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 *un*representative. 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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The Pitted Path to Publication

Everything we know about the opinion publishing process tells us that published opinions are not—they cannot be—representative, except by utter chance. We all know the major variables: some parties object to publication; and the several services select opinions in order to provide examples of decisions on subjects not already fully covered in that service. They also select on the basis of quality. (I let that stand in all its ambiguity.)

Perhaps the services also seek to publish arbitrators with little or no track record to enable parties in search of arbitrators to get some kind of line on him or her. (Of course, these instances also must be unrepresentative of an individual arbitrator.)

Obtaining Party Permission to Publish—A Distinct Problem

Another major variable provides the principal focus of *my* comments: the method by which permission to publish is obtained.

The American Arbitration Association (AAA) contacts the parties directly to enable either to veto publication. The arbitrator plays no part in that process.

FMCS is the principal source of published opinions. The FMCS approach to publication has varied over the last quarter century. When I first joined its roster in 1960 and for a long time thereafter, its case report form requested the arbitrator to ask the parties whether either objected to publication. Either could veto. Upon receipt of the opinions and awards (supplied in multiple copies), FMCS supplied all of the reporting services with copies of decisions where a party had registered no objection. The services in turn made their selections.

Some time in the seventies, FMCS changed. *It* took on the task of asking the parties whether either objected to publication. The arbitrators never knew which approved or disapproved and dutifully mailed off the multiple copies (no great burden thanks to easy and inexpensive photocopying). The slight loss to American and Canadian forests constituted a major improvement for the arbitral process, in my judgment. And here is the kernel of my commentary.

The Parties' Right to Choose Freely

I start with the proposition that parties to an arbitration have every right to veto publication for whatever reasons they wish.

Privacy is one of the vaunted advantages of arbitration. It can remain so only if the parties feel free to withhold permission to publish.

So the question arises: if the *arbitrator* asks the parties whether either objects to publication, might that limit the parties' free choice about publication? A party may think that if *it* vetoes publication, the arbitrator may take offense, possibly unknowingly. That may inhibit free choice. In my judgment, that consitutes reason enough for the arbitrator not to put the question.

The Relation of Publication to Confidence in the Arbitrator

Next, I take it as given that party confidence in the arbitrator enhances the process—no, is an essential ingredient. Any misgivings about the arbitrator that creep in damage the process.* If the arbitrator puts the question about publication to the parties at the hearing, that is, before he or she undertakes to decide, some present may wonder: why does the arbitrator ask the question? does he or she desire to be published? if so, does that suggest some ulterior motive?

Advocates, company reps, and union officials familiar with arbitration likely would not be bothered. Like the big kids, they know where published opinions come from. But many participants are neophytes. For, in addition to the seasoned lawyer or personnel manager or business agent, the hearing also involves the grievant, some members of the union committee, employer officials, the department manager, the supervisor. For any of them arbitration may—often will—be a new experience. Their impressions also count. They, too, must have confidence that the system works fairly. Anything that causes them to question the impartiality and reliability of the arbitrator will damage such confidence.

So, also, an inquiry by the arbitrator accompanying the decision may be colored by a party's possible apprehension that its veto may diminish the good will of an arbitrator whose services it may wish to use again. Or the inquiry may raise questions with the parties about whether the arbitrator is self-seeking.

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*Of course, the gravest blow to party confidence is an adverse award. That difficulty cannot be avoided. Presumably, after some experience, the parties take a loss philosophically. Of course, any number *expect* not to prevail.

Thus, I conclude, the Academy's ruling that an arbitrator may not properly make inquiry about publication at the hearing is completely sound.

Perhaps the most important reason for giving the arbitrator no role in the publication decision is the discipline that the possibility of publication imposes.

A written opinion performs several important functions. In the first instance, it requires the arbitrator to persuade himself or herself that the outcome makes sense. On more than one occasion, I've had to start over when the award I thought correct turned out to be impossible to explain to my own satisfaction. The opinion should also explain to the parties that the arbitrator paid attention to their evidence and arguments. And it should provide guidance to the parties about how to deal with the same and similar disputes.

If arbitrators have no role in making their opinions available for publication, the possibility that any one of them may appear in print provides an incentive to do a creditable job on all. In this busy world, the pressure to get a job done, to meet many deadlines, can lead in just the opposite direction, sometimes resulting in a sacrifice of quality in the interests of output. Ideally, such pressures should be rejected. In the real world, it is desirable to have counter pressures.

Thus, I conclude, it is undesirable to make it the *arbitrator's* task to ask if any party objects to publication at any stage of the proceeding.

The Loss of Potential Opinions

Moreover, there is some evidence that the *current* FMCS procedure causes another related and undesirable result. Many arbitrators—I among them—will not put the question to the parties. Several arbitrator colleagues tell me that they share the views expressed here. This then leads to the unavailability of opinions and awards from some of the most seasoned arbitrators. Evidence that this occurs on a scale substantial enough to be noticed is a recent letter from BNA—entirely unsolicited—observing the recent decline in opinions made available by experienced arbitrators.*

*After the Academy session, a representative of another service told me that her service experienced a decline of 30% in the number of opinions available since the FMCS put the burden of inquiry on arbitrators.

