since I am not a statistician and have great difficulty comprehending multivariate analysis and multiple regressions. The authors have done a great job of explaining it, however, and their paper adds to the knowledge in the field. Many of us have been concerned about just how representative of the total arbitration scene the published decisions are. For some time there has been concern among members of this Academy that these published decisions are not representative. This paper both helps put to rest some of this concern and affirms some of the concerns we share. There is no question, as the paper points out, that published arbitration decisions are used by different groups of people for many different reasons. Because of this the published decisions need to be representative of all arbitration decisions, or the persons using them, for whatever reason, will get a misleading picture of arbitration as it actually exists.

My overall impression of this research, before I speak to specific points, is that I get the feeling that this paper tells us more about the bias and predilections of CCH and BNA editors than it does of anything else. But this may simply be the nature of the beast and is not intended as a criticism of this particular research—I suspect it would be true of any endeavor in this area. In regard to specific thoughts I have had after reading and thinking about the paper, I would offer the following comments.

In regard to the use of attorneys as advocates, it is not surprising that more published decisions had attorneys involved than unpublished decisions. It seems to me that one of the few advantages to having attorneys as advocates in arbitration is that they "tend" to help cut through all the crap and get to the issue.

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Frequently, or at least it should be the case, attorneys do a better job of getting the facts before the arbitrator. The use of an attorney—by either or both sides—may result in a "better" decision from the arbitrator—not necessarily different but better written, with the issues more clearly addressed. The same is true with use of briefs. The better the parties do in presenting the case to the arbitrator—in theory, all other things being equal—the better the arbitrator should then do in writing the decision. This makes the decision a more likely candidate for publication by the publishers. (For example, one of the criteria in BNA's Publication Policy Statement is that "The Arbitrator's opinion sets forth his reasoning in a manner that can be clearly understood by persons other than the parties.") What I am saying is somewhat akin to the phrase used in regard to computers "Garbage in—Garbage out" and the correlation to this is "Quality in—Quality out." I think that this also applies in general to arbitration decisions. The quality of the presentation should be reflected in the quality of the decision.

I found their findings in regard to which group—academy members or nonacademy members—having the highest denial rate of great interest.

Research by Professor Nels Nelson and myself published in 20 Industrial Relations Journal 312 (1981) concluded that inexperienced arbitrators would be more favorable to the union than an experienced arbitrator—at least in certain types of discharge cases. We found, however, that the amount of experience was a significant factor only for the new arbitrator who has heard a total of 19 or less cases. We found that there was no statistical difference with arbitrators with a moderate amount of experience, i.e., 20–199 cases and those of very experienced arbitrators, i.e., over 200 cases. In our study we found that of the least experienced third, 68 percent reinstated the grievant, compared to 33.3 and 32.0 percent, respectively, for the middle and most experienced thirds. An examination of the original data reveals that 87.5 percent of those with zero cases and 80 percent of those with one to nine cases reinstated the grievant. The impact of experience appears to be due to the effect on the sample of the arbitrators with very little experience. The most important contribution of the study under discussion today, in my opinion, is that it shows that if one wishes to draw conclusions regarding arbitration from the published decisions, then both or all major sources should be used.

In my only, very unscientific survey of cases, I looked for decisions by NAA and non-NAA arbitrators in BNA and CCH and came up with the following results:

Using the Index to BNA's Labor Arbitration Reports, Vol. 80, which included Vols. 76–80, I found a total of 1457 cases published—decided by 665 arbitrators. Of these 248 NAA members heard 652 cases or 2.63 cases per NAA member, and 417 non-NAA arbitrators heard 805 cases or 1.93 per arbitrator.

Using CCH Labor Arbitration Awards Vol. 83–2, 167 arbitrators heard 299 cases. Seventy-six NAA members heard 154 cases or 2.02 each, and 91 non-NAA arbitrators heard 145 cases or 1.59 each. What do these figures suggest? I'm not sure, and, just as beauty is in the eye of the beholder, you may make what you will from my statistics. However, this little study does show that of the decisions published by BNA, 45 percent of the published decisions were by members of the Academy while 55 percent were by nonmember arbitrators. Academy members made up 37 percent of the total arbitrators published while nonmembers made up 63 percent of the total arbitrator population published. For CCH of the total cases published, 52 percent were by members of the Academy and 48 percent by nonmembers. Of the total arbitrator population published 46 percent were members of the Academy and 54 percent nonmembers. It would appear that both publishers published fewer NAA members than nonmembers but that both used a larger percentage of academy members' cases.

I found Table 2, "The Distribuion of Reasons for Discharge in Percentages," of interest, in regard to the percentage of times an issue came up in the unpublished cases and the percentage it was raised in published decisions—or how representative of the issues are the published decisions. One can look at Table 2 and for some issues clearly see that perceived reader interest dictated what was and was not published. No one should be surprised that absenteeism cases are underrepresented in published decisions because of lack of perceived reader interest by the editors or that the miscellaneous category is overrepresented, again, because the editors perceive greater reader interest. If one relied upon published decisions as representative of the reasons for discharge in arbitration in these two categories, one would be greatly misled. However, in the other 14 categories the difference in the frequency of occurrence in the unpublished and

published decisions is not as great and researchers relying upon the published material won't be led too far astray. What is the responsibility of the publishing houses in regard to ensuring that the published decisions are representative and who places that responsibility on them are questions I cannot answer. This paper, however, goes a long way in giving guidance to future users of published decisions as to the amount of reliance they can or cannot give to published decisions and for that the authors are to be congratulated.

The other topic I was asked to discuss and the real reason I was asked to be on this otherwise distinguished panel has to do with the current dispute in the Academy regarding publication of arbitration awards and obtaining permission to publish.

I got involved in this dispute when I sent a copy of the form that I was sending out to the parties, along with the decision, requesting their permission to submit the decision for publication. In that form I stated that if they did not return the form to me within 30 days, I would assume their consent by silence. I sent this form to Howard Cole's Committee on Professional Responsibility and the Committee's decision, the first of the opinions that Howard spoke of earlier, was that consent by silence went beyond requesting and amounted to pressuring the parties in violation of the Code. Therefore, I stopped using that particular form. I was never involved in asking the parties, at the hearing, for permission to publish. To me the Code is clear on that issue and while members from the Ohio Region have expressed concern, I personally have never been in favor of asking permission prior to the time the parties see the award in order. It may well be that they decide that they don't want the award published simply because of loose language the arbitrator has used. Or they may decide too much dirty laundry is showing, and they don't want it spread on the public records. This, I believe, is the party's right.

The American Arbitration Association's new policy is the procedure that I was using and that the Committee on Professional Responsibility told me that I could not use. There is a distinction, however, between the two situations and that distinction, as I see it, is that the appearance of impropriety is present when Earl Curry as an individual arbitrator asks the parties for permission to publish the decision and assumes consent by silence, that is not present when the American Arbitration Association does so. However, getting the parties' affirmative permission to publish

a decision after they have seen it is a difficult problem. If published decisions are to be representative, they have to be sent to the publishers in large numbers, in order to be representative of all arbitrators and issues. From my personal experience I find that I can get the permission from both parties to publish after they have seen the decision in less than five percent of the cases. Frequently, I will get consent from one party but the other party simply does not respond. I personally support the Committee on Professional Responsibility and Grievances' suggestion that was published in the February 1984 issue of the Chronicle. That is, that the Academy meet with representatives of the publishing agencies and the American Arbitration Association and the FMCS and that a concerted effort be made to develop procedures to promote the publication of awards and to eliminate to the extent possible the participation of the arbitrator in the procedure.