

problems they visualize, consistent with the Code, or obtain some change in Code language.”

As indicated in these words from Syl, there are some who believe that the Code, as presently written and interpreted, is too restrictive in this area. They are concerned that, unless the arbitrator is free to request consent to publish before the award is issued, or is at least free to assume consent from what may be a cold silence after the award is issued, consent from the losing party is not likely to be obtained. In effect, they advocate some dilution of the parties' present rights of privacy in the interest of making more decisions available for publication. Thus, we are challenged to make some hard judgments about the relative values that should be placed on these sometimes conflicting considerations—i.e., the parties' rights of privacy versus nourishment for the publication process.

Our judgments in this regard should be better, if we are provided with some more and better objective data. A cold can't be hurt by chicken soup, and a debate can't be hurt by a few facts.

II.

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Grievance arbitration is widely accepted in the United States to resolve disputes over the interpretation and application of collective bargaining agreements. However, because the arbitration process belongs to the parties, decisions are not usually made available for publication if either the union or the employer objects. Furthermore, in cases in which the arbitrator is selected directly by the parties, rather than through an appointing agency such as the American Arbitration Association (AAA) or the Federal Mediation and Conciliation Service (FMCS), the arbitrator is also involved in the publication process. The final decision regarding publication is, of course, made by the publishing organizations, which publish only a very small proportion of all decisions received.

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Published arbitration decisions are used in varying degree by the parties, arbitrators, and by industrial relations researchers. The parties may use such decisions as guides in deciding whether to settle a case during the grievance procedure or to go to arbitration, in the selection of arbitrators, and in arguments and post-hearing briefs. Arbitrators may refer to published decisions to see how other arbitrators have decided cases involving issues and/or contract provisions similar to cases they are considering. Industrial relations scholars often analyze published decisions in research on how arbitrators have decided specific issues appealed to arbitration. To the extent that published decisions are not representative of unpublished decisions on a particular issue, reliance on them will present a misleading picture of the characteristics and outcomes of cases appealed to arbitration. Interest in and concern over the extent to which published arbitration decisions may or may not be representative of unpublished decisions led us to undertake this pilot study. To our knowledge, there has been no previous published study of this subject.

The Data

This study is limited to the issue of discharge for cause. Discharge was selected because it is the issue most frequently submitted to arbitration,¹ it is almost uniformly stated in terms of "just cause," and the awards in such cases are usually more clear-cut and definitive than awards in cases involving the interpretation and application of contract provisions. The choice of a single issue rather than grievances involving a variety of issues also permits analysis of a relatively homogeneous sample of cases and provides a control over the range of factors which may be present in cases involving many different issues.

Our data consist of 1213 published and unpublished discharge decisions. We used 759 published decisions, of which 441 were published by the Bureau of National Affairs, Inc. (BNA), 270 by Commerce Clearing House (CCH), and 48 by both organizations during the years 1979, 1980, and 1981.² The

¹In 1979, 1980, and 1981, 22% of all decisions published by BNA and CCH were discharge cases. In 1979, discharge was the issue in 24% of all AAA Michigan region and 33% FMCS Michigan decisions.

²*Labor Arbitration Reports*, Volumes 73 through 77, Bureau of National Affairs, Inc., Washington, D.C.; *CCH Labor Arbitration Awards*, Volumes 79-1 through 82-1, Chicago.

unpublished cases consist of all Michigan discharge decisions rendered by ad hoc arbitrators selected under the auspices of the Federal Mediation and Conciliation Service in 1979 and the American Arbitration Association in 1979 and 1982. There were 454 such cases—97 from FMCS and 357 from AAA. The distribution of cases between the two appointing agencies reflects the extent to which the parties used each agency to select arbitrators and the availability of decisions from the two agencies.³

It should be noted that the data for unpublished and published cases are not drawn from the same years. Also, the published decisions represent a national sample, while the unpublished decisions all come from Michigan. However, we do not believe that these differences will significantly affect the analysis. There is no reason to believe that characteristics and awards in discharge cases vary systematically from year to year. As to geographical distribution, we recognize that no single state can be considered truly representative of all 50 states. States have different configurations of industries and unions, and varying economic conditions may affect the incidence and possibly the outcome of arbitration cases. In our judgment, however, discharge cases are less likely to be influenced by differences among states than cases involving other issues that are appealed to arbitration.

Comparison of Published and Unpublished Decisions

In considering which decisions to publish, representatives of BNA and CCH stated they consider such factors as: significance and interest to practitioners and arbitrators, clarity of the arbitrator's reasoning, geographical distribution of cases, novel and unusual issues, giving exposure to relatively new arbitrators, and precedent-setting cases. Both publishers claimed that the decision to publish was not influenced by the outcome of a case or by the likelihood that a case had been or might be published by the other publisher.⁴

³AAA decisions were available for 1979 and 1982. A previous study by the same authors had used 1979 decisions. When we later decided to augment our sample, 1980 and 1981 decisions had been stored in an inaccessible location. However, 1982 decisions were available. FMCS cases were available only for 1979.

⁴*The Publication of Arbitration Awards*, in *Arbitration—1975*, Proceedings of the 28th Annual Meeting, National Academy of Arbitrators, eds. James L. Stern and Barbara D. Dennis (Washington: BNA Books, 1976), 208–15; and personal interviews with BNA and CCH representatives.