The Utility of Published Opinions

Early in this brief commentary, I observed the reasons for believing that published opinions do not reflect fully the body of arbitral opinion. Thus, the further question arises: what have we lost by the unavailability of some opinions if they're not fully representative to begin with—as the main paper strongly suggests?

I suggest that we lose quite a good deal. With fewer decisions published, all concerned receive less guidance from opinions and all receive less information on developing doctrines.

We all know that decisions under other collective agreements do not supply precedents. We also know that out of tens of thousands of agreements, very few duplicate precisely the same language.

Even so, arbitral decisions often afford guidance. (Elkouri and Elkouri can get us just so far; and even that splendid resource must renew itself.) At the business rep/personnel manager level, published decisions provide *some* clues about how each "side" may fare if the matter goes to arbitration. That enters into the calculus of settlement.

Now that we have the evidence of the Stieber-Block-Corbett papers, those party representatives should be doubly cautious in assessing their chances. More importantly, the Elkouris should take into account the papers' conclusions in assessing the weight of authority. But, I think they and the parties always have been cautious and have not counted decisions so much as assessed them. If, because of the diminished flow, decisions in possibly comparable situations do not exist, or are sparse, or date back many, many years, that crucial guidance will be less available, especially about newly emerging issues.

If FMCS procedures impede the full flow of opinions, we all shall be more dependent upon older decisions, which were necessarily shaped by contemporaneous perceptions and values.

And many pay attention to the identity and reputation of the arbitrator; I know I often do. That is, I react affirmatively to the decisions of people of proven sound judgment—such as Ben Aaron. In my book, one of his opinions is worth three Mickey Mantle cards, and I'll throw in the bubble gum. And within industries, certain arbitrators achieve special status. For example, I remember at one Shulman conference the deference—nay, reverence—with which a Naugatuck Valley building trades

business agent addressed John Dunlop. All of us may not be so reverent, but I suspect most of us would give respectful consideration.

At the arbitration level, published opinions also prove helpful, even where contract language may differ, as it so often does. The availability of a substantial number of cases helps set the boundaries of reasonableness, particularly on newer issues or just unfamiliar ones. Like the four-minute mile and a man on the moon, a body of decisions establishes the realm of the possible. If a substantial number of cases on an issue share common values and reasoning, that commands attention even if it does not compel agreement. When in the woods, all of us are more comfortable if we see some paths. That really does beat hacking out an entirely new path through, over, and past possibly numerous and unseen hazards.

In addition, many parts of the labor-management community benefit from research about the workings of arbitration. Much of that research mines the published reports.

Does the Stieber-Block-Corbett paper suggest caution? Perhaps. I don't suggest that their findings are not pertinent or should or can be ignored. I do suggest that arbitrators will usually follow persuasive arguments rather than feel bound by other decisions as precedent. I doubt that the number of decisions on one side or the other proves crucial unless all published opinions agree in outcome. Today's papers suggest—only suggest—that we should be more cautious yet in how we are influenced by published opinions. I would be shocked and surprised if further research were to show that *points of view* went unrepresented. I suspect that several platoons of graduate students will be deployed to find that out.

I'm equally sure that the editorial staff of the publishing services will redouble efforts to assure that that does not happen.

Conclusion

So, the loss of any appreciable group of decisions injures the grievance/arbitration process at several levels. The current FMCS method of obtaining party agreement to publish seems unfortunate. The possibility, perhaps likelihood, that it inhibits party choice, raises questions in the minds of participants, or causes the loss of a fair body of decisions, all argue for a change. Of course, I must grant that more assured freedom of choice

may diminish the supply. But, publisher plaints suggest that it was the FMCS change in procedure that has led to a diminished flow.

A Proposed Procedure

What AAA does and what FMCS used to do takes the arbitrator out of any active role in regard to publication that may interfere with a wholesome relation with the parties. Those procedures seem to promise the largest yield from which the services may select with the least danger to the integrity of the arbitration process.

FMCS abandoned that procedure, however, for financial reasons. I would not argue that general Treasury funds should pay for it. Rather, it seems reasonable that those members of the labor-management community who use the published decisions should pay for the preferable procedure.

That's easily done. The reporting services should enter into negotiation with FMCS to ascertain the reasonable cost of enabling FMCS to resume inquiries to the parties and distributing decisions to the services. If they can agree about what amounts are required and they are willing to contribute (say in proportion to their use or the volume of their sales), it would also be reasonable to add that into the price of their volumes (as, I have no doubt, they would). Thus the users—the beneficiaries—will foot the bill. That shouldn't be much and it would be fair.

A Second-Best Solution

Failing that best solution, a lesser one could be used. Arbitrators could supply the parties with a form on which they may register their veto of publication. Mailed in a plain stamped envelope, neither party need bear the onus of objecting. (Usually, the post office of origin does not show on the envelope.) If sent with the decision, the parties will know to what they acquiesce. The main problem here is that returns might well be low. More importantly, it would not be becoming for the arbitrator to *urge* permission to publish, whereas the administrator of the system can—and I think should.

In my judgment, the problems of publication are no small matter. Present arrangements run three unnecessary risks—that some parties will not feel free to choose; that arbitrators who

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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