

# ***MANAGEMENT RIGHTS***

***MARVIN HILL, JR.  
ANTHONY V. SINICROPI***

***BNA Books  
Arbitration Series***

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***A LEGAL AND ARBITRAL ANALYSIS***

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## Preface

This text, in substantial part, relies on arbitration awards published by The Bureau of National Affairs, Inc. (BNA) and/or by Commerce Clearing House (CCH). To the extent that these awards are not representative of the thinking of the arbitral community,<sup>1</sup> the conclusions drawn by the authors may be suspect. An analysis by Stieber, Block, and Corbitt<sup>2</sup> of 759 discharge cases<sup>3</sup> published in *Labor Arbitration Reports* (BNA) and/or in *Labor Arbitration Awards* (CCH) in 1979, 1980, and 1981 revealed that in both publications the final outcomes and awards were not representative of final outcomes and awards in unpublished cases, at least when judged by the results in a collection of unpublished cases decided by Michigan arbitrators. (To the extent that the constituencies, practices, and local statutory restrictions for Michigan arbitrators differ from those of arbitrators nationwide, the findings are, of course, not reliable.) The study also indicated that in terms of actual proportion of types of cases to the whole, published decisions tend to underrepresent public sector cases, cases involving female grievants, and cases involving employees in the service occupations.

Cases published by BNA showed a significantly higher grievance denial rate than the rate for the Michigan "control" group, while cases published by CCH showed an even more significant lower denial rate than that for the unpublished

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<sup>1</sup>The authors invite the arbitral and academic community to submit data in support of the contention that published awards are not representative of the thinking of the industrial relations community.

<sup>2</sup>Unfortunately, the study was limited to arbitration decisions regarding discharges. The findings therefore may not be indicative of the relationship between published and unpublished decisions for other issues presented in grievance arbitration.

<sup>3</sup>Stieber, Block & Corbitt, "How Representative Are Published Decisions?" Proceedings of the 37th Annual Meeting of NAA, 172-92 (BNA Books, 1984).

decisions. However, the combined grievance denial rate in cases published by BNA and CCH was found to be quite representative of the overall denial rate for the unpublished cases. As pointed out by Stieber and his colleagues, this suggests that if one wishes to draw conclusions from published cases, both cases published by BNA and cases published by CCH should be examined. The authors have done this.<sup>4</sup>

Further, the authors have reviewed a number of unpublished decisions, many involving the airline and coal industries, and, when relevant, cite them in the text. In addition, the authors consulted many scholarly articles—particularly those appearing in the proceedings of the National Academy of Arbitrators, in law reviews, and in other journals in the industrial relations area—in an attempt to ascertain the thinking of arbitrators on issues discussed in this text. These also are cited where appropriate.

Finally, the authors researched decisions of the NLRB and of state and federal courts involving management rights and arbitration and discuss them in the text where relevant. In the authors' view, any text on management rights would be deficient without some knowledge of the views of the judiciary, especially where the NLRB continues to defer a decision in unfair labor practice cases pending the rendering of an award by an arbitrator who, in turn, frequently looks to the law in resolving a grievance. Indeed, the authors found an ever-increasing number of arbitrators "applying law," especially law derived from fair employment decisions by the courts, even when disposition of a case was not deferred by the NLRB.

At the same time, the authors have found a disturbing trend by the judiciary in the area of management rights. When the parties' contract is silent on a particular matter, some courts have not hesitated to overturn arbitrators' decisions implying limitations on managerial discretion, rather than applying traditional standards of review as outlined by the Supreme Court in the *Steelworkers Trilogy* decisions.<sup>5</sup> These

<sup>4</sup>Some arbitration cases have been published by both BNA and CCH. In such instances, only the LA (BNA) cite is provided for cases discussed in this text.

<sup>5</sup>*Steelworkers v. American Mfg. Co.*, 363 U.S. 564, 46 LRRM 2414 (1960); *Steelworkers v. Warrior & Gulf Nav. Co.*, 363 U.S. 574, 46 LRRM 2416 (1960); *Steelworkers v. Enterprise Wheel & Car. Corp.*, 363 U.S. 593, 46 LRRM 2423 (1960). The *Trilogy* is discussed at length in Hill & Sinicropi, *Remedies in Arbitration*, 13-20 (BNA Books, 1981).

courts have thus taken a strict "reserved rights" approach in determining the rights of management vis-a-vis unions, even where arbitration awards theoretically are entitled to some deference. For the above reasons, in addition to an understanding of arbitral thinking, an understanding of the law as it relates to managerial discretion is imperative.

It is the authors' hope that this integrative approach to a study of issues relating to management rights will prove to be sufficiently comprehensive that readers searching for answers to specific questions will a) obtain if not the answers at least some guidance as to where to find them, and b) discover whether there are other questions they should be seeking the answers to as well.

For the convenience of readers, the United States Arbitration Act is reprinted as Appendix A, followed by the Uniform Arbitration Act as Appendix B. A list of titles of proceedings of the annual meetings of the National Academy of Arbitrators is provided as Appendix C, to supplement the abbreviated titles used in footnotes.

## Acknowledgments

Our debts are many and we again wish to thank our families who continue to be patient with us while time demanded our efforts for this text. Thanks must be extended to our research assistants: Richard Quist and Chuck Nave of the College of Law, Northern Illinois University; Diana Beck and Pat Walz, graduate students at the Industrial Relations Institute, University of Minnesota; and Joseph Humsey, College of Law, University of Iowa. A special thanks to BNA's Tim Darby, a fine editor who actually reads footnotes.<sup>1</sup> Like Marvin's German shepherd, he is always watching and he cannot be fooled. Finally, we wish to thank our colleagues at work, many of whom write and publish science fiction and believe that we only moonlight as professors. All of you we still love.

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<sup>1</sup>"No passion in the world is equal to the passion to alter someone else's draft."  
H.G. Wells.



## About the Authors

Marvin Hill, Jr., is currently Associate Professor of Industrial Relations at the College of Business Administration, Northern Illinois University, and an Iowa attorney. A member of the National Academy of Arbitrators, Hill is actively engaged in arbitration and mediation in the public and private sectors. Hill has contributed articles to many journals, including *The Arbitration Journal*, *Labor Law Journal*, *Indiana Law Review*, *DePaul Law Review*, and *Oklahoma Law Review*. He has also co-authored (with A.V. Sinicropi) two other books, *Evidence in Arbitration* and *Remedies in Arbitration*, both published by The Bureau of National Affairs, Inc. (BNA). To his credit, Hill is a Cubs fan.

Anthony V. Sinicropi is John F. Murray Professor of Industrial Relations at The University of Iowa and University Ombudsperson. In the past he has served the university in several administrative positions. He has also served as a consultant for several government organizations, is an arbitrator and umpire, and has acted as a mediator and fact finder in the public sector. He is a member of the National Academy of Arbitrators, having been a member of the Board of Governors and a vice president, and is a past president and founder of the Society of Professionals in Dispute Resolution. Among his publications are *Iowa Labor Laws*, "The Legal Status of Supervisors in Public Sector Labor Relations," "The Legal Framework of Public Sector Dispute Resolution," "Excluding Discriminational Grievances From Grievance and Arbitration Procedures: A Legal Analysis," and "Subcontracting in Labor Arbitration."

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