Table 1 compares published and unpublished decisions for selected characteristics.

Table 1
Comparison of Unpublished and Published Discharge Arbitration Cases by Selected Characteristics (in Percent)

(Absolute number of observations is noted in parentheses)¹

	<i>Unpublished (Michigan)</i>	<i>Total Published</i>	<i>Published By BNA</i>	<i>Published By CCH</i>
<i>Appointment source</i>				
AAA	78.6 (357)	10.3 (61)	12.2 (45)	8.0 (21)
FMCS	21.4 (97)	84.8 (504)	83.7 (309)	85.6 (226)
Appointed by parties	0 (0)	4.9 (29)	4.1 (15)	6.4 (17)
Unknown	(0)	(165)	(120)	(54)
<i>Sector</i>				
Public	41.0 (186)	10.5 (80)	10.8 (53)	10.7 (34)
Private	59.0 (268)	89.5 (679)	89.2 (436)	89.3 (284)
Unknown	(0)	(0)	(0)	(0)
<i>Occupation</i>				
Skilled	18.0 (59)	25.4 (142)	25.8 (94)	24.9 (57)
Semi-skilled	18.9 (62)	32.1 (180)	32.1 (117)	32.3 (74)
Unskilled	6.7 (22)	16.8 (94)	17.3 (63)	15.7 (36)
Professional/Technical	2.7 (9)	1.8 (10)	1.1 (4)	3.7 (7)
Service	43.3 (142)	15.9 (89)	16.4 (60)	15.7 (36)
Clerical	10.4 (34)	7.1 (40)	6.8 (25)	7.0 (16)
Sales	0 (0)	0.9 (5)	0.5 (2)	1.3 (3)
Unknown	(126)	(199)	(124)	(89)
<i>Sex of grievant</i>				
Male	72.0 (326)	84.8 (623)	84.8 (403)	84.9 (258)
Female	28.0 (127)	15.2 (112)	15.2 (72)	15.1 (46)
Unknown	(1)	(24)	(14)	(14)
<i>Length of service</i>				
Less than 6 months	6.2 (21)	5.2 (27)	5.0 (17)	5.3 (11)
6 mos.-5 yrs.	54.3 (183)	49.0 (254)	45.6 (156)	55.0 (115)
6-10 yrs.	24.9 (84)	27.0 (140)	28.7 (98)	24.4 (51)
11-15 yrs.	11.0 (37)	10.4 (54)	11.7 (40)	8.1 (17)
Greater than 15 yrs.	3.6 (12)	8.3 (43)	9.1 (31)	7.2 (15)
Unknown	(117)	(241)	(147)	(109)
<i>Attorney used by employer</i>				
Yes	71.7 (297)	68.0 (458)	68.4 (294)	66.7 (192)
No	28.3 (117)	32.0 (216)	31.6 (136)	33.3 (96)
Unknown	(40)	(85)	(59)	(30)
<i>Attorney used by union</i>				
Yes	26.6 (110)	48.9 (326)	48.5 (206)	51.4 (147)
No	73.4 (304)	51.1 (341)	51.5 (219)	48.6 (139)
Unknown	(40)	(92)	(64)	(32)

¹"Unknown" denotes information not available. "Unknown" decisions are not included in percentage calculations.

Table 1—continued

	<i>Unpublished (Michigan)</i>	<i>Total Published</i>	<i>Published By BNA</i>	<i>Published By CCH</i>
<i>Brief filed by employer</i>				
Yes	71.9 (212)	82.3 (186)	83.2 (109)	82.5 (85)
No	28.1 (83)	17.7 (40)	16.8 (22)	17.5 (18)
Unknown	(159)	(533)	(358)	(215)
<i>Brief filed by union</i>				
Yes	68.2 (202)	76.7 (155)	77.5 (93)	76.4 (68)
No	31.8 (94)	23.3 (47)	22.5 (27)	23.6 (21)
Unknown	(158)	(557)	(369)	(229)
<i>Award²</i>				
Grievance denied	44.4 (193)	43.0 (318)	50.9 (243)	30.5 (94)
Grievance sustained	55.6 (242)	57.0 (422)	49.1 (234)	69.5 (214)
With no back pay	25.7 (112)	23.0 (170)	20.1 (96)	26.3 (81)
With partial back pay	14.7 (64)	13.1 (97)	12.4 (59)	15.6 (48)
With full back pay	15.2 (66)	20.9 (155)	16.6 (79)	27.6 (85)
Unknown	(19)	(19)	(12)	(10)
N	454	759	489	318

²Only decisions in which there was a definitive "award" are included in percentage calculations. Decisions in which the "award" is conditional, e.g., grievant being able to pass a physical examination, or in which the case is remanded to the parties, are classified as "unknown."

Appointment Source

Published decisions were drawn overwhelmingly from FMCS cases, which accounted for 85 percent of the total. Only ten percent of the published decisions came from AAA, and five percent were by direct appointment of the parties. There were 165 published cases which did not indicate the source of appointment. CCH published a somewhat larger proportion of FMCS cases and a smaller proportion of AAA cases than BNA. There was also a substantial increase in the publication of FMCS cases by CCH over the three-year period covered by the study—from 78 percent in 1979 to 84 percent in 1980 and 96 percent in 1982. The BNA distribution remained fairly constant over this period.

The distribution of unpublished cases was the reverse of that among published cases. For 1979, when we secured all Michigan discharge cases from both appointing agencies, 65 percent came from AAA and 35 percent from FMCS. When the 1982 cases were added, the AAA percentage increased to 79 and the FMCS percentage decreased to 21 because 1982 cases were not available from FMCS.

Based on interviews with representatives from BNA, CCH, FMCS and AAA, there appear to be several reasons for the vastly different distribution among FMCS and AAA as between published and unpublished cases:

1. FMCS sent many more decisions to the publishing organizations than AAA. During the period under study FMCS asked arbitrators to submit four copies of each decision. Each party requesting a panel of arbitrators was asked to notify FMCS if it wished to withhold the decision from publication. Failure to return the notification letter was considered to indicate acquiescence to publication. "In short, silence will constitute consent."⁵ AAA followed a more stringent procedure on releasing decisions for publication. A card was sent to each party asking if there was objection to publication. Objection by either party would stop publication. In private sector cases failure to return the card was interpreted by AAA as an objection to publication. For cases originating in the public sector, failure to return the card was interpreted as assenting to publication.⁶

2. FMCS usually sent decisions to publishers within a week after receipt. AAA decisions often arrived at BNA and CCH six months or more after they were rendered. Since both BNA and CCH publish arbitration decisions each week, they favored current decisions over older ones.

3. AAA sent publishers only cases that AAA itself was publishing through its own service. This amounted to only a small proportion of all decisions released for publication. This policy may have been motivated to some extent by the fact that AAA considers BNA and CCH "friendly competitors." FMCS sent the publishers all decisions released for publication.

4. Unions and employers in Michigan apparently requested arbitration panels from AAA much more frequently than from FMCS.

Private and Public Sector Cases

The ratio of private to public sector decisions differed greatly as between published and unpublished cases: 9 to 1 for published cases and 6 to 4 for unpublished cases. The vast difference was due to the predominance of AAA cases in our sample of unpublished cases. AAA cases in Michigan were about evenly

⁵FMCS letter to arbitrators, January 3, 1978.

⁶Telephone interview with AAA National Office representative, June 13, 1983.

divided between the private and public sector, while FMCS cases were much more heavily weighted toward the private sector. There was practically no difference between BNA and CCH in the distribution of private and public sector cases during the period 1979–1981. However, BNA more than doubled its proportion of public sector cases, from 7.4 to 16.2 percent, while CCH showed a decrease from 10.2 to 8.8 percent in public sector cases between 1979 and 1981.

Occupational Distribution

The proportion of grievants in skilled, semi-skilled and unskilled blue collar occupations was much higher in published than in unpublished cases. On the other hand, grievants in service occupations constituted 43 percent of all unpublished cases as compared to 16 percent of published cases. These differences were statistically significant.⁷ Clerical employees also represented a higher percentage of unpublished than published cases. There was little difference between BNA and CCH in occupational distribution.

The predominance of blue collar grievants in the published decisions and service employees in unpublished decisions was due largely to the private-public case distribution in the two groups. The data show that for the 233 public sector cases for which occupational information was available, 57 percent were in service occupations as compared to only 15 percent of the 643 private sector cases. Since public sector cases were much more prevalent in the unpublished sample, service occupations occurred proportionately much more often among those cases than in the published group. The situation is reversed for private sector cases which were dominant in the published group.

Grievant's Sex

Twenty-eight percent of the grievants in unpublished cases were female as compared with 15 percent in published cases.

⁷Differences between published and unpublished cases for each occupational group were statistically significant at the .01 level. This means that the likelihood of these differences occurring by chance was 1 in 100. Similarly, a difference which is found to be statistically significant at the .05 level would mean that the likelihood of it occurring by chance is 5 in 100 given the number of decisions for which we have data. In the remainder of this paper we shall consider as statistically significant any differences at the .05 level or lower.

While some of this difference is explained by the private-public sector distribution, there was a significantly higher percentage of females involved in the unpublished than in the published cases even when private and public sector decisions were considered separately. The percentage of female grievants was 15 percent in both BNA and CCH cases.

Length of Service

There was little difference between published and unpublished cases with respect to length of service. Grievants with less than five years of service constituted a majority in both groups. Long service grievants—those with more than 15 years seniority—were twice as prevalent in published cases than in unpublished cases: 8.3 as compared with 3.6 percent. There were only minor differences between BNA and CCH in grievants' length of service.

Use of Attorney Advocates

Attorneys were used by employers in about 70 percent of both the published and unpublished cases. Unions used attorneys much less often than employers in both groups of cases. However, there was a significant difference in union use of attorneys as between published and unpublished cases. Unions were represented by attorneys in 49 percent of the published cases as compared only to 27 percent of the unpublished cases. This very large difference was because three unions—UAW, AFSCME, and SEIU—that rarely use attorneys in arbitration accounted for a disproportionate number of the unpublished cases, all of which originated in Michigan. When these three unions were excluded, the difference in union use of attorneys was significantly reduced as between published and unpublished cases. Excluding these three unions, unions used attorneys in 44 percent of the unpublished cases and 51 percent of the published cases.

Filing of Post Hearing Briefs

Briefs were filed more frequently by employers and unions in published than in unpublished cases. Employers filed briefs in 82 percent of the published cases and 72 percent of the unpublished cases. Unions filed briefs less often than employers,

but again the percentage was higher in published than in unpublished cases: 77 percent and 68 percent, respectively.⁸

The Award

The most important variable in arbitration cases is, of course, the outcome, that is the arbitrator's award. There are two ways of looking at the outcome: (1) in terms of a 2-category classification—grievance denied (discharge sustained) and grievance sustained (grievant reinstated); or (2) in terms of a 4-category classification—grievance denied (discharge sustained); grievance sustained in part (grievant reinstated with no back pay); grievance sustained in part (grievant reinstated with partial back pay); grievance fully sustained (grievant reinstated with full back pay). Figures in Table 1 permit analysis using both 2-category and 4-category classifications.

We first consider the award in terms of the 2-category classification—grievance denied and grievance sustained. The former is considered a victory for the employer, the latter a victory for the union and the grievant.

There is little difference between the denial rate for all published and unpublished cases: 43.0 and 44.4 percent. This difference is not statistically significant. But this comparison masks significant differences between unpublished awards and BNA and CCH, considered separately. BNA cases had a 50.9 percent denial rate and CCH cases a 30.5 percent denial rate.⁹ Thus, the difference in denial rates between all unpublished cases and BNA, all unpublished cases and CCH, and between BNA and CCH, were all statistically significant, with CCH being most out of line. In terms of awards favoring the employer or the union, BNA awards were least favorable to the union (51 percent denied and 49 percent sustained), unpublished awards were

⁸Because of the large number of decisions in which information on briefs was not available, these figures should be interpreted with caution.

⁹Previous studies of discharge cases found the following denial rates (denial rates listed by author and year with number of cases in parentheses):

<i>Holly</i>	<i>Teele</i>	<i>Jennings & Wolters</i>
1942-46	1956-60	1971-74
41.0 (433)	44.0 (130)	42.3 (169)

Holly, *The Arbitration of Discharge Cases: A Case Study*, in *Critical Issues in Labor Arbitration*, Proceedings of the 10th Annual Meeting, National Academy of Arbitrators, ed. Jean T. McKelvey (Washington: BNA Books, 1957), 16, Table 5; Jennings and Wolters, *Discharge Cases Reconsidered*, 31 Arb. J. 169, Table 1 (1976); Teele, *The Thought Processes of the Arbitrator*, 17 Arb. J. 87 (1962).

more favorable to the union (44 percent denied and 56 percent sustained), and CCH awards were most favorable to the union (31 percent denied and 70 percent sustained).

There was a significant increase in the denial rate for CCH cases over the three-year period for which data were collected: 26 percent in 1979, 30 percent in 1980 and 37 percent in 1981. BNA cases went from a 50 percent denial rate in 1979 to 55 percent in 1980, and then reverted back to 50 percent in 1981. For unpublished AAA cases, the denial rate was 43 percent in 1979 and 48 percent in 1982. Unpublished FMCS cases were available only for 1979 when the denial rate was 48 percent.

The 4-category analysis yielded somewhat different results. If we construct an index in which "grievance denied" is given a value of 1, "grievance sustained with no back pay" a value of 2, "grievance sustained with partial back pay" a value of 3, and "grievance sustained with full back pay" a value of 4, the mean indexes for the unpublished and published decisions are: 2.01 for unpublished decisions, 2.12 for all published decisions, 1.95 for BNA decisions, and 2.40 for CCH decisions.

The differences between the mean index of unpublished decisions and CCH decisions and between BNA and CCH decisions are statistically significant. However, the differences between indexes of unpublished decisions and all published decisions and between unpublished decisions and BNA decisions are not statistically significant. These results differ from those obtained from the 2-category analysis where all comparisons yielded differences which were statistically significant.

Interpreting the indexes in terms of impact on the union, BNA decisions were least favorable to the union, unpublished decisions were somewhat more favorable to the union, and CCH decisions were by far the most favorable to the union. BNA and CCH decisions combined were more favorable to the union than were the unpublished decisions.

In an effort to explain the differences in denial rates between published BNA and CCH decisions and unpublished decisions, we have considered various possibilities: (1) appointment source of the arbitrator, (2) public-private sector distribution, (3) released versus unreleased decisions, (4) distribution as between experienced and less experienced arbitrators, and (5) reason for discharge.

We found no significant difference in denial rates between awards in AAA and FMCS cases, between private and public

sector cases, or between decisions released and not released for publication.

Some arbitrators and practitioners believe that published cases tend to overrepresent less experienced arbitrators, and indeed BNA and CCH have indicated that giving exposure to relatively new arbitrators may play some part in their selection of decisions for publication.¹⁰ Lacking an objective basis for classifying “experienced” and “less experienced” arbitrators, we used membership in the National Academy of Arbitrators as a proxy for “experienced” arbitrators and nonmembership in the NAA as a proxy for “less experienced” arbitrators. The results are shown below:

**Case Frequency and Denial Rates by NAA Membership Status
(in Percent)**

Membership	Unpublished	N	Total		BNA	N	CCH	N
			Published	N				
NAA	39.5 (109)	276	39.3 (149)	379	49.5 (102)	206	29.3 (58)	198
Non-NAA	52.8 (84)	159	46.8 (169)	361	52.0 (141)	271	32.7 (36)	110
Total								
Decisions		435		740		477		308

The above figures indicate that during the period 1979–1981 published awards in discharge cases were about equally distributed between Academy and non-Academy members. However, the distribution varied as between BNA and CCH. BNA published more cases by non-Academy members (57 percent), while only slightly more than one-third of all discharge decisions published by CCH were rendered by non-Academy members. The unpublished sample had a 37 percent representation of non-Academy arbitrators. This reflects the large number of Academy members in Michigan, most of whom were apparently on both the AAA and FMCS panels. These findings do not bear out the belief that published decisions are heavily weighted with relatively inexperienced arbitrators.

Equally interesting are the denial rates in discharge grievances decided by Academy and non-Academy members. In all four

¹⁰See, e.g., Seitz, *The Citation of Authority and Precedent in Arbitration (Its Use and Abuse)*, 38 *Arb. J.* 58–61 (1983); Feller, *Remedies: New and Old Problems*, in *Arbitration Issues for the 1980s*, Proceedings of the 34th Annual Meeting, National Academy of Arbitrators, eds. James L. Stern and Barbara D. Dennis (Washington: BNA Books, 1982).

groupings of decisions, non-Academy members had higher denial rates than Academy members, i.e., their awards were more favorable to employers than to unions. The differences between Academy and non-Academy member denial rates were statistically significant for unpublished and for all published cases. Within BNA and CCH, the differences in denial rates between Academy and non-Academy members were too small to be statistically significant, indicating that arbitration experience was not a causal factor in either the relatively high denial rate in BNA discharge cases or the much lower denial rate in CCH cases.

We next analyzed published and unpublished cases by reason for discharge. Table 2 shows the distribution of cases by reason for discharge. Reasons which occurred 30 or more times in the combined published and unpublished cases are shown separately; reasons occurring less than 30 times are grouped together as "Miscellaneous." Table 3 shows denial rates by reason for discharge.

Excessive absenteeism was the reason most often given by employers in discharge cases—126 cases. Cases grouped as "Miscellaneous" constituted 18 percent of the unpublished cases and about one third of all published cases, with little variation between BNA and CCH. The high proportion of "Miscellaneous" published cases suggests that both BNA and CCH tended to select novel or unusual discharge cases for publication. Cases in which "excessive absenteeism" was given as the reason for discharge were vastly underrepresented among published cases as compared with unpublished cases—6.2 percent compared to 17.5 percent. Also significantly underrepresented among published cases were those involving "absence from work without permission" (3.0 and 6.2 percent), "Insubordination" (2.5 and 5.5 percent) and "abusing customer/client" (1.8 and 4.0 percent). In addition to "Miscellaneous," reasons significantly overrepresented among published cases were "refusal of assignment" (8.8 percent and 3.5 percent), and "possession/use of drugs" (5.1 percent and 2.2 percent).

The different representation of various reasons for discharge among published and unpublished cases accounted for only very minor differences in the overall denial rates. Much more important were the differences in denial rates for the same discharge reason as between unpublished decisions, BNA decisions, and CCH decisions.

Table 2

Distribution of Reasons for Discharge (in Percent)
(Absolute number of observations is noted in parentheses)

<i>Reason¹</i>	<i>Unpublished (Michigan)</i>	<i>Total Published</i>	<i>Published By BNA</i>	<i>Published By CCH</i>
Excessive absenteeism	17.5 (79)	6.2 (47)	6.5 (32)	5.7 (18)
Incompetence/ Negligence/ Unsatisfactory Performance	8.4 (38)	7.9 (60)	6.5 (32)	9.1 (29)
Refusal of assignment	3.5 (16)	8.8 (67)	8.6 (42)	8.8 (28)
Theft	6.9 (31)	6.3 (48)	5.3 (26)	6.9 (22)
Falsification of records	5.8 (26)	6.1 (46)	5.7 (28)	6.9 (22)
Threat/assault on employer	5.3 (24)	4.1 (31)	5.5 (27)	1.6 (5)
Absence from work without permission ²	6.2 (28)	3.0 (23)	3.1 (15)	2.8 (9)
Possession/use of drugs	2.2 (10)	5.1 (39)	5.9 (29)	4.1 (13)
Possession/use of intoxicants	4.4 (20)	3.4 (26)	3.7 (18)	2.5 (8)
Leaving post	3.5 (16)	4.0 (30)	3.9 (19)	3.5 (11)
Insubordination	5.5 (25)	2.5 (19)	2.5 (12)	2.8 (9)
Threat/assault on employee	3.3 (15)	3.3 (25)	3.9 (19)	2.5 (8)
Obscene/immoral conduct	2.9 (13)	2.5 (19)	2.7 (13)	2.5 (8)
Abusing customer/client	4.0 (18)	1.8 (14)	1.2 (6)	2.5 (8)
Damage to/misuse of property	2.7 (12)	2.5 (19)	2.9 (14)	2.5 (8)
Miscellaneous	17.7 (80)	32.4 (246)	32.1 (157)	35.2 (112)
N	451	759	489	318

¹Only reasons for discharge that were found in 30 or more cases, published and unpublished cases combined, are listed separately. All other reasons are grouped together as "Miscellaneous."

²Includes cases in which grievant was discharged for being absent from work without permission for two or more consecutive days.

Despite only a minor difference in the overall denial rate for all unpublished and published cases (44.7 percent and 43.0 percent), there were significant differences in denial rates for specific reasons as between these two groups of cases. But these differences pale in comparison with the differences in denial rates for the same reason for discharge as between unpublished cases and BNA, unpublished cases and CCH, and between BNA and CCH. Of the 15 specific listed reasons for discharge, the denial rates for BNA decisions were at least ten percentage points *higher* than the unpublished denial rates for six reasons; it

Table 3

Denial Rates by Reason for Discharge (in Percent)
(Absolute number of observations is noted in parentheses)

Reason	Unpublished (Michigan)	Total Published	Published By BNA	Published By CCH
Excessive absenteeism	57.9 (44)	53.5 (23)	56.7 (17)	50.0 (8)
Incompetence/ Negligence/ Unsatisfactory Performance	39.5 (15)	55.9 (33)	84.4 (27)	25.0 (7)
Refusal of assignment	46.7 (7)	39.1 (25)	46.2 (18)	29.6 (8)
Theft	51.6 (16)	40.4 (19)	50.0 (13)	28.6 (6)
Falsification of records	44.0 (11)	52.2 (24)	71.4 (20)	27.3 (6)
Threat/assault on employer	58.3 (14)	54.8 (17)	59.3 (16)	20.0 (1)
Absence from work without permission ¹	32.0 (8)	21.7 (5)	26.7 (4)	22.2 (2)
Possession/use of drugs	40.0 (4)	48.7 (19)	51.7 (15)	30.8 (4)
Possession/use of intoxicants	25.0 (5)	46.2 (12)	50.0 (9)	37.5 (3)
Leaving post	18.8 (3)	32.1 (9)	27.8 (5)	40.0 (4)
Insubordination	41.7 (10)	31.6 (6)	41.7 (5)	11.1 (1)
Threat/assault on employee	46.7 (7)	37.5 (9)	38.9 (7)	25.0 (2)
Obscene/immoral conduct	61.5 (8)	21.1 (4)	7.7 (1)	37.5 (3)
Abusing customer/client	38.9 (7)	42.9 (6)	66.7 (4)	25.0 (2)
Damage to/misuse of property	50.0 (6)	47.4 (9)	64.3 (9)	25.0 (2)
Miscellaneous	40.0 (28)	41.0 (98)	48.0 (73)	32.4 (35)
Average Denial Rate	44.7 (193)	43.0 (318)	50.9 (243)	30.5 (94)

¹Includes cases in which grievant was discharged for being absent from work without permission for two or more consecutive days.

was 10 points *lower* for only one reason. CCH cases showed eleven reasons for which denial rates were at least 10 percentage points *lower* than those in unpublished cases and only two in which they were 10 points or more *higher* than the unpublished rates. And between CCH and BNA, there were eleven reasons for which CCH denial rates were *lower* by 10 or more points and only two in which they were *higher* to the same degree. Also, in the "Miscellaneous" category, the denial rate for CCH was 32 percent as compared with 48 percent for BNA and 40 percent for unpublished cases.

The comparison of denial rates by reason for discharge shows that CCH selected for publication decisions in which the grievance was denied much less often than did BNA, and far out of

proportion in relation to the unpublished denial rates for the same reasons. To a lesser extent, the BNA selection process resulted in publication of decisions with higher denial rates than were found among unpublished cases for the same reasons.

Conclusions

What inferences may be drawn from the foregoing analysis? With respect to awards in discharge cases, neither BNA nor CCH published decisions were representative of unpublished AAA and FMCS decisions in Michigan during the period studied. BNA cases showed a significantly higher denial rate and CCH an even more significantly lower denial rate than the unpublished decisions. However, the denial rate of BNA and CCH discharge decisions combined was quite representative of the overall denial rate for unpublished cases in Michigan. This suggests that, if one wishes to draw conclusions regarding awards from published arbitration discharge cases, both BNA and CCH decisions should be used.

Perhaps a more important conclusion to be drawn from this analysis is that denial rates in discharge cases vary greatly among reasons for discharge. Furthermore, there are large differences in the denial rates as between BNA, CCH, and unpublished decisions in cases involving the same reasons for discharge. This suggests that caution should be exercised in drawing conclusions from published decisions regarding the outcome of grievance arbitrations for different types of discharge cases.

The data also seem to indicate that decisions of relatively less experienced arbitrators, using NAA membership as a proxy for experience, are not published more frequently than decisions of experienced arbitrators, at least not in discharge cases. As between Academy and non-Academy members, the nonmembers appear to have higher denial rates.

Our findings also show that there are no significant differences in denial rates in discharge cases originating in the private and public sector, or between cases released and not released for publication.

The data indicate that published decisions tend to underrepresent public sector cases, female grievants, and cases involving grievants in service occupations. Cases in which unions use attorneys and file post-hearing briefs appear to be overrepresented in published decisions.

As noted at the outset, these findings are based on discharge cases published by BNA and CCH in 1979, 1980, and 1981 as compared with Michigan discharge cases for which arbitrators were drawn from AAA decisions rendered in 1979 and 1982, and FMCS decisions issued in 1979. To the extent that Michigan discharge cases or Michigan arbitrators differ from cases and arbitrators in the nation as a whole, our findings may not be reliable indicators of the extent to which published discharge decisions are or are not representative of unpublished decisions. Finally, this study was limited to discharge arbitration decisions and the findings cannot be considered indicative of the relationship between published and unpublished decisions for other issues presented in grievance arbitration.

Multivariate Analysis of Published and Unpublished Decisions

The preceding section indicated that published discharge decisions were not representative of unpublished Michigan decisions with respect to a number of case characteristics, the most important of which was the award. This conclusion was based on a univariate analysis, analyzing only the relationship between the publication status and the arbitrator's award without taking into account the effects of other case characteristics (hereafter called variables) that might also affect the award. When such other variables are present, some unknown portion of the observed relationship between the award and publication status might actually have been caused by those unidentified variables.

For example, the univariate analysis indicated that the arbitration decisions published by CCH had lower denial rates than the unpublished decisions or the decisions published by BNA. Suppose, for the sake of discussion, that the CCH selection process happened to favor for publication cases that were viewed as "important," or "precedent setting." Assume further that unions, because they also considered these cases to be "important," were more likely to be represented by an attorney in such cases than in other discharge cases. If unions fare better in cases in which they are represented by an attorney, then at least part of the observed relationship between publication by CCH and the award would be due to the overrepresentation among CCH decisions of cases in which unions were represented by an attorney. Thus, in analyzing the relationship between publica-

tion status and the award, one would want to "control" for whether or not the union was represented by an attorney. Similarly, if other factors or case characteristics might conceivably affect the award, one would also want to "control" for the effect of these variables on publication status and the award.

The statistical technique for analyzing the effect of one variable while controlling for the simultaneous influence of other variables is called "multiple regression analysis." Generally, in multiple regression analysis we attempt to predict the value of the "dependent variable" as a function of a series of "independent" or "explanatory" variables. For each of the explanatory variables we generate a regression "coefficient" which tells us the effect on the dependent variable of a one unit change (however measured) in the explanatory variable while controlling for the effects on the dependent variable of all the other explanatory variables. When we say that we control for the effects of the other explanatory variables, we mean that we are examining the effect of each variable on the dependent variable while holding the values of all of the other explanatory variables constant.

As used in our study, the dependent variable was the arbitrator's award in the case or, more precisely, the index constructed from placing a numerical value on the awards. Two indices were used, a two-category index and a four-category index. For the two-category index, the decision was assigned a value of 1 if the grievance was denied (i.e., the discharge was upheld), and 2 if the grievance was sustained in whole or in part (i.e., the discharge was not upheld and the grievant was reinstated, with or without back pay). For the four-category index, the decision was assigned a value of 1 if the grievance was denied; 2 if the grievance was sustained in part with the grievant receiving no back pay; 3 if the grievance was sustained in part with the grievant receiving partial back pay; and 4 if the grievance was sustained in full, with the grievant receiving full back pay.

When we generate a regression coefficient, we obtain a number with either a positive or negative sign. A positive sign on the coefficient means that there is a positive or direct relationship between the dependent and the explanatory variables; an increase in the value of the explanatory variable is associated with an increase in the value of the dependent variable; and a decrease in the value of the explanatory variable is associated with a decrease in the value of the dependent variable. A nega-

tive sign on the coefficient means that there is a negative or inverse relationship between the dependent and explanatory variables; an increase in the value of the explanatory variable is associated with a decrease in the value of the dependent variable; and a decrease in the value of the explanatory variable is associated with an increase in the value of the dependent variable.

Thus, in the analysis, a negative coefficient in the two-category regression means that, when controlling for all other variables, the explanatory variable of interest is more likely to be associated with arbitrators' decisions that deny the grievance, while a positive coefficient is more likely to be associated with arbitrators' decisions sustaining the grievance. In the four-category regression, a negative coefficient means that, controlling for other factors, the explanatory variable of interest is more likely to be associated with arbitrators' decisions denying the grievance or sustaining the grievance without back pay. A positive coefficient means that the explanatory variable of interest is more likely to be associated with arbitrators' decisions sustaining the grievance in full or to a relatively great extent.

Finally, it should be noted that we take no position as to whether the two- or the four-category classification is the more appropriate for analyzing discharge decisions. This is a matter for the parties to decide.

The explanatory variables were the publication status of the case (CCH, BNA, or unpublished) as well as the occupation of the grievant (skilled, semi-skilled, unskilled, professional-sales, service, or clerical), sector of the case (public or private), sex of the grievant, representation by an attorney (by the union, by the employer, by both parties, and by neither party), and the arbitrator, if the arbitrator had more than fifteen cases.

By using an appropriate statistical test we can also determine whether or not the regression coefficient is "significant." When we test for the significance of a coefficient, we are really determining the probability that the observed relationship between the explanatory variable and the dependent variable could have occurred by chance, and was not the result of a true, qualitative relationship between the two variables. For our purposes we will assume that a significant relationship exists between the explanatory and dependent variables if there is not more than one chance in twenty (or five in one hundred) that the relationship

could have occurred by chance (i.e., significant at the .05 level or less).

Results on the Representativeness of Published Cases

The regression results on the BNA and CCH published cases strongly supported the results obtained from the univariate analysis. If anything, they were even more striking. Cases published by BNA generated coefficients that were negative and significant in both the two-category and four-category regressions. This suggests that, controlling for other factors, the decisions published by BNA were more likely to be associated with arbitrators' awards denying grievances or sustaining grievances to a lesser extent than was the case for either the CCH decisions or the unpublished Michigan decisions.

Conversely, the CCH decisions generated positive and significant coefficients in both the two-category and the four-category regressions. This suggests that, controlling for other factors, decisions published by CCH were more likely to be associated with arbitrators' awards sustaining the grievance in both an absolute sense (in the two-category regression) and in a relative sense (in the four-category regression) than either the BNA decisions or the unpublished Michigan decisions. Thus, the regression results confirm the results from the univariate analysis that neither discharge cases published by BNA nor the cases published by CCH were representative of the unpublished Michigan cases.

The Influence of Attorneys and Arbitrators

One of the benefits of multiple regression analysis is that it provides information on the effect on the dependent variable of a one unit change in each of the explanatory variables, while controlling for all the other explanatory variables. Thus, just as we can learn the effect of publication status while controlling for the arbitrator and for attorney representation, we can also learn the effect of the arbitrator, controlling for publication status and attorney representation (as well as for the other explanatory variables), and the effect of attorney representation controlling for the arbitrator and publication status (as well as the other explanatory variables).

Our analysis provides substantial support for the proposition that, other things equal, representation by an attorney does

make a difference. Using as a benchmark (or reference) group cases in which both parties were represented by an attorney, both the two-category and four-category regression models generated coefficients that were significant and positive for cases in which only the union used an attorney, and significant and negative for cases in which only the employer used an attorney. The coefficient on those cases in which neither party used an attorney was insignificant.

These results do not indicate that in any given case, attorney representation will make a difference. They do suggest, however, that based on the analysis of a large number of cases, attorney representation appears to have an impact on arbitrators' awards. The results indicate no difference in awards when both sides are represented by an attorney or neither side is represented by an attorney. They do indicate, however, that controlling for other factors, the grievance is more likely to be denied, or sustained to a lesser extent than otherwise, if the employer is represented by an attorney and the union is represented by a nonattorney. On the other hand, the results also suggest that the grievance is more likely to be sustained in full, or to a greater extent than otherwise, if the union is represented by an attorney and the employer is represented by a nonattorney.

The results regarding arbitrators are also interesting, although less striking than the results for attorney representation. Analyzing only the data for the ten arbitrators in our total sample with fifteen or more discharge cases (in order to avoid having the results unduly influenced by a few unusual cases), we found that eight of the ten arbitrators generated insignificant coefficients. This suggests that, controlling for other factors, there was no relationship between the vast majority of arbitrators and their decisions in these discharge cases.

As for the two arbitrators who generated significant coefficients, the results differed considerably. One of the arbitrators was associated with negative and significant coefficients in both the two-category and four-category regressions, suggesting that, controlling for other factors, this arbitrator is more likely than other arbitrators to be associated with decisions denying the grievance or sustaining the grievance to a lesser extent. The other arbitrator was associated with a significant and positive coefficient only in the four-category regression, but not in the two-category regression. Thus, for this latter arbitrator, while he or she may not be any more likely to sustain a grievance than

other arbitrators, once he or she decides to sustain a grievance, this arbitrator seems to be associated with higher back pay awards than other arbitrators.

Impact of Merit Versus Nonmerit Factors

Regression analysis also permits estimation of the amount of variation in the award indices that can be explained by all of the variables in the regression combined. The results indicate that we can explain from 14.5 to 15.1 percent of the variation in the award indices from factors which have nothing to do with the merits of the case. Adding variables for the fifteen reasons for discharge that occurred more than thirty times in our sample increases the amount of variation explained to 21.8 percent in the two-category specification and 19 percent in the four-category specification. This suggests that roughly 80–85 percent of the awards in discharge cases are a function of the merits of the case and the evidence presented to the arbitrator. Fifteen to twenty percent of the variation is determined by “nonmerit” factors. These findings should be reassuring to unions, employers, and arbitrators.

III. PROPER PREPUBLICATION PROCEDURES: AN
ARBITRATOR'S COMMENT

MERTON C. BERNSTEIN*

My assignment is to discuss proper procedures for arranging for the publication of arbitrators' opinions.

Even before receiving the Stieber-Block-Corbett papers, I assumed that published decisions must be *unrepresentative*. That is, they do not provide a *sample* that accurately portrays how *all* arbitrators' opinions would fall on a scattergram depicting the distribution of arbitral authority on any given issue. Nonetheless, the papers do sharpen questions about the proper *use* of published opinions.

But the problem I am assigned to address is narrower—but, I suggest, important.

